Fates of Political Liberalism in the British Post-Colony
The Politics of the Legal Complex

Edited by Terence C. Halliday, Lucien Karpik,
The Sri Lankan Legal Complex and the Liberal Project

*Only Thus Far and No More*

Deepika Udagama

**PARADISE LOST**

Sri Lanka was called “Serendib” by some of its colonizers. Serendipity was thought to characterize the lives of the “natives.” In 1948, at independence from the British, Ceylon was an oasis of tranquility with its peoples enjoying a relatively high quality of life. Respect for the rule of law and liberal values within a background of strong political and legal institutions was the order of the day. It boasted a vibrant polity and also high social indicators (especially literacy and health indicators) for a developing society. Today, Sri Lanka is known the world over as an instance of paradise lost — a society torn by ethnic strife and political violence. Indeed, political violence has engulfed Sri Lanka for the past three decades.

The central foci of this study are the relationships among a liberal legacy, a history dominated by nationalist conflict, and the ways the legal complex has acted in the middle of a prolonged and cruel civil war. Was there some space for the legal complex to be the bearer of individual freedoms or did it have to give up, or compromise, its fundamental commitments? Is it realistic to expect continuity of individual liberties in the middle of a thirty-year civil war? Is the liberal legacy strong enough to maintain some impact on the state and the other actors? It is clear that nationalism and civil war have created a specific general situation in Sri Lanka but how specific is it in relation to other national and historical situations?

To provide answers it is necessary to undertake a careful review of reality in order to disentangle what may sometimes appear to be contradictory (and is not), or convergent (and is not). The first part in the essay is devoted to a presentation of the traditional and colonial political and legal heritages with some clues they provide about their anticipation of contemporary reality. The second part treats different forms of action by the bench and the bar during the contemporary period.
BUILDING OF THE MODERN LEGAL SYSTEM OF SRI LANKA

The modern legal system of Sri Lanka, including the legal profession and the judiciary, is essentially a creature of its colonial legacy. But this inheritance is a complex reality as it combined the traditional organization of several peoples located in the same territory and the sedimentation of three successive colonial experiences (Nadaraja 1972).

Pre-colonial Legal System

The ancient Kandyan Kingdom, located in the central hills, had a remarkably well-developed legal system, with customs of the people constituting the most important source of law. This system of law pertained to the Sinhalese inhabitants of the Kandyan province who formed the majority. The omnipotent Kandyan monarchs were subject to certain customary laws that marked the limits of authority and, indeed, determined the legitimacy of a reign (Amerasinghe 1999). The monarch appears to have had only residuary legislative powers. While intricate details of the indigenous legal system may not have conformed with the liberal principles and institutions introduced by the British, its spirit and value base were not entirely inconsistent with or antithetical to liberal values.

Even though history is replete with tales of authoritarian Kandyan monarchs, it does appear that norms of good governance and administration of justice were institutionalized. The system of administration of justice had consisted of many layers, with village tribunals (gamasabhava) at the bottom of the ladder, and the monarch at the apex, the being the supreme adjudicatory authority. Those who served as judges in the various courts were local officials, chieftains and officials of the royal court. There is no evidence of the existence of professional pleaders, or those akin to lawyers, who appeared in courts on behalf of parties to disputes (Amerasinghe 1999; Cooray 1972).

It is thought that the same customary rules that applied to the Kandyan Sinhalese may have applied to the Sinhalese in the littoral areas before the latter were subjected to successive waves of colonial powers, and ensuing assimilation (Nadaraja 1972). The Tamils who constituted the majority in the Northern province (Jaffnapatnam) too had a well-developed system of customary laws (Tesavalamai), which was applied territorially. The Muslim inhabitants of the island were governed by their own customary laws. Similarly, the Mukkuvars, a specific caste group that had settled in Sri Lanka from the west coast of India, also had a specific system of customary laws referred to as the Mukkuvar Law (Nadaraja 1972; Cooray 1972).

Thus, before the advent of colonial influence, the various communities were governed by their respective systems of customary laws and well organized legal systems that went all the way down to the village level.

Colonial Stamps

Of the three succeeding colonial powers, the Portuguese had the least impact on the legal system of Sri Lanka. The customary laws of the local populations were respected, albeit administered by colonial officials, and the extant system of administration of justice that relied on the established local courts and officials was not fundamentally altered (Cooray 1972).

The Dutch who came next maintained the customary law systems of the "natives" but they established an elaborate system of courts in areas under their control. It was a three-tier court system with High Courts of Justice, the Landraden (land/district courts) and Stads Raden (town courts). European and local officials also exercised judicial powers, although not as courts of record. As in the replaced system of indigenous courts, judicial functions were discharged by officials. The principle of an independent judiciary came much later, under the British. There is also no evidence of the existence of a legal profession under the Dutch.

The British, to whom the Dutch capitulated in 1796, followed the policy of permitting the existing legal system to continue. But before long, the British colonial authorities brought about fundamental changes to the justice system in the colony through a series of Charters and Proclamations. Successive colonial Governors set up different systems of courts. While the institutional/structural changes were taking place, important substantive principles of justice were being incorporated into the legal system. For example, criminal procedure was liberalized to permit trial in open court, torture and "barbarous" forms of punishment were abolished, and principles of equity of the English courts of Chancery were introduced (Cooray 1972, Nadaraja 1972).

As the judiciary began to assert its independence, the tension with the executive rose until extensive changes brought about under the Charter of Justice of 1833, which gave effect to the Colebrook-Cameron reforms. It is said that Cameron, a Barrister-at-Law of Lincoln's Inn, was greatly inspired by Jeremy Bentham and John Stuart Mill (Amerasinghe 1999). Under the reforms a uniform system of justice was introduced into the colony, which now consisted of the whole island after the British overthrew the Kandyan King in 1815. Moreover Governors could not add courts to those established by the Charter, and Appeals to the Privy Council were also introduced. The Charter of Justice of 1833, consolidated by the Courts and Their Powers Ordinance No.1 of 1889, is a turning point in the development of the modern legal system of Sri Lanka, as it paved the way for an independent judiciary and a coherent system of administration of justice. During that period the composition of the bench also changed: the monopoly of the British judges was breached at the turn of the twentieth century when a few Sri Lankans were appointed. In 1949, a Sri Lankan was appointed as chief justice of the Supreme
Court and in 1956, for the first time, the Court's composition was entirely Sri Lankan (Amerasinghe 1986).

In the post-colonial period, several constitutions were adopted and the nature of guarantees of individual freedoms too changed. The Soulbury Constitution, which served as the independence Constitution after Sri Lanka (then Ceylon) gained independence in 1948, made provision for an independent judiciary, separation of powers and checks and balances. It did not contain a Bill of Rights, but it focused on protection of minority rights by prohibiting Parliament to enact laws that discriminate on the basis of religion and community (Article 29 (2)). It was replaced by the first and the second Republican Constitutions in 1972 and 1978 respectively: both recognized liberal principles but to a weaker extent than the Soulbury Constitution (Cooray 1995). For example, both constitutions did away with judicial review of legislation, and the 1978 Constitution granted immunity from suit to the almost omnipotent executive presidency created by it. Nevertheless, the liberal legacy remained.

**The Legal Profession**

The foundation of the legal profession in Sri Lanka was laid by the British. By Charter of Justice of 1801, professional pleaders could appear before courts established by the British in the littoral, the only area under their control. The Supreme Court was empowered as the sole authority to admit persons to act as Advocates (Barristers) or as Proctors (Solicitors). The Charter permitted a person to be both a Proctor and an Advocate. Gradually, an unofficial bar came into existence, increasingly playing an important role in the working of the legal system. Previously, due to the dearth of private pleaders, Crown lawyers were permitted to engage in private practice. Thus, the Charter of 1801 paved the way for the emergence of a class of professional pleaders.

The Charter of Justice of 1833 brought about radical reforms to the legal profession as well. It created a clear division between Proctors and Advocates. A further division was created between Proctors of the Supreme Court and Proctors of the District Courts (provincial courts). Proctors and Advocates had to obtain distinct training and qualifications to be admitted to each category (Nadaraja 1972). Advocates, who were akin to British Barristers, were held in higher esteem than the Proctors. However, at the provincial level, the Proctor was also considered to be a person of considerable standing. This bifurcation of the legal profession with its internal hierarchy was done away with under the Administration of Justice Law (Act No. 44 of 1973) soon after Sri Lanka became a republic in 1972. Thereafter, the legal profession was unified with all its members referred to as “Attorneys-at-Law.”

During British rule, joining the legal profession was considered to be a very attractive prospect for locals. Law ranked above divinity and medicine as it permitted a career independent of the government. It offered prospects of a pleasing income and perhaps eventually reaching the highest achievement in the field - that of serving on the Supreme Court. If the civil service was monopolized by the British with locals serving in the lower administrative positions, the bar was open to all without strong racial exclusion. The British, who preferred the mercantile and plantation sectors, did not monopolize the legal profession, and in fact they promoted locals to join the legal profession. But the evolution of legal education and the expansion of the composition of the bar was slow (Samarakoon 1987).

**Legal Education**

Under the Charter of Justice of 1833, the Supreme Court was vested with the authority to admit and enroll suitably qualified persons as Barristers and Proctors. Early legal education was confined to the practice of pupillage or apprenticeship, whereby an aspiring lawyer would be trained by a senior lawyer in chambers. The Supreme Court would conduct examinations for admission to the bar. That “loose” system of legal education was replaced by a more formalized system with the Ceylon Law College in 1874. It introduced a professional course with a prescribed curriculum and conducted examinations for the admission to the bar. The primary focus of the College was the molding of future practitioners. Barristers were expected to be trained in the tradition of classical liberal education while the training of Proctors was rudimentary (Goonesekere 1969).

Legal education entered the realm of university education only around the time of independence. In 1947 the first department of law was established within the then University of Ceylon. The students at that time came from a privileged socioeconomic background, even though the university was non-fee levying. The best students were sent to Oxford, Cambridge, and other prestigious universities in the United Kingdom for post-graduate training and were absorbed back into the academic staff. One of first students of the department, R. K. W. Goonesekere, is

---

1. There do not appear to have been professional pleaders in the courts and tribunals in the ancient Kandyan legal system, and it is not clear whether there was such a category in the system of justice under the Dutch.

2. Tinechevam argues that the “Masters” who originated from the elite classes had a degree of control over their young trainees preventing alternative ideas about the law and legal practice to emerge among the pupils. This system of training readily perpetuated colonial notions of the law (Tinechevam 1977).

3. R.K.W. Goonesekere, senior attorney-at-law, went on to become a senior academic of the Law Department, University of Ceylon; principal, Ceylon Law College; and eventually, chancellor of the University of Peradeniya. He is widely acknowledged as an eminent public law practitioner who is best known as counsel in landmark fundamental rights judgments. The observations were made in the course of an interview with the author.
observed that while the education was positivist and steeped in the principles of Roman, Roman-Dutch and English law, the students obtained a sound grounding in the law in the liberal tradition. Law academics were generally known to be politically conservative.

The number of institutions offering legal education at state expense has expanded over the years. Legal education, which was once offered only in English, was also offered in the vernacular (i.e., Sinhala and Tamil) from the early 1970s (Goonesekere 2000). For a variety of reasons, this growth of an egalitarian foundation of legal education has not been successful in changing the hitherto conservative, positivist ethos of the legal complex in Sri Lanka. In fact, one can observe a serious regression within the legal education establishment of traditional liberal values and also in the will to publicly champion liberal values. There has been a palpable silence among legal academics and law students in the public defense of pluralism, secularism, gender justice and opposition to political abuse, including serious threats to the rule of law. By far, legal education in Sri Lanka is coveted mainly as a means of social mobility.

Social and Ethnic Composition
As an education in English was a sine qua non to qualify for admission as a Proctor or an Advocate in the early part of the nineteenth century, those who were at a distinct advantage were members of the Burgher community in Sri Lanka. They were residents of European ancestry, mainly Dutch and Portuguese, who were traditionally better educated (in English); were of the Christian faith; and possessed more refined manners than other locals. In 1868, of the two hundred and twenty lawyers in the colony one hundred and forty were Burghers. Several Burgher lawyers were appointed to the Supreme Court (Samarawera 1897). In fact, the British had an express policy of giving preferential treatment to “native Burghers” (who were equated with Europeans) in appointments connected with the administration of justice (Nadara 1972). Despite their favored status, eminent Burgher personalities among them prominent lawyers were at the vanguard of radical thinking and “taking on” the colonial authorities, especially in the nineteenth century. The young radicals were steeped in liberty, equality and secularism and other such “subversive” ideas of the Enlightenment (Jayawardena 2000). However, their progressive influence appears to have gradually waned in the early twentieth century with the intensification of political hostilities between the Sinhala and Tamil communities, and was lost when most Burghers migrated to Australia and Europe in the aftermath of the Sinhala only-official language policy of 1956.

The other local communities were slow in building their numbers at the bar. The first “pure native” (as distinguished from anyone of European ancestry) Proctor was admitted in 1839, the first Advocates in 1849, the first Barrister to be

admitted in England in 1847, the first Supreme Court Justice in 1879 (Nadara 1972, Amerasinghe 1986). And it was only in 1949 (after independence) that a “native” was appointed the chief justice.

Taking to the legal profession was popular among the emergent local bourgeoisie of nineteenth-century Sri Lanka. Amassing wealth through “rentier capitalism,” locals (especially the Sinhalese of the coastal areas) with great entrepreneurial skill built huge business empires to form an emergent bourgeoisie. These pioneers invested their newfound wealth in education for their children and in the plantation economy. Education in the hallowed portals of Oxford and Cambridge brought great prestige to the families, which helped them further consolidate their social position. Many among the second generation of this class took to the law. While the traditional aristocratic class remained conservative in their social and political outlook, this new English-educated elite could have brought substantial social and political transformation having imbued liberal values through Western liberal education. On the whole, this evolution did not happen. In fact, education was mainly “a process through which the bourgeoisie transformed a portion of its wealth into social and political capital” (Jayawardena 2000, 349).

This new professional class was heavily influenced by the lifestyle of the British aristocracy. Several of these dynasties had converted to Christianity. The same observations have been made about the Tamil bourgeoisie. There is no evidence to suggest that, on the whole, the local legal community – of which a considerable number were “Bigmen” of the local political elite – played a strong transformative role either socially or politically. The limited reforms that were agitated for had tribal overtones, with the demands focused mainly on ethnic and caste representation in political affairs (Jayawardena 2000; Silva 2005). The approach to political reform on their part was a positivist one, based on constitutional reform (they were called the “constitutionalists”), rather than one that galvanized the populace with demands for self-rule and radical social, economic and political change as was the case with India’s independence movement. Demands for radical reform came from the labor movement and the Marxists.

When the Donoughmore Commission on Constitutional Reform commenced its work in the late 1920s and sought views of the leading Sri Lankan politicians on crucially important issues it met the same answers: the political elite was against universal franchise, complete self-rule and suffrage for women. In fact, the local political elite was more conservative than the British reformers. As a result, prominent members of the Commission took a great liking to A. E. Goonesinghe, who spearheaded the labor movement and was perhaps the only local leader who was very supportive of universal adult franchise and radical reform. He was regarded “… as the representative of the democratic and radical forces in the country and a politician whose views were all the more valuable on that account” (Silva 2005, 519-20).
Eventually, the Donoughmore Commission’s report paved the way for universal adult franchise notwithstanding the opposition of the local “patriots.” Sri Lanka was the first South Asian country to enjoy such extensive political rights, especially for a colony.

The Post-Independence Turn

The government elected into power in 1956 under the leadership of the late S. W. R. D. Bandaranaike through the “1956 revolution” was a triumph for the Sinhala nationalist forces. In that year Sinhala was made the official language of the country with no special status accorded to the Tamil language. This deepened the ethnic divide eventually culminating in the 1983 ethnic pogroms in the south of the country, targeting the Tamil community. And that year, full-scale civil war broke out in the north and east of the country between the Liberation Tigers of Tamil Eelam (LTTE) and government forces. The LTTE was militarily defeated by the state security forces in May 2009, ending one of the longest civil wars in modern history. Significantly, running parallel to that conflict were the uprisings in the south of the country, first in 1971 and then in 1987, staged by disgruntled sections of the majority Sinhala youth under the stewardship of the People’s Liberation Front (JVP). The declaration of emergency rule in the aftermath of the first JVP insurrection saw the gradual but certain birth of a national security state in Sri Lanka. Since 1971, except for short spells of normalcy, Sri Lanka has been governed under emergency rule (ICJ 2009). In addition, the Prevention of Terrorism Act No. 48 of 1979 (PTA) (initially a temporary measure that became permanent in 1982) increased serious curtailment of human rights protection (CHRD 2010). Both conflicts, one minority-based and the other majority-based, have proven to be extremely bloody with massive levels of violations of human rights and humanitarian law principles.

Under these new historical conditions, what happened to the judiciary as an independent institution consecrated as such by the constitution, to the bar organized along liberal rules, to legal education that continues to have a strong focus on liberal principles and doctrine and, more generally, to the values of political liberalism?

FORMS OF ACTION BY THE LEGAL COMPLEX

The emergence of a national security state, needless to say, placed immense constraints in the path of the legal complex. Ambiguity and silence became the central features of its responses. All faced the dilemma of nationalism in tension with individual freedoms. Sri Lanka was not the first society to confront such deadly choices; yet solutions to resolve the dilemma have not been the same everywhere.

As state and non-state violence became commonplace, the chapter looks, first, to the ways the bench responded to the state’s nationalistic agenda, which in effect, further marginalized the minorities, especially the Tamils; second, at steps by the bench, nevertheless, to place some limits on state arbitrariness; and, third, at ways the bar, or at least some lawyers, escaped official constraints put on them not only by the government but also by the bar itself in order to defend individual liberties.

The Nationalist Agenda and the Bench

The history of Supreme Court jurisprudence provides ample evidence of how the Court’s failure to uphold core liberal-legal ideals contributed to strengthening the nationalist agenda of the political elite. Support for this interpretation can be seen in five domains: definition of national citizenship; the primacy of Sinhalese as a national language; safeguards to religious freedom; the re-organization of the state; and Sri Lanka’s international obligations.

Citizenship

The period immediately after independence saw the consolidation of majoritarian policies. One of the earliest of such policies related to citizenship. The Citizenship Act No. 18 of 1948, which laid down requirements to qualify as a “citizen of Ceylon,” in effect, denied citizenship to a large number of “Indian Tamils,” or descendents of laborers brought into the island by the British to work on plantations, as their forefathers were not born in Ceylon. That law coupled with the Ceylon (Parliamentary Elections) Amendment Act No. 45 of 1949 denied the franchise to many in that community even though they had been eligible to vote previously as British subjects.

Challenges to these laws were failures. In Mudanayake v. Swagamanasunderam, the Supreme Court took a literalist approach to interpreting the legislation and found no violation of Article 20(2) of the Soulbury Constitution, which prohibited Parliament from enacting legislation discriminatory of persons belonging to any religion or community. The court was not keen to examine the practical realities of the application of the laws nor the motive for enacting them. In also expressed doubts as to whether Article 20(2) was meant to protect the minorities alone. Similarly, in Kodakan Pillai v. Mudanayake, no lesser forum than the Privy Council (which

---

4 Judicial review of legislation was permitted under the Soulbury Constitution. It is interesting to note that the two republican constitutions removed that feature.
53 NLR 25.
6 NLR 433.
was the final judicial appellate authority before Sri Lanka became a republic in 1972, held that it was perfectly natural for Parliament to regulate the composition of its nationals and found that the citizenship law was not intended to discriminate against the Indian Tamil population. The community's migratory habits were deemed to justify the decision of the legislature. The latter judgment was particularly symbolic because it came from an "enlightened" apex judicial body for the British Commonwealth. The disenfranchisement of Tamils of Indian origin by the legislature and rendering most of them stateless produced decades of political bickering and negotiations for rectification of this historic injustice.

Language

Sinhala was made the single official language of Sri Lanka in 1956. The Official Language Act, No. 33 of 1956, was enacted with the declared intention of removing English as the dominant language of education and administration and to give pride of place to "people of the soil." But it failed to recognize that there were other communities that fitted the description, but who spoke different languages. Pursuant to the language policy, public officers, inter alia, had to sit Sinhala proficiency tests to qualify for jobs and for promotions and related entitlements. The enactment of the Official Language Act increased already existing ethnic tensions by leaps and bounds. The subsequent enactment of the Tamil Language (Special Provisions) Act No. 28 of 1958, which provided for the use of Tamil for limited official purposes, did little to assuage the grievances of the Tamil community. These tensions eventually resulted in ethnic violence in 1958 ending up with the declaration of a state of emergency (Gooray 1995).

The Supreme Court confronted the issue of the constitutionality of the official language policy in Attorney General v. Kodeeswaran. The respondent was a member of the government clerical service from the Tamil community who was refused his salary increment because he had not sat for a proficiency test in Sinhala. He then challenged the constitutionality of the Official Language Act of 1956 on the basis that it violated Article 29(2). While the lower court ruled in favor of Kodeeswaran, the Supreme Court overruled that decision on the technicality that government servants could not sue the crown for breach of contract of employment. It thereby implicitly approved the constitutionality of the impugned legislation. Given that one of the bitterest complaints of the Tamil community, and indeed a ground that drove the LTTE's demand for secession, was the inferior status accorded to the Tamil language and the resulting marginalization, this decision could only increase the tide of majority nationalism.

Religion

The Soulbury Constitution of Sri Lanka had provisions to safeguard the interests of religious groups (Article 29 (2)). This scheme was altered dramatically by the two republican constitutions of 1972 (Article 6) and 1978 (Article 9). Both declared that Buddhism shall be given the foremost place by the state. However, the assurance of the fundamental right to freedom of religion guaranteed by each of the constitutions was given to all religions by the same provisions. Needless to say, the provisions — in spite of assurances made to all religions — were of great concern to other religious groups, which saw this as another step to entrench majoritarianism. Indeed, if all religions are protected, but yet one religion was to be given preference by the state, it is tantamount to others being inferior.

In a judgment that was of grave concern to civil libertarians, Article 9 of the 1978 Constitution was used by the Supreme Court to narrowly read the freedom of religion clause. The judgment in question was delivered in a case in which the Supreme Court reviewed a Bill that sought to incorporate a religious institution through a private member's motion. The religious institution — "Provincial of Teachers of the Holy Cross of the Third Order of Saint Francis of Menzingen of Lanka" — was based on Catholicism and had as its objectives, among others, the spread of knowledge of the Catholic faith, conducting of educational activities, engaging in charity by serving in institutions such as hospitals and refugee camps and the establishment of homes for the elderly, orphanages and the like.

The constitutionality of the Bill was challenged by a private party, mainly on the basis that the stipulated objectives of the institution violated the Constitution in that the objectives could give rise to situations of forced religious conversion of beneficiaries. In two previous cases the Supreme Court had held similar Bills to be in violation of Article 10 of the Constitution (freedom of religion clause) by accepting arguments of the possibility of forced religious conversions. What was particularly significant in the Holy Cross case was that the Court unanimously accepted the argument that the Bill violated Article 9 of the Constitution as well. It was thought that the propagation of another faith combined with altruistic activities would impact negatively on Buddhism by converting adherents through force and allurement. It was almost as if Sri Lanka had become a theocracy with the propagation of "other" religions being taboo.

Yet, at the same time, and in an opposite turn, the Supreme Court found a move to introduce the concept of a state religion to be in violation of the basic tenets of the 1978 Constitution. In the review of a Bill entitled "The Nineteenth Amendment

70 NLR 121.

to the Constitution” a unanimous judgment of the Court found the idea of a state religion to be repugnant to guarantees of freedom of religion, the right to profess one’s religion, and the right to equality and non-discrimination.10

As the judgments are brief and not elaborated upon, it is very difficult to discern the judicial reasoning underlying the various approaches. The end result was a very confused state of affairs regarding the relationship between religion and the state. The state is to give preference to the religion of the majority, yet the state is considered to be secular. The concept of a state religion has been rejected, yet religious institutions are enjoined from engaging in religious activities for fear that they may be inimical to the majority religion. Article 9 still continues to be a source of friction and will remain so until either it is done away with in a future amendment or there is an authoritative judgment that provides clarity and assurances to the “other” religions.

The State

As discussed earlier, the adoption of an official language increased ethnic tensions to breaking point. It saw the growth of the demand by Tamil politicians for autonomy for the regions heavily populated by the ethnic Tamil community. In fact, Prime Minister S. W. R. D. Bandaranayake, who was the architect of the language policy and the one who ran on the plank of Sinhala nationalization arrived at an agreement — in the face of sustained protests by the Tamil political parties — with the head of the Federal Party of Sri Lanka, Mr. S. J. V. Chelvanayakam, to establish a form of federal structure of governance in the country. The intention was to accord greater autonomy to the Tamil community. That move was scuttled by the then political opposition, which saw the move as one that went against the interests of the majority Sinhala community. The opposition move was led by Mr. J. R. Jayawardane, who later went on to become the first elected executive president of the country, under whose administration the ethnic conflict metamorphosed into full-scale armed conflict.

With political and legal avenues to canvass their demands being unsuccessful, the moderate Tamil political establishment became increasingly marginalized. The demand for autonomy ripened altogether into a demand for secession. Young radical elements within the community rallied around the demand of secession, a chief proponent of which was the group LTTE, led by Velupillai Prabhakaran. The sporadic acts of violence transformed into full-scale civil war in 1983 after anti-Tamil pogroms in the south. That conflict raged on for more than a quarter of a century with devastating consequences.

In 1987 the then President Jayawardane, realizing the lethal force of the LTTE and, indeed, India’s own geopolitical interests, entered into an agreement with India (which initially played a key role on the ethnic issue, first promoting it and then trying to defuse it) with a view to solving the ethnic conflict. The agreement paved the way for the 13th Amendment to the 1978 Constitution, which set up a system of provincial councils in the entire island with a Governor and a Chief Minister at the helm of each council. The idea was to devolve certain powers to the periphery so as to afford a degree of autonomy to the regions. It was hoped that the new system would reassure the Tamil community and would douse the flames of war.

The judiciary had to deliver a decision on the constitutionality of devolution of power under the 13th Amendment to the Constitution when the president referred the Amendment Bill and a related statutory Bill for an advisory opinion. The majority judgment of the Full Bench of the Supreme Court narrowly found in favor of the devolution scheme (5-4), with the decision splitting the court mainly along ethnic lines.11 Three of the five justices who participated in the majority judgment were from minority communities: Chief Justice Shavamanda and Justice Tambiah belonged to the Tamil community, while the third, Justice Colin-Thome, belonged to the Burgher (descendants of European settlers) community. The other two justices were from the majority Sinhala community. All four justices who rendered dissenting opinions were from the Sinhala community.

The majority judgment found that provincial councils only possessed delegated legislative powers and therefore, did not transgress the supremacy of the central legislature. It was recognized that devolution of power under the 13th Amendment meant the delegation of central government power without the relinquishment of supremacy. For the dissenting judgments, on the contrary, the scheme of devolution violated the entrenched principles of the Constitution and required the Bill to be adopted by a special procedure, which required submission to a referendum in addition to obtaining 2/3 majority in Parliament, especially as the devolved powers would curtail full legislative powers of Parliament. Concern was expressed that councils in the predominantly Tamil areas “would be controlled and administered by Tamils who had for nearly a half century claimed this territory as their traditional homeland and resented a Sinhala presence. They have subscribed to a two-nation theory and not to an ideal of a Sri Lankan nationality.”12

Such judicial language was very revealing of the underlying fears of the majority to see the minority becoming “masters of their own destiny.” It explains why, even though the devolution scheme was declared constitutional by the majority
have to be transformed into domestic law through enabling legislation enacted by Parliament. The enactment of enabling legislation in Sri Lanka has been very tardy, at best.

In a number of celebrated judgments, however, a handful of justices of the Supreme Court, in particular two, have indirectly incorporated international human rights norms into domestic law by using those norms as interpretive guides to interpret the fundamental rights chapter of the 1978 Constitution of Sri Lanka. Slowly a body of fundamental rights jurisprudence began to emerge that was shaped and enriched by international human rights law norms. Civil libertarians and victims who claimed redress were enthused by those developments. A new frontier of using international law opened up when in October 1997 the state ratified the Optional Protocol (OP) to the International Covenant on Civil and Political Rights (ICCPR) permitting aggrieved individuals and groups to seek redress from the UN Human Rights Committee set up under that Covenant.

But a major setback to this trend was experienced with the highly problematic judgment of the Supreme Court in Singarasa v. Attorney General. The petitioner had been convicted under emergency regulations and the Prevention of Terrorism Act on five counts and sentenced to a total of 50 years. Later, on appeal the conviction was reaffirmed but the sentence was reduced to 35 years. Having exhausted all possible avenues of appeal in Sri Lanka, Singarasa's lawyers then submitted a communication to the UN Human Rights Committee alleging violations of rights guaranteed by the Covenant. The Committee found that the conviction was in violation of that treaty. Lawyers then filed a petition in the Supreme Court seeking revision of the previous refusal to entertain Singarasa's appeal, among other grounds, on the basis that the Committee's views should be taken into account in light of Sri Lanka's international legal obligations under the ICCPR. A five judge bench of the Supreme Court, basing its decision entirely on the claim made under the ICCPR, rejected the application for revision. In the course of doing so, the Court made a dramatic pronouncement that the ratification of the Optional Protocol was unconstitutional as it, among other things, usurped the sovereign judicial powers of the people by recognizing an international judicial authority. The implication was that Sri Lanka was not obligated to take any steps to implement the views of the UN Committee. Overall, Singarasa marked a setback of tremendous proportions.

International Human Rights Obligations
Sri Lanka has ratified most of the major international human rights conventions and without reservations. However, as the Sri Lankan legal system is dualist international law norms are not automatically incorporated into domestic law; they

---

14 Sri Lanka has ratified all the major UN human rights treaties except the following: the UN Convention on the Rights of Persons with Disabilities has been signed by Sri Lanka but not yet ratified. It has yet to sign the Statute of the International Criminal Court (the Rome Statute) and the International Convention for the Protection of All Persons from Enforced Disappearances.
In sum, this brief sketch of Supreme Court rulings on important constitutional issues illustrates the manner in which the apex court, wittingly or unwittingly, contributed to the nationalistic project of the state. That was so during the civil war but that was also the case before it. Citizenship, language, religion, the organization of the state and protection of human rights through international obligations may be viewed as types of freedom, but taken together, at that time, they were interdependent elements of a unitary and collective faith, a national conception. To give primacy to the requirements of such a vision and its enabling policy almost necessarily put limits on individual freedoms. In fact, the liberal legacy implicitly offered a power capable of maintaining the unity of a country based on several different ethnic groups and religions. Such a constitutional arrangement was put in place by the colonial power before it departed. However, it gradually but surely crumbled soon after independence.

How the Bench Fought the State to Defend Individual Freedoms

If the judiciary failed to positively respond to efforts at creating a pluralistic society it has, on the other hand, periodically displayed a greater degree of concern regarding violations of individual civil and political rights, in particular, regarding freedom from torture and arbitrary arrest and detention. This was so even during the secessionist civil war. This dichotomy between the judiciary’s reluctance to acknowledge identity-based group demands and the sensitivity to individual rights is significant. It suggests that the liberal ethos of the judiciary extended to those principles and rights that can be accommodated without changing the political status quo of majority domination; to expect anything more has proved time and time again to be futile.

Despite the statist-nationalist approach of the judiciary on vital and sensitive political issues (which might have been expected to earn the judiciary respect from the executive) it is significant that there have been sustained onslaughts against judicial independence in the past four decades. What explains this? There are at least two possible answers. One is that the state required a politicized judiciary to comply with its nationalist agenda and therefore manipulated the judiciary. Another and more plausible answer is that nationalist tendencies were an inherent feature of the dominant judicial philosophy. Yet co-mingling with those nationalist tendencies was a commitment to certain liberal ideals such as checking governmental excesses where individual rights were at stake. Arguably, it was the recognition by the state of those liberal tendencies which brought sustained attacks against judicial independence. Inroads into judicial independence commenced with the onset of the national security state in the 1970s and the emergence of an increasingly authoritarian state under the two republican constitutions (1972 and 1978).

This regression perhaps reached the highest point when in 1983 residences of Supreme Court Justices were attacked following a fundamental rights judgment delivered by the Court that found against the state. This latter period also saw the promotion by the state of police officers who were found by the Court to be responsible for violations of fundamental rights (Amerasinghe 1986). It witnessed questionable appointments to higher judicial positions ranging from the appointment of the chief justice of the Supreme Court to appointments of justices of the appellate courts, as the Executive overlooked the tradition of appointing theparliamentary justice in favor of those politically favored by the government. The explanation for such transgressions, or at least part of it, resides in the judicial forms of action used against violations of individual rights.

Soon after independence, political stability degenerated into cycles of violence and armed conflict. The uprisings were both in the north and the south of the country staged by youth belonging to the majority as well as the minority communities. State responses were swift and violent. While the laws were tightened up with the adoption of emergency regulations and the Prevention of Terrorism Act, the massive levels of rights violations by the state were mostly due to extra-legal measures taken to crush “subversives” or “terrorists.” The latter, too, did not have qualms about using terror tactics and unleashing brutal cycles of violence. The violence reached a crescendo in the latter part of the 1980s when the conflicts in the northeast and the south raged on simultaneously.

With the growth of state violence, judicial doctrine shifted from a paradigm of deference to the state to one of suspicion and interrogation (Udagama 1998). Initially, before the onset of conflict, the judiciary paid a great degree of deference to the executive branch following the presumption in English law that official acts are deemed to be lawful (omnia praesumuntur rite esse acta) unless established otherwise. The application of the presumption placed a heavy onus on the party alleging wrongdoing by the state by requiring proof of bad faith or unreasonableness. The presumption was strongest during periods of emergency when the executive branch is vested with enormous powers.

However, gradually, with mounting numbers of extra-judicial executions, involuntary disappearances, arbitrary arrests/detentions and torture, the presumption was displaced by a suspicion of executive action, especially when the executive used extraordinary powers either under emergency regulations or under the Prevention of Terrorism Act. The onus, therefore, shifted to the state to establish reasons for arrests and detentions, to explain disappearances and other forms of illicit executive action (Udagama 1998). The transformation of judicial reasoning paved the way for a series of judgments on fundamental rights.
How Committed Lawyers Left the Bar for Other Organizations

Lawyers in Sri Lanka, as elsewhere, are engaged in the public life of the country perhaps more than any other professional group. A large number of politicians, both elected and unelected, happen to be lawyers. The training of a lawyer, versed in public law, provides a logical foundation to enter public life. And the organized bar as an independent professional entity possesses the capacity and the knowledge-base to function as a public watchdog.

When the legal profession was unified in 1973 transforming all lawyers into Attorneys-at-Law, professional representation was found through the Bar Association of Sri Lanka (BASL) established in 1974. It replaced the General Council of Advocates and the Law Society which represented Proctors. Article 2 of the BASL Constitution outlines its objectives, inter alia, the protection of interests, rights and privileges of the bar and the extension of cooperation to maintain the honor and independence of the judiciary. It also declares that the “consideration of matters of national importance relating to the rule of law and if need be, making of representation thereon to the government … and taking further steps in respect thereof including filing actions or intervening in actions in courts of justice” to be an institutional objective.

In fact, one could perhaps identify only two short moments of lawyers’ defense of the bar’s constitutional aspirations.

First, in the latter part of the 1960s and early 1970s a few lawyers, some with affiliations with the political left, and others staunch defenders of liberal values, had become very active within the then Bar Council (the governing body of the General Council of Advocates). Not only did they take up issues of general public importance, but they also publicly canvassed international causes that were seen to be progressive. For example, they orchestrated a general boycott by national Bar Associations of the Commonwealth Law Conference of 1972 which was to be held in Uganda as a mark of protest against the atrocities committed by Idi Amin. Similarly, a group of lawyers had styled themselves as “Lawyers Committee for the Defense of Sheikh Mujibur Rahman” in 1971. A letter dated August 20, 1971, signed by 226 members of that committee protests the secret military trial of the Bangladeshi freedom fighters.

At the national level, the Bar Council was critical of the adoption of the controversial Press Council Bill in 1972 on the ground that the Press Council, if established, would have a serious chilling effect on media freedom. Previously, it had issued a detailed statement about the inherent violations of due process rights by the Criminal Justice Commission Bill that sought to set up a special tribunal to try a group of insurrectionists. It had also made extensive representations regarding the drafting of the Republican Constitution in 1972, especially regarding the procedural dimensions of constitution making and the need to strengthen independence of the judiciary. It is worth noting that the Bar Council had written to a number of constitutional experts in the Commonwealth to obtain their insights before making representations.23

The second moment of lawyers’ engagement on behalf of liberal constitutional values came in the decade of the 1980s when the state responded with great violence to the first JVP insurgency staged in the south of the country. The insurgency itself was very brutal. Lawyers who presented habeas corpus writ applications on behalf of suspected insurgents were particularly singled out for assassination. Some were severely tortured. During that period the BASL played an active role against state excesses, but unlike the previous cycle of activism it was mostly regarding the protection of its membership. However, the appearance of a strong bar did have a positive impact on the ground, strengthening the resolve of those who opposed the highhanded actions of the state.

Aside from those two periods of activism, one is hard pressed to identify active championing of liberal causes by the bar. Thus, despite the stated objectives of the BASL Constitution, the bar has not actively intervened in public issues unless the legal profession and the bench were directly affected adversely.

A survey of the limited literature available on the actions of the BASL (mainly limited to its newsletters) bears out that gradually, but surely, its concern regarding public issues of wider interest has waned. The BASL in recent years has even capitulated to the extent of demanding that none of its members should appear on behalf of suspects in controversial cases. Similarly, when the President directly appointed judges to the superior courts in violation of the 17th Amendment to the 1978 Constitution (which required the President’s nominees to be approved by the Constitutional Council), the bar was silent. That inaction and questionable commitment to liberal principles sharply stand out against the backdrop of violence and increasing levels of fragmentation in Sri Lankan society. The bar has not voiced its position on many, if not all, the public issues that were selected for detailed discussion above. Today, in the post-war period when Sri Lanka is emerging from the devastation of a three-decade war, the silence of the bar on many an important issue is louder than ever.

That level of inaction makes the BASL stand out in stark contrast to its active counterparts in neighboring Pakistan, India, Nepal, and Bangladesh. Increasingly, the organized bar has been viewed as a very politicized entity, which is incapable of acting in an independent manner.24 The current apathy appears to be mainly

---

23. The documents pertaining to the preceding two paragraphs, including correspondence (unpublished), are available at the Nadesan Centre, Colombo, Sri Lanka.

24. The politicization of the bar and its apathy are well documented and discussed in a recent report compiled by the International Bar Association (IBA 2009).
attributable to short-term political benefits and survival instincts. It proves the point that the overall liberal complexion of the bar rests on thin ice. The level of regression of the Sri Lankan bar could perhaps be understood only in the context of the political culture of the country, which even at the moment of independence was more bent on conformity than change. That trend appears to have become more entrenched with the onset of state authoritarianism and violence.

In a private interview with the author, one of the protagonists of activism during the two cycles of activism, Suriya Wickramasinghe (who still serves as the Secretary of the Civil Rights Movement) described in detail the difficult path that had to be traversed to overcome the opposition that emanated from the entrenched conservative stalwarts of the bar during the first phase of activism. Even though their push to make the bar more activist-oriented and progressive did succeed, that glorious period was not to last for long.

Many of the activist lawyers who were behind those remarkable actions gradually moved away from engaging in advocacy through the organized bar. The difficulty of taking a proactive position through such an inherently conservative professional establishment appears to be the primary reason for the desire to work through independent human rights organizations. The pattern that emerges today is just that: the handful of lawyers who wish to use their professional training and status for public good do so not through the organized bar but through various non-governmental organizations.

Several lawyers, academics, and members of the clergy were instrumental in founding the first human rights organization—the Civil Rights Movement of Sri Lanka—in response to the violence and abuses in the aftermath of the first southern insurrection in 1971 (CRM 1979). They were all well educated in the liberal tradition, fiercely independent and were committed to a fault. Gradually, other organizations followed suit. The first round of NGO-styled human rights organizations were closely linked to trade unions and had a number of members drawn from the trade union movement. Trade unions continued to be a formidable force in the country in the years soon after independence. Although Marxist in ideology they were the main civil society entities, which espoused what could broadly be identified as liberal causes, before the onset of NGOs. The violence that engulfed the country in the 1980s, and the specific targeting of trade unions and its leaders, left the movement in tatters. What replaced public activism of the unions were the NGOs.

In light of this larger reality, the rights of the people have been consistently fought for only by a few dedicated lawyers. Some continue to work with well-established NGOs that provide legal aid to the needy; a few others work in independent chambers of their own. Some of the remarkable judgments discussed earlier have emanated through their advocacy. However, it is increasingly becoming clear that their idealism is frustrated by the inherent limitations of these organizations: clinical professionalism is replacing political commitment and ideological causes. NGOs are being viewed by the state as westernized entities mainly dedicated to the agenda of donors, which make all NGOs suspect of collaborating with the enemy. Finally, and perhaps most dangerously, they are increasingly losing relevance and legitimacy among the larger populace.

CONCLUSION

The case of Sri Lanka is theoretically important because it shows how legal actors, under very strong constraints, can face a choice between opposite principles of orientation. Ultimately, with some exceptions, illiberal principles prevailed in the face of ethno-nationalism and civil war.

The legal complex in Sri Lanka is, by all appearances, based on a foundation of liberal values and principles, which form a vital part of the British colonial legacy. The orientation of legal education and the institutional and procedural framework of the complex are all based on that legacy. However, the manner in which the components of the complex operate points to strong internal contradictions that have compromised liberal values. Those who pursue a liberal agenda within the complex are more the exception than the rule.

One reason for the internal contradictions, it could be argued, is the strong ethno-nationalist character of post-independence politics of Sri Lanka. Ethno-nationalism has overshadowed other ideologies and has emerged stronger as a result of the nearly three decade old separatist war that ended only recently. Although liberalism is appealed to for purposes of championing individual rights (even by nationalists), nationalist discourses dominate political engagement. At the level of rhetoric, liberalism and liberals constitute the “other” and are often scoffed at as being Western and alien.

That accusation of “otherness” leads to the second possible reason for the internal contradictions within the legal complex. That is that liberalism never strongly took root in Sri Lanka society. Liberal values have constantly been in contestation with popular notions of indigenous values. In Sri Lanka even those educated in the Western liberal tradition in the high seats of British learning did not agitate for social or political changes in keeping with liberal ideals. The stalwarts of the independence movement, of whom a considerable number were lawyers, were more bent on caste and communal politics than envisioning a new post-independent society that was pluralist and egalitarian.

An overview of the post-independence jurisprudence of the apex court of Sri Lanka highlights the extent to which the judiciary too was trapped in nationalist logic. The nationalistic project of the state was, unwittingly or unwittingly, contributed to by the Court in a string of judgments on policies relating to language, citizenship,
and religion. When the state, subsequent to worsening ethnic violence, attempted to make amends by establishing structures of governance declared to be more inclusive, the Court was sharply divided. More recently, the Court articulated a negative position on the use of international human rights law for national protection of human rights, citing imperatives of state sovereignty.

In stark contrast to those positions, the Court did deliver justice, sometimes extremely progressively, in cases of individual violations of civil and political rights arising even in the context of the secessionist conflict. It appears that the liberal tendencies of the judiciary surfaced mostly when the state turned very authoritarian. Here it seems that the Court discovered for itself that it was not prepared to abandon all restraints on executive power - that it did rest upon bedrock foundations of basic legal freedoms when the state pushed it to extremes. It responds by insisting upon limits to the state’s illiberalism, although within the contours of the broader majoritarian status quo. It is this duality of positions of the judiciary that requires reflection. If the judiciary upheld the nationalistic project of the state because of state manipulation of judicial politics, then the apex court would not have shown much independence in fundamental rights cases either. It could, therefore, be argued that nationalistic logic was inherent in judicial philosophy. When, on the other hand, the Court showed signs of obstructing authoritarian tendencies of the state, then the judiciary got a battering for showing a measure of liberal daring.

In broad brushstrokes it can be said that the Court’s orientation to legal-liberalism has gone through three phases. In the first, from the early 1960s to mid-1970s, the Supreme Court, unwittingly or unwittingly, deferred to the state’s nationalistic project and issued opinions that ran counter to ideals of liberal-legal jurisprudence. The second phase came about in the latter part of the 1980s when the Supreme Court increasingly focused on protection of individual rights in the face of serious abuse of power by an entrenched national security state. In contrast, the 1970s and early 1980s saw a high degree of judicial deference to the executive on national security issues. The third phase, beginning in the late 1980s and continuing into the 1990s, brought both strands of reasoning together on parallel tracks. For the most part the Court displayed an inherent conservatism on issues that contested majoritarianism, but on occasion it did assert its defense of basic legal freedoms of the individual.

More than the judiciary, the bar in Sri Lanka had a greater opportunity to espouse liberal causes and embrace change. Its diverse composition and professional independence could have been its assets. The bar in microcosm might have demonstrated how a commitment to legal-liberalism could transcend racial, linguistic and religious difference. Instead its behavior amalgamated apathy with politicization.

On the one hand, just as it was not implicated in the fight for independence, neither did it actively advocate defense of individual rights or any other key value of political liberalism. On the other hand, it has chosen to be subject to strong politicization, and consequential division within the ranks, which defeated any prospect of the defense of legal-liberalism. The liberal elements within the bar have been marginalized over the years. It has prompted them to move away from the organized bar to engage in liberal activism. The new theater of activism for most of them has been human rights NGOs. There they play a pivotal role as public interest lawyers and public interlocutors who champion liberal values. However, the NGO sector too has come under intense state pressure for its independent positions. More problematically, the NGO sector has lost credibility with the public for being too donor-driven, and for being out of sync with the masses. For the few activist lawyers this represents a new challenge. But they continue to persevere.

REFERENCES


