UNITED STATES AND SRI LANKA CONSTITUTIONS: A COMPARATIVE STUDY

AMERICAN STUDIES ASSOCIATION OF SRI LANKA
AND
LAW AND SOCIETY TRUST

THE UNITED STATES AND THE SRI LANKA CONSTITUTIONS: A COMPARATIVE STUDY

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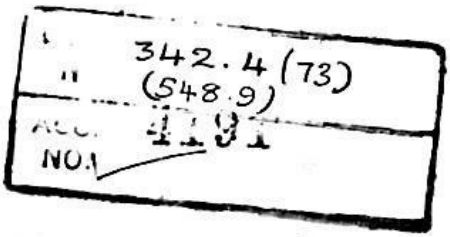

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PREFACE

The present volume was expected to be out in print in 1988/89, but due to the unsettled conditions in Sri Lanka at the time, was unavoidably delayed, and the task had to be completed during 1991. In spite of the delay the material contained herein has its freshness, relevance and perennial interest not only for students of political science, but also for the general public.

The manuscript for the press was prepared by Mr. Asita Obeysekere at the request of the Law and Society Trust, and was further edited by the present writer, who also undertook the task of proof reading of the entire volume. The writer also acknowledges the cooperation of the Sridevi Printers. Once again the American Studies Association of Sri Lanka wishes to recognise the cooperation and the strong support given by the American Cultural Affairs Office of the U.S.I.S. in Colombo and the Law and Trust Society of Sri Lanka.

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August 1991.

W. M. K. Wijetunga
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INTRODUCTION

The papers published in this volume, with one exception, were all read at a Seminar on the Constitutions of the United States and Sri Lanka: A Comparative Study organised by the American Studies Association of Sri Lanka at Kandy, on the 28th and 29th of November 1987. The exception is the article by Professor S. U. Kodikara who was unable to attend the Seminar due to other engagements. However, on 18th June 1988 he more than made up for this by addressing the American Studies Association in Colombo on the theme of "Foreign Policy and the Democratic Process: The United States and Sri Lanka". By the end of his exposition it was clear that the inclusion of that address would enhance the value of this volume. The presentation by Dr Neelan Tiruchelvam on the "Constitutional Safeguards in the U.S. and Sri Lanka Constitutions" is also not included in this volume as a manuscript was not available at the time of printing.

About four years have elapsed between the original date of the Seminar and the publication of this volume. During this period many of the original papers were modified not only in response to criticisms and suggestions during the Seminar itself but also on the request of the editor. What has emerged therefore is a collection of essays exploring many different aspects of the Constitutions of Sri Lanka and the United States. The essays themselves are written from different points of view and no attempt has been made to harmonise the divergent and sometimes even conflicting views expressed in them. Together they form the most penetrating and extensive effort yet made at comparing (as one speaker put it) "an old constitution in a new country with a new constitution in an old one."

Indeed, throughout the discussions at the Seminar, some scholars wondered about the validity of the comparisons. Not only was the United States a federal state but some of the constituent units of that federation were far larger in size than the entirety of Sri Lanka. There were wide variations in the histories of the two countries as well as differences in their cultures, their historical heritage and in the current economic and social conditions prevailing in them. Although some agreed that the constitutional structure in other countries were profoundly influenced by the British colonial

tradition and western liberal democratic institutions, many Sri Lankans, though not all, tended to view the constitution of the United States as a standard by which they could assess the flawed realities of the Sri Lankan structure.

The essays in this book embody not only a considerable amount of painstaking research but also flashes of illumination and insight. Some of them have wide areas of agreement. For example both Ms Jacqueline Lee Mok in her welcome address and Mr. Edward Marks in his presentation on the socio-political history of the constitution of the United States pointed out that constitutions were often compromise settlements that emerge in certain socio-political environments. They need to be amended or modified when conditions change.

Professor G. L. Pieris deals with a different area altogether in his own essay. He makes a clear distinction between the Austinian concepts of individuals, illimitable sovereign power and the more pragmatic and functional idea of the separation of powers. Having clearly shown how this latter concept operates (within limitations) in the United States he agrees that, despite the presence of a vigourous executive, it has influenced the Sri Lankan constitution as well. Professor Wiswa Warnapala on the other hand emphasises that the procedure of appointing members of Parliament, the extension of the life of Parliament by means of a referendum in 1982, and the strong party control over members of Parliament make a "mockery of democracy" in Sri Lanka. He argues that the Presidential system in Sri Lanka emanated from the "political strategies" of Mr. J. R. Jayewardene rather than from a consensus within the ruling United National Party. He argues that unlike in the United States "the Presidential experiment instead of bringing about political stability and continuity of democratic government in the third world has resulted in political chaos and the erosion of constitutional government and democracy."

Dr Jayadeva Uyangoda's essay is basically an examination of the relationship between the President and Parliament in Sri Lanka. He tries to relate the establishment of a Presidential system to the need for a strong executive to implement the new outward-oriented economic policy based on foreign investment. He argues further that this development was also in line with the tendency in

other deeply divided third world societies to try to create a strong centre of power. He argues that this very attempt has produced further cleavages in Sri Lankan society and has promoted a growing isolation of the regime. Dr Uyangoda in his essay also expresses considerable misgivings on the survivability of the 1978 constitution of Sri Lanka. Dr Radhika Coomaraswamy, on the other hand, examines the Sri Lankan constitution from a different point of view. "Whatever disagreements we may have about the actual text of the 1978 constitution....." she writes, "....the constitution, in the text at least is very much written in the Anglo-American tradition which has been the basis of our legal and political processes since independence." However, she points out that it is really the working of the constitution that is crucial. In her detailed critique of the amendments to the constitution and the referendum of 1982, she contends that these developments have delegitimised the entire political structure.

If in the analysis of the nature of the constitution this collection is much more informative and critical of the Sri Lanka situation than of that in the United States, the balance is much more even in respect of the studies that deal with the conduct of foreign policy. Dr Amal Jayawardena provides a sound analysis of the powers of the Presidents of the United States and Sri Lanka in relation to foreign policy and reminds us that the two sets of powers may be difficult to compare in reality because Sri Lanka is weak and the U.S.A. powerful in military and economic terms. Dr S. U. Kodikara's incisive analysis of 'Irongate' in the U.S. and the Indo-Lanka Accord in Sri Lanka is set solidly in the background of the constitutional and political structures of the two countries. His paper is one which reveals equal familiarity with the political systems of both countries.

In the area of federalism and the devolution of power, Dr Ranjith Amarasinghe's clear analysis of the situation in the U.S.A. and India with lessons that could be drawn by Sri Lanka is a notable contribution. He emphasises that in the end, what would matter are not constitutional niceties but acceptance by the people. Dr Shirani Bandaranayake on the other hand, is concerned with limits of devolution within the unitary Sri Lanka state. She argues (and Dr Amarasinghe agrees) that the Thirteenth Amendment to the Constitution introducing Provincial Councils has changed the unitary nature of the Sri Lankan Constitution.

The four concluding essays in this collection deal with the judiciary and its role. Mr. Shibly Aziz makes a clinical analysis of the ways in which the Supreme Court of Sri Lanka has tried to deal with cases dealing with various fundamental rights protected by the constitution. He highlights the problems faced by those who claim redress including the high cost of litigation, possible victimisation and delay. His suggestion that a greater role could be played by a Human Rights Commission merits serious notice. Mr Anton Cooray in a well-reasoned essay argues that because the constitutional role assigned to Sri Lankan judges is limited, "the power that the American Courts wield can never be realistically achieved by Sri Lankan courts." Nevertheless, he is optimistic that the Supreme Court could still hold an important position of influence and indicates that the tendency of dissenting judges to place their reasoning on record is a positive feature. Justice T. W. Rajaratnam in the final essay in this collection emphasises that the US constitution has had more time to grow, and more lessons to learn from. While being critical of the performance of the Supreme Court of Sri Lanka he too states that "where there have been dissenting judgements, our jurisprudence, to that extent, has been enriched."

The collection of essays in this work thus covers a wide area. As is inevitable in a work of this sort certain key aspects—such as the electoral system and the provisions relating to control of public administration—are not examined in any length. Moreover, the essays themselves, written largely by Sri Lankan scholars, reveal Sri Lankan concerns and preoccupations. Nevertheless, taken as a whole, within the cover pages of this volume there is much that stimulates reflection and thought.

The publication of this work was undertaken as a joint venture by the American Studies Association and the Law and Society Trust. The help, encouragement and advice given by the Executive Committee of the American Studies Association as well as by Dr. Neelan Thiruchelvam and Ms Sakuntala Rajasingham of the Law and Society Trust are all recorded here with gratitude.

C. R. de Silva,
Editor,
1988.

I THE SOCIO - POLITICAL HISTORY OF THE U.S. CONSTITUTION

Edward Marks

"We the people of the United States, in order to form a more, perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Just over fifty words and yet the preamble to the U. S. Constitution sets forth the style of government to match the inspiring words of our Declaration of Independence. And in those fifty-odd words, two very important concepts are heralded. That the power of the Constitution stems from the people, and that the government established by the Constitution has a responsibility to promote national unity, justice, peace at home and abroad, liberty, and the general welfare.

William Gladstone, British statesman and Prime Minister, once described the American Constitution as "The most wonderful work ever struck off at a given time by the brain and purpose of man". That description might be a little exaggerated, but in this bicentennial year of the signing of our Constitution, we take pride in the fact that our Governmental Charter has withstood the crucial test of time. Drafted in Philadelphia in 1787, the American Constitution is now the oldest written and still politically viable Constitution in the world. In the words of Alfred Kelly and Winfred Harbison, "it has survived the trials of practical politics, the holocaust of civil war, and the immense and relentless tide of social and economic change induced by the industrial revolution". Written in the eighteenth century for an agrarian nation of four million people, the Constitution remains the binding force of a late twentieth century multi-everthing society of 250 million Americans.

How did this remarkable document come into being? And what makes it so enduring? As our seminar undertakes this two-day study of both the U.S. and Sri Lankan Constitutions, I would like to touch upon a few of the socio-political events which led up to the creation of the American Constitution. I do not pretend to be a scholar on these matters, but I hope some of what I say this morning will help put the U.S. Constitution in an historical context.

I will not reinvent the wheel by going back to the days of the Magna Carta. Suffice it to say that England's own long political and constitutional history greatly influenced the kind of government called for in our Constitution. But it is in the colonial period that history melded with contemporary thought to produce the American Revolution and Constitution.

The American colonies could be roughly divided into three basic categories: Joint-stock, compact or convenant, and proprietary. English merchant companies were the first to settle in the new world in Virginia and Massachusetts. Because of their mercantile philosophy basic charters were drawn up to define their purpose and their modus operandi. As much as anything else the charters were designed to insure proper management of the business operations and to encourage new stock subscriptions. Eventually, these company contracts gave way to locally administered governments patterned after British representative assemblies because the London-based Administrative Councils were not responsive to the local situation.

In Connecticut and Rhode Island, colonies were established to escape religious persecution in England. Unlike their mercantile compatriots, these colonists intended to settle in parts of the new world away from the joint-stock companies. Consequently, the political authority which covered, for example the Virginia Company, was for all intents and purposes, meaningless to the Plymouth settlers. There, in one of the most famous examples in history, a group of colonists organized themselves through a compact—in this instance, the Mayflower Compact. Bound together on religious grounds, the Mayflower Compact signatories declared

that "We whose names are underwritten.....do by these presents, solemnly and mutually in the presence of God and one another, covenant and combine ourselves together into a civil body politick....."

Nevertheless as in the case of the joint-stock colonies, the compact societies developed a system of local government where a Governor, a Board of Magistrates and Town Representatives met together in a "General Court or Legislature" to pass laws, collect taxes, make land grants and establish a public code of conduct.

The third of the colonial categories is the proprietary-settlements which were deeded outright by royal charter, like Maryland, New York, and Pennsylvania. In fact, eight of the thirteen original colonies in America grew out of these feudal grants awarded to those loyal to the Stuart reign. First meant to be an extension of the seventeenth century British feudal system, the proprietary charters gave almost absolute authority to the Crown's representative in the areas of local administration, lawmaking and military affairs.

But as time passed, the proprietery colonies collapsed for two reasons: Feudalism itself was dying in Britain, and it never really flourished in America because the premise of land preservation had no relevance in the new world where land was abundant. Nonetheless, the proprietary colonies left the legacy of a parliamentary system because the relationship the proprietor had to his tenants was "analogous to that of the King of England". Thus, the familiar British parliamentarian system of government was the easiest for the proprietor to adopt in administering his own lands.

So, from these different types of colonial settlements, we find the fundamental core from which the American constitutional system evolved. According to one historian, "The joint-stock company contributed the basic framework of colonial and later state government. The separatist church contributed the doctrine of government by compact. The feudal proprietaries.....hastened the transfer of English parliamentary institutions to America". These influences are still noticeable today.

Without subjecting you to a crash course in American history, let me just mention a philosophical development which influenced the formation of the United States and its Constitution. The old world imagined, invented, and formulated the enlightenment... The new world-certainly the Anglo-American part of it—realized it and fulfilled it. It was Newton and Locke, and their eighteenth century successors in Britain and on the Continent—Philosophers like Priestly and Bentham, Hume and Monboddo in Britain, Montesquieu, Voltaire, Buffon, and Diderot in France, Christian Wolf and Lessing Von Haller and Goethe in Germany, Genovesi, Filangieri, Beccaria, and Tanucci in the Italian States, and sometimes supporting them, "Enlightened" monarchs like Frederick of Prussia, Joseph of Austria, Leopold of Tuscany, and Gustavus of Sweden—who launched the enlightenment, gave it respectability and, somewhat tentatively, experimented with it. But it was Americans who not only embraced the body of enlightenment principles, but wrote them into law, crystalized them into institutions, and put them to work. That, as much as the winning of independence and the creation of the nation, was the American Revolution.

Although inevitably the enlightenment took different forms from country to country and from generation to generation, in its dominant and pervasive ideas it transcended national and continental boundaries. Alike in the old world and the new, it had its roots in the same intellectual soil, and produced a common harvest of ideas, attitudes, and even programs: recognition of a cosmic system governed by the laws of nature and nature's God; faith in reason as competent to penetrate to the meaning of those laws and to induce conformity to them among societies in many ways irrational; commitment to what Jefferson called "The illimitable freedom of the human mind", to the doctrine of progress, and—with some reservations—to the concept of the perfectibility of man; an ardent humanitarianism that attacked torture, slavery, war, poverty, and disease; and confidence that providence and nature had decreed happiness for mankind.

In his second Treatise on Government, written in 1680, Locke considered that the natural rights were those of "Life, Liberty and Estate". As we all know, Locke's doctrine of inalienable natural rights would later be enshrined both in our Declaration of Independence and in our Constitution's Bill of Rights.

Because the circumstances leading up to the American Revolution are well known, I'll push the "fast-forward" button and move to the events leading up to the signing of the American Constitution in 1787. I have already outlined earlier the political and philosophical genesis of the Constitution, so this next part will, I hope, put the Constitutional Convention in its historical context.

In March 1781, during the American revolution, American statesmen adopted the Articles of Confederation, described by some as "simply a league of friendship". Originally drawn up in late 1777 by the Continental Congress, the Articles of Confederation tried to find a common ground amid the various disputing factions. In fact, although the Articles "vested all national power in a Congress to which each state legislature appointed delegations and in which state had a single vote", the Congress was actually powerless.

In principle the Articles of Confederation accorded many of the same authorities to the National Government as did the Constitution. Yet, the Articles are perhaps best understood in what they did not achieve. All decisions made by the Congress had to be endorsed subsequently by the States: thus, the real power belonged not in the National Congress but with the individual sovereign states. The weakness of the Confederation became more obvious as the United States moved from its War of Independence to the establishment of some kind of normalcy.

When Daniel Shays, a former revolutionary war hero, led a band of farmers in an angry and rebellious attack against a federal arsenal in Massachusetts in late 1786, leading American statesmen clearly realised that events had come to a head. They decided to hold a Constitutional Convention in Philadelphia in May 1787, their task: "To take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as.....will effectually provide for the same" In essence, the Constitutional Convention was to create a new American frame of government.

The Convention assembled in what has been called "The critical period of American history". The American people had experienced a long and destructive war: They were just beginning to emerge from a severe economic depression following a war-time boom: Their normal peace-time commerce with Great Britain and the West Indies was disorganized by reason of separation from the British empire. Economic "Heresy"—paper-money agitation and other evidence of recurrent populism—was abroad in the land, and in at least one instance taking the form of armed insurrection. Political agitation, under such revolutionary slogans as equality and the rights of the people, that spirit of "Faction" which so alarmed Madison and others, was rampant. There was hostility to government and a marked aversion to taxation, whether with representation or without representation. In the minds of many, life, liberty and property were far from safe. Facing these difficulties, the nation was attempting to do business under the Articles of Confederation, which Alexander Hamilton termed an "imbecility". Each State was an *imperium in imperio:* Public credit was demoralized and private credit lacking in confidence; the Treaty of Peace with Great Britain was being ignored by both sides and seemed incapable of enforcement; the national currency was practically worthless; the prestige of the government was practically nonexistent at home and abroad; the public will seemed to be paralyzed. Almost any citizen could present a catalogue of catastrophies attributable to the Articles of Confederation, and the most vocal citizens did.

Our Cultural Affairs Officer, Ms. Mok, recounted earlier this morning how the delegates to the Convention had to hammer out compromise after compromise. In doing so, the framers of the Constitution created a delicate balance between a central government given certain authorities to uphold the national interest and the sovereignty of the individual states to govern themselves. Most important, the power given to the Congress, as well as that retained by the States, was explicitly defined as deriving from the people themselves.

As we enter into the third century of the American Constitution, we are amazed at the longevity of this document which was born in desperation. Until the final days of ratification, there was

intense dispute about the intent of the Constitution, and anti-federalists fought against too much power being given to the central government. Yet, in spite of the many obstacles the delegates faced, there did emerge our Constitution.

Benjamin Franklin is often quoted as saying, "I doubt, too, whether any other Convention we can obtain may be able to make a better Constitution, for when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me..... to find this system so near to perfection as it does.....I consent.....to this Constitution because I expect no better, and because I am not sure that it is not the best".

The American Constitution may not be the best, but it has survived. American scholar Barbara Jordan calls it a living document, not a lifeless piece of paper resting in a dusty archives. The recent intense debate in the United States over the nomination of Robert Bork to the Supreme Court is a perfect example of just how much of a living document the Constitution is. The United States Senate rejected the nomination because many Americans disagreed with Judge Bork's narrow and literal interpretation of the Constitution, where the "original intent" of the Constitution's framers should be the only guide in applying the Constitution to today's legal issues. That is not the philosophy of the majority of the American public, who do not believe that the framers of 1787 could possibly have imagined the world of 1987. In short, Americans want Supreme Court Justicies who will interpret the Constitution more broadly, taking into account the social and economic changes of the past 200 years. Bork did not seem to offer that view of the Constitution, and that cost him a seat on the Supreme Court. The debate reflected how Americans feel about the Constitution, and what they expect of those who are called upon to interpret it. Possibly even more significant, it demonstrated the importance they give—both in politics and in popular mythology—to the role of the Constitution in contemporary American life. It is truly a document that lives.

As we begin our seminar on the U.S. and Sri Lankan Constitution, I am sure we will see both these documents come to life.

2 THE DOCTRINE OF SOVEREIGNTY IN THE UNITED STATES AND SRI LANKAN CONSTITUTIONS: THEORY AND PRACTICE

G. L. Pieris

Sovereignty is an essential attribute of the modern State. The viability of the concept can be traced back to the rise of individual states in Europe about the time of the Renaissance. A conspicuous feature of the Middle Ages was the oneness and indivisibility of the Continent of Europe which had the appearance of an impregnable monolith in the spiritual as well as the temporal sphere. In the former area the unquestioned authority of the Roman Catholic Church embraced the entirety of European Christendom, and in the latter the Holy Roman Emperor reigned supreme. This was an epoch of history described as the Age of Darkness. It was so labelled because the spirit of inquiry, the supremacy of reason and the emphasis on analytical power and the human intellect, which typified the zenith of Greek civilization, went against the grain of the values and predilections of an altogether different phase in the history of mankind. The importance of individual judgement and discrimination, coupled with the refusal to accept what was not fully grasped by the unaided intellect, yielded to the enthronement of faith, belief and obedience as the ultimate values. The teachings of the Church became the conduit through which the work of God became intelligible to man. St. Augustine, in his monumental work *Civitas Dei*, stresses the fallibility of man and the inherent limitations of human intellectual capacity. This theme is powerfully developed by St. Thomas Aquinas who, in *Summa Theologica*, declares that a good deal of the *lex divina*, or the law of God, is by its very nature incomprehensible to the human mind and that the path to salvation lies in unremitting faith in the doctrines of the Church. The relegation of the critical faculty was thus identified as a cardinal virtue in the environment of the Middle Ages.

These values underwent a fundamental transformation with the advent of the Reformation. Luther in Germany, Calvin in France, Zwingli in Switzerland and Wesley in England taught that religion is an essentially personal experience and that man should commune with his Maker directly rather than through an intermediary such as an institutionalised Church. From this movement, as powerful in its repercussions as any other in history, arose the impetus for the rise of national Churches in different regions of Europe.

The tendency towards separation and disintegration was strengthened by yet another phenomenon which eroded the stability of the social order characteristic of the preceding age. Social institutions during the Middle Ages derived from feudalism, and the pivotal relationship regulating patterns of social behaviour at this time was that between vassal and fief. Ownership of land was the key to the structure of social bonds in the feudal hierarchy, the essential attribute of which was the lack of social mobility. Birth determined one's social station in life and immutably governed one's destiny.

All this could hardly survive the consequences of colonialism and mercantilism which were inexorably ushered in by the discovery of vast tracts of land in the New World, in Asia and in Africa. The spirit of the new age was one of adventure, initiative and the relentless pursuit of profit. Archaic social distinctions giving expression to moribund priorities were swept into oblivion by the winds of change; these values did not survive, and were incapable of surviving, because they were perceived as impediments to economic prosperity and self-advancement. The growth of institutions of higher learning around the Mediterranean, in Germany and in the British Isles, and the rapid spread of education, broke down social barriers and brought into existence a vigorous, confident and economically viable middle class dependent for its prosperity on trade rather than on ownership of land. It is wholly in keeping with the aspirations of the dominant groups which emerged into prominence during this period that the pan-European bonds unifying the social and economic structure should fast disintegrate. Patriotism, born of consciousness of and pride in national identity, began to manifest itself as a powerful motivating force.

It is against this background of social, economic and cultural developments that the theory of national sovereignty began to be propounded by philosophers at the dawn of the modern age. Jean Bodin, in France, was one of the first thinkers to postulate national sovereignty in absolute terms.[1] Sovereignty to him, had necessarily to be total and all-embracing if it was to be meaningful. A qualified or diluted conception of sovereignty was, according to his analysis, a contradiction in terms. However, it has to be remembered that in this, as in any other age, the spirit and the substance of political ideologies are largely moulded by prevailing social circumstances. This was a time when, throughout the length and breadth of Europe, enterprising barons were seeking to expand their hegemony and to lay claim to the occupation of a national throne.

Typical of the rise of national monarchies is the success of Henry Tudor, Earl of Richmond and later Henry VII of England, in subjugating the House of York in the Wars of the Roses and in establishing his authority over the entirety of England as a unified kingdom. Comparable developments, away from the divisive influences of petty chiefs and potentates wielding regional influence and towards the forging of national authority symbolised by a seat of government encompassing the realm, were much in evidence simultaneously in France and in Spain. In each of these instances the national well-being was predicated on a strong and secure central administration which had both the will and the power to suppress parochial claims to suzerainty. The intellectual impetus towards forging of this national consciousness was supplied by writers who argued persuasively that unfettered power at the centre was indispensable to effective nation-building. It is, therefore, for pragmatic reasons envisaging consolidation of national authority against overwhelming odds that the leading intellects of the period unrepentantly advocated the conferment of despotic power upon the sovereign.

The most influential of the writers who immortalized this tradition in the jurisprudence of the West is John Austin. His theory of analytical positivism, contained, as an integral element, a distinctive conception of sovereignty.[2] To Austin's mind soveregnty was, of necessity, indivisible and illimitable. Austin was convinced

that any mechanism, institutional or practical, which aims at circumscribing the scope of sovereignty cannot but eliminate the very basis of sovereignty. Sovereignty, as he conceived of it, is an all or nothing concept: if it is to exist at all, it must exist in its integrity and totality. Austin's notion of sovereignty has an essential link with his exposition of the imperative theory of law which underpins his political thought. The fundamental character of law, in Austin's opinion, is that of a command issued by a political superior to a political inferior, its efficacy ensured by sanctions attendant upon contravention of the command. According to Austin's analysis the coercive sanctions which ensure obedience to law are directly attributable to the political will of the sovereign. This uncompromising analysis of the nature of sovereignty and law makes no concession to social realities: on the contrary, it postulates, at the apex of political organisation, a fusion of powers which admit of no limitation under the aegis of the legal order.

A similar analysis of sovereignty, unattractive as a practical concept in the everyday world of affairs, is embodied in the work of Thomas Hobbes.[3] In his *magnum opus*, *The Leviathan*, Hobbes conceives of the State as a giant, omnipotent and unconquerable. Hobbes imputes to the human subjects of the sovereign extreme qualities of frailty., vulnerability and weakness. Indeed, his attitude to the individual member of society is one of undisguised contempt. He looks upon human beings, subject to the governance of the sovereign, as mere "worms in the entrails of Leviathan". The essential message of Hobbes is that the sovereign, if he is to govern society effectively, must wield plenary and unbridled power. Any legal limitation of the substance of sovereignty is, inevitably, the precursor of anarchy.

If Hobbes' prescription of sovereignty appears to the modern mind the surest road to despotism, the answer is that the attitudes and approach of Hobbes need to be viewed in perspective, in the setting of the social and political circumstances which dominated life in England in the time of Hobbes. This was an age of turmoil and upheaval when Charles I of England had declared war against his Parliament. The bitter and sustained conflict between the Cevaiers and the Roundheads made normal life impossible. The prevailing atmosphere was one of deep division and tension, with

families torn asunder by enmity and suspicion and the spirit of freedom inexorably snuffed out. It was at such a time that Hobbes denigrated human life as "nasty, brutish and short". Hobbes attributed the failure of political and social institutions in his day to debilitating restraints on sovereignty which prevented the emergence of a ruler possessing the resolve and the competence to stifle internecine conflict and to give society the peace for which it yearned.

These extreme interpretations of sovereignty, themselves the product of compelling social exigencies, have little relevance to contemporary political theory. Sovereignty constitutes the cornerstone of the Constitutions of Sri Lanka as well as the United States; but the point of departure in defining and applying the attributes of sovereignty is, naturally, very different. Modern political thought is moulded by the assumption that sovereignty is a concept of value only in so far as it subserves social needs and provides a structural framework within which the requirements of the community can be fulfilled.

This is the foundation of the theory relating to the social contract which pervades the thinking of several political philosophers of distinction. It can perhaps be said with justification that no political thinker influenced the doctrines embodied in the Constitution of the United States to the same extent as did John Locke.[4] The whole edifice of Locke's political philosophy is constructed on the base of the social contract, a hypothetical phenomenon which is said to regulate the relationship between the ruler and his subject people. Life in a state of nature was free but indisciplined; it provided no security or contentment because it was founded upon brute force, the survival of the fittest. Men were therefore disposed to abjure a part of their primodial rights of self-determination and to surrender this segment of their inherent individual rights to the sovereign as the nucleus of a coercive authority designed to ensure order and tranquillity in the community.

In the state of nature which preceded this development all individuals were sovereign. It is because this condition of affairs was not conducive to the full flowering of the human personality that government based upon a structural framework for the exercise of civil authority was acquiesced, in as a matter of consensus,

to promote an atmosphere in which all members of the community would be free to lead orderly lives. Human beings are egocentric in motivation and their interests are often incompatible. To ensure peace by regulating conflict among members of the community, the sovereign needs power; his authority must be acknowledged, and his commands obeyed. But his authority is morally warranted and acceptable to society not as an abstract value desirable in itself but only in so far as the sovereign's authority is exploited for purposes which members of the community envisaged when they transferred their rights in part to him.

The hypothetical transaction between the sovereign and the community has a bipartisan and reciprocal character. Just as the sovereign has a right to the allegiance of the community, so must he accept the imperative duty to exercise his power to preserve peace and serenity in the society which he rules. The seminal idea is that political power is controlled and limited by the objectives which it is intended to accomplish. The underlying concept bears some resemblance to the juridical character of a trust. As a condition for exacting continued obedience from his subjects, the sovereign is bound to fulfil the public purposes in contemplation of which his authority was created and strengthened. As soon as sovereignty is directed towards the attainment of objectives extraneous to these aims, sovereignty degenerates into tyranny and caprice, and is no longer fortified by a convincing ethical rationale. Writers like Locke and Rousseau,[5] nurtured in the liberal tradition of the social contract, placed consistent stress on the moral limitations of sovereignty by reference to the well-being of the community at large.

John Locke developed the notion of private property as one of the major strands interwoven into the fabric of social contract ideology. In common with the *laissez-faire* economic and political philosophers who followed him, Locke believed that the stimulus of private profit and private property lay at the core of man's primaeval instinct for self-advancement. Locke was convinced that there exists no greater impetus for rededication and commitment, no greater spur to redouble one's efforts in the pursuit of socially desirable goals, than the urge to develop oneself and to benefit one's family. Private property, according to this analysis, is a uniquely powerful mainspring of initiative and creative energy.

When man renounced the law of the jungle and opted for a coherent social order, one of his primary motivations arose from the innate desire to secure the integrity and inviolability of the assets which he had accumulated.

This perception was elevated in the political philosophy of Locke to the plane of recognition that a cardinal justification for the existence of the State itself was the protection it conferred on the institution of private property. The legal order enforced by the sovereign by resorting to coercive sanctions engenders in the minds of the public the sense of security which they need in respect of the safety and continuity of their private possessions. It is as part of the price which they are content to pay in order to obtain this basic sense of security that men show themselves prepared to disavow some element of their intrinsic rights and to concede sovereignty to their ruler. John Locke's discussion of the role and significance of private property illustrates in vivid terms the functional complexion of sovereignty and the need constantly to justify its negative aspects, entailing the curtailment of individual liberty, by focussing upon practical gains which are seen to accrue to the community in areas crucial to their collective well-being.

It is no mere coincidence that Locke's reference to the protection of "life, liberty and property" as the *ultima ratio* of the State, as the embodiment of political sovereignty, should have been adopted by the framers of the Constitution of the United States with but one modification. The Founding Fathers chose to delete the reference to "property" and to substitute for it an allusion to "the pursuit of happiness". A central thread which runs through the fabric of the American Constitution is the imposition of a variety of restraints, cumulatively dramatic in their impact, on the exercise of sovereignty. In fundamental respects the Austinian theory of sovereignty is incompatible with the postulates of American constitutional law. Far from sovereignty being, by its very nature, indivisible and illimitable, as Austin insisted, the federal constitutional structure which the Founding Fathers selected presupposes a division of governmental powers between centre and periphery, between the federal organs of government and the constituent States of the federation.

The essence of federalism is the aim of unity amidst diversity. The States retain their resolve to remain self-governing and autonomous in an extensive gamut of matters, embracing *inter alia* education, transport, agriculture and recreation. It is only in regard to a comparatively restricted range of matters, principally defence and foreign affairs, that the States agree to devolve their powers upon the centre and to be guided by its decisions. Federalism, essentially, is a mediating technique of constitutional theory designed to combine a liberal measure of self-government in parochial spheres with the recognition of central authority in areas which are vital to the life and welfare of all the constituent units without discrimination. It is, at bottom, an experiment in the sharing of power. The balance to be struck in the distribution of power between the centre and the periphery involves value-judgments which must show sensitivity to existing cultural patterns and geo-political realities. The federal government in Canberra, for instance, retains in its hands a far greater volume of powers than the federal administration in Ottawa. This difference is accounted for by the significant contrast between the constitutional experience of Australia and that of Canada. Inhibitions generated by the growing influence of hostile powers, chiefly the People's Republic of China, and the enhanced perception of the need for a vigorous defence deterent, which these fears have buttressed, have proved powerfully conducive to reinforcing the powers of the federal government in the geo-political context of the Australasian subcontinent. On the other hand, important cultural differences and, even more, striking inequalities with regard to possession of natural resources and distribution of income among the different provinces of Canada have brought about a climate of opinion in which the provinces remain implacably jealous of their rights and privileges, and view with misgivings efforts, however well-intentioned, to strengthen the centre at the expense of their own autonomy. The ramifications of the conflict between Rene Levesque, at the time the regional leader of Quebec, and Trudeau, the former Prime Minister of Canada, are symptomatic of these tensions.

Ethnic and linguistic antagonisms frequently exacerbate these strains, and the choice of the appropriate *via media* has necessarily to take into account empirical social circumstances and the entirety

of the historical experience of the community in question. The Constitution of India contains an extensive list of subjects in respect of which concurrent jurisdiction may validly be exercised by the central government in New Delhi as well as by the individual states. Federalism is no stereotype but a flexible constitutional model endowed with sufficient resilience and elasticity to accommodate vagaries of social and cultural context. Throughout the spectrum of federal constitutions in the modern world there is an impressive array of variations upon a central theme reflecting disparate shades and nuances. This augurs well for the viability of the constitutional concept. It remains true, however, that the structured allocation of powers to the centre and the periphery is a point of departure indispensable to the roots of federalism, and this feature typifies all federal constitutional models without exception, irrespective of regional variations. It is apparent then, that the fusion or concentration of powers which Austin identifies as the hallmark of sovereignty is far removed from the foundation of federal constitutions, including that of the United States of America.

There is another reason why the Austinian analysis of sovereignty is basically repugnant to American constitutional doctrine. Austin, like Hobbes, sought to strengthen the sovereign's hand by resisting single-mindedly any erosion or diminution of his powers. By contrast, no doctrine captures more typically the spirit of American constitutional law than the theory relating to the separation of powers. This doctrine which has impeccable antecedents in Western political thought, had its origin in the brilliant exposition by the French political philosopher Montesquieu.

The American system of government rests on a series of checks and balances which ensure that no single organ of government is invested with a plenitude of power which involves jeopardy to the freedom of the individual. In terms of Article I section 1, of the American Constitution, the sole repository of legislative power is the Congress of the United States which consists of the Senate and the House of Representatives. The Constitution, which regards Congress as the exclusive source of federal legislation, excludes any parallel legislative authority in competition with Congress. The executive, therefore, lacks competence to exercise law-making authority in the absence of valid delegation by the legislature. The

Constitution holds the balance of power between the legislature and the executive. Although the President of the United States, in the Oval Office, occupies the most powerful executive position in the world, his authority is circumscribed by the American constitutional system's decisive rejection of the doctrine of inherent power in the executive. Any assertion of power by the President of the United States must be referable to express delegation either within the framework of the Constitution or under the aegis of a law passed by Congress. The American Constitution[6] provides for vesting of the executive power in the President of the United States who is elected every four years (Article II, sections I and 2), and the President is enjoined by the Constitution[7] to ensure that the laws are faithfully executed and to commission all the officers of the United States (Article II, section 3).

The distribution of power between the President and Congress under the American Constitution discourages the emergence of dictatorial power. The President has the crucial power of veto in respect of a bill which has received the assent of both Houses of Congress.[8] On the other hand, such a bill becomes law, once it is passed a second time by both houses with a two-thirds majority in each House.[9] The presence of this power of veto serves as a fetter on precipitate or ill-conceived legislative action. While the President has charge of foreign affairs, nevertheless treaties made by him must be ratified by a two-thirds vote of the Senate.[10] Moreover, even though the President is Commander-in-Chief of the armed forces, Congress alone has the constitutional power to declare war.[11]. (Article I, section 8). The President appoints members of the federal Supreme Court and other federal judges, subject to the condition that these appointments are approved by the Senate.[12] Likewise there is the constitutional requirement that the major appointments made by the President should be confirmed by the Senate.[13] (Article II, section 2). In each of these instances executive and legislative powers act as a brake on one another in the interest of constitutional control of public power.

While there are several areas in which the American constitution countenances legislative inroads into the domain of executive power, it is equally true that executive patronage and prerogative may influence legislative policy. This element of reciprocity informs and

sustains the mechanisms controlling the relationship between the legislative and the executive organs of government. Although the President cannot dissolve Congress, he is entitled to disallow any bill passed by it. He may influence Congress through messages which he is constitutionally empowered to deliver,[14] and by this method he may seek to impress upon Congress the necessity for enactment of the laws which his Administration desires. Furthermore, as party leader, he may require the members of his party in Congress to espouse his proposals. This, however, is subject to the *caveat* that, since there is much less rigidity in the United States than in the United Kingdom or indeed in Sri Lanka with regard to the structure and discipline of political parties, the American President would be rash to take for granted the support of all members of his party in volatile contexts.

The counterpoise to Presidential power and prestige consists of the constitutional role of Congress as overseer of the administration. The primary instrument of legislative supervision is financial control. Apart from the fundamental reality that all exercise of power by the administration must have its origin in a valid legislative act, the financial resources which are essential for the conduct of American government can be secured only through authorisation by the legislative body.[15] (Article 1, section 9). Appropriation of funds, made as a rule every year, enables the legislature to exercise constant supervision over the formulation and implementation of executive policy.

At the core of entrenchment of individual liberty through the separation of powers lies the American doctrine relating to justiciability of legislation. The authority of the federal Supreme Court to review the constitutionality of legislation which Congress purports to enact, and to strike down such laws to the extent of their inconsistency with the provisions of the paramount law, is derived not from any explicit stipulation in the constitutional instrument itself but from the assumption of this power by the Supreme Court of the United States in the uniquely daring decision which it handed down in the landmark case of *Marbury* v. *Madison*.[16] The premise that the Supreme Court has inherent jurisdiction to pronounce upon the constitutional validity of legislative and executive acts is indispensable to effectiveness of the limitations spelt out in

the constitutional instrument for the purpose of safeguarding freedom; "for otherwise the acts of the legislature and the executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions contained in the Constitution, and usurpations of the most unequivocal and dangerous character might be assumed, without any remedy within the reach of the citizens".[17] (Story, *Commentaries on the Constitution of the United States*).

The United States, above all, is a nation conceived in the spirit of freedom. Its birth was the result of an armed struggle waged by the American colonists against George III of England to uphold the principle, which they considered sacrosanct, that there should be no taxation without representation in Parliament. The aspiration uppermost in the minds of the Founding Fathers, in bringing into being a new nation, was to abjure State tyranny and to nurture freedom under the law. Thus, the Founding Fathers, in the Preamble to the American Constitution, set out as one of their principal objectives the aim of "securing the blessings of liberty to ourselves and our posterity".

To this end, the framers of the American Constitution were astute to incorporate in the paramount law decisive limitations on the powers of organs of the State. It was their firm belief that the inalienable liberties of the citizen called for protection not only against transgression by their peers but against violation by the machinery of the State; indeed, the latter, in their eyes, was by far the greater potential threat to the freeom of the individual. To ward off this peril the American Constitution defines and circumscribes the powers not merely of the executive but of the legislature as well. This makes necessary a fundamental departure from notions of sovereignty integral to British constitutional law. The concept relating to the sovereignty of Parliament is pivotal in Anglo-Saxon public law. But this idea, repugnant as it was to the basic goals of the American Founding Fathers, had to yield to mechanisms directed towards the constitutional limitation of legislative power. James Madison,[18] consequently, was able to assert with justification that "in the United States the People, not the government, possess the absolute sovereignty" and that "In the United States the great and essential rights of the people are secured against legislative as well as against executive ambition."

It is a vital aspect of the philosophic foundations which underpin American constitutional theory that the State has but a limited role in regulating the lives of citizens and that there are extensive areas of individual life and experience which should enjoy immunity under the law from encroachment by the State. This provides the theoretical justification for constitutional restraints upon the exercise of legislative power and imparts coherence to the role of the judiciary as ultimate arbiter in determining whether purported legislation contravenes fundamental rights enshrined in the Constitution.

This conceptual premise explains the approach of American Constitutional law in excluding several areas of law making from the purview of legislative competence. These restrictions are articulated in the Constitution itself, in the provisions of Article I, section 9. No Bill of Attainder or *ex post facto* legislation may be validly passed by Congress. The Constitution of the United States expressly denies the power of Congress to suspend the writ of *habeas corpus* "unless when in cases of rebellion or invasion the public safety may require it." Other limitations[19] on the legislative competence of Congress include a direct prohibition against levying capitation or other equivalent tax on individuals or property unless it is proportionately divided among the states in accordance with their populations or respective number of articles to be taxed. Congress, moreover, is prohibited from taxing articles exported from any state within the federation, and the legislature is disentitled under the Constitution to discriminate in any form against particular states in the regulation of foreign and domestic commerce.

It is evident that the Constitution of the Democratic Socialist Republic of Sri Lanka is powerfully influenced by doctrines derived from the constitutional laws of the United States. This influence is nowhere more marked than in practical applications of the concept of sovereignty. The point of departure of American law pervades the assertion, in Chapter I of our own Constitution, that "in the Republic of Sri Lanka sovereignty is in the People and is inalienable."[20] Again in line with the American constitutional experience, sovereignty is declared to encompass, in the Sri Lankan constitutional context, the total range of "the powers of government, fundamental rights and the franchise."[21] (Article 3)

The constitutional reference to the people as the repository of sovereignty has its major practical application in the explicit recognition that Parliament is not the sole and exclusive law making authority in Sri Lanka. The Constitution provides for the exercise of legislative power by the people at a Referendum.[22] This brings into sharp relief innovative mechanisms which have their roots in the earliest stages of the development of democratic theory. Democracy in the city state of Athens envisaged direct participation by the people in the affairs of government, and the rise of institutions of representative government was attributable to the impracticality of direct democracy in the complex conditions of modern life. Nevertheless, contemporary democratic theory does make concessions, in appropriate social contexts, to expression of the popular will by means which transcend the conduct of free elections at regular intervals. This is epitomised by the continuing viability of such modalities as the plebiscite, the initiative and the recall in modern times.

The referendum, for which provision is made in the present Constitution of Sri Lanka,[23] is another such device which is designed to give pragmatic expression to the ultimate sovereignty of the electorate and to ensure that the elected representatives of the people continue to remain responsive to the wishes of those from whom they derive their authority. The sovereignty of the people, in the final analysis, is underscored by constitutional provision[24] in Sri Lanka that certain Bills, to become law, have not only to be passed by Parliament but must be approved by the People at a referendum. Article 83 of the Constitution of Sri Lanka provides that no Bill which seeks to amend, repeal or replace any one or more of ten Articles of the Constitution, or is inconsistent with the provisions of any of these Articles, shall become law unless it is passed by a two-thirds majority in Parliament and is approved by the people at a referendum. Likewise, any Bill which seeks to extend the term of office of the President or the duration of Parliament beyond the limit of six years requires the consent of the people, given at a referendum, to become law[25]. The sovereignty of the people is demonstrated even more graphically in a situation where a Bill which has been rejected by Parliament is still constitutionally capable of becoming law, once it secures the approval of the

people at a referendum held on a reference by the President.[26] (Article 85, section 2). Here, in the clearest terms, the legislative supremacy of Parliament succumbs to the final sovereignty of the people.

The focus, in Sri Lanka, on the referendum as a pivotal constitutional device marks a decisive departure from the British tradition in public law. British constitutional theory is predicated upon the unfettered legislative supremacy of Parliament during its lifetime. It was this characteristic of British constitutional practice which evoked the derision of Rousseau, a perceptive critic of the English political scene from across the Channel, regarding a legitimate dictatorship by Parliament during the period between elections. The assumptions of British constitutional law in respect of the supremacy of Parliament have proved uncongenial in the radically different social and cultural environment of Sri Lanka, and indeed among many of the nations of Asia, Africa and Latin America which have recently emerged from colonial thraldom. In this area the philosophy and antecedents of the American Constitution have proved of distinct value.

The pervasive influence of American constitutional doctrine is unmistakable in regard to the role of the Supreme Court of Sri Lanka in pronouncing upon the constitutionality of proposed legislation at the Bill stage. There is, admittedly, a significant point of contrast with the American conceptual pattern, in so far as the justiciability of laws, once they are fully enacted by the legislature, finds no parallel in the provisions of the Sri Lanka Constitution. What our own Constitution embodies is a revamped and diluted version of the American doctrine, so structured in a divergent setting as to permit of challenge on the ground of incompatibility with entrenched rights during the passage of the Bill into law. Articles 120-123 of the Constitution of Sri Lanka confer upon the Supreme Court the authority to determine whether a Bill needs to be passed by a two-thirds majority in Parliament or whether it requires, in addition, the approval of the people at a referendum. Article 85 renders it obligatory for the President to submit a Bill to the people for approval when the Cabinet of Ministers has made an endorsement to that effect, or when the Supreme Court has determined that it should be approved at a referendum and after the Bill has been passed by Parliament by a two-third majority.

The need for incorporation of fundamental rights,[27] in quite an elaborate form, in the constitutional laws of Sri Lanka has been perceived for a variety of reasons connected with the history of the island and the ethnic composition of its people. The plurality of Sri Lankan society, in respect of race, language, religion and cultural identity, is a conspicuous characteristic which, naturally, has important repercussions on the pith and substance of constitutional norms. The demand for effective representation in the legislature by minority groups became pronounced in Ceylon during the era of the Donoughmore Constitution. Numerical equality of representation for the Sinhala and Tamil communities formed the substance of a proposal presented in earnest by a leader of the minority community to the Soulbury Commissioners on the eve of promulgation of the Independence Constitution of 1946. This demand was the product of a sense of insecurity and apprehension on the part of the minority community in regard to the anticipated attitudes of the majority, once they assumed control of the apparatus of government. Section 29 of the Independence Constitution of 1946 made some concession to these minority fears by declaring that Parliament could not, except by resorting to a special procedure which entailed a two-thirds majority in support of the proposed legislation, impose on any community disabilities or restrictions which were not equally applicable to other communities. During the period of operation of the 1946 Constitution of Ceylon, the Judicial Committee of the Privy Council was tempted to observe that, since the principle embodied in Section 29 of that Constitution represented the minimum condition on the basis of which the minority community was prepared to accept at all the constitutional arrangements attendant upon the transfer of political power from Whitehall, the guarantees contained in that provision against discriminatory legislation were absolutely unalterable within the framework of the Constitution of 1946[28].

The Bill of Rights embedded in the second Republican Constitution of 1978 represents a development of the trend towards allaying minority fears and engendering a climate of constitutional security. Legitimate minority interests, as they have been perceived by the framers of this Constitution, have warranted the limitation of legislative power, under the aegis of the constitutional instrument,

so as to preclude jeopardy to rudimentary rights guaranteed to the whole of the population. This involves no diminution of national sovereignty; on the contrary, the constitutional mechanisms control the distribution of power within the State with a view to achieving maximum harmony among competing interests. This is an area in which the American Constitutional experience has had much to offer us in evolving and refining our own laws to suit the requirements of a multi-racial and multi-cultural society.

The final link between the constitutional heritage of the United States and that of Sri Lanka pertains to the desire to establish a vigorous and effective executive. Under the Constitution of Sri Lanka the executive power of the people is considered an intrinsic element of the sovereignty of the people[29]. (Articles 3 and 4 (b)). The Constitution enacts that "The executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People."[30] (Article 4(b).) The Constitution provides for the creation of an Executive President by declaring him to be Head of State, Head of the Executive and the Government and Commander-in-Chief of the armed forces[31] (Article 30 (1)).

Experience of the previous constitutions of Ceylon/Sri Lanka offered some scope for the reflection that priorities in a developing country called for an elected Executive not overly dependent on the goodwill of the legislature. There was the reservation expressed in many quarters that State policy had all too often been stultified in the midst of the shifting sands of public opinion, by the reduction of the executive to a state of excessive subservience to the will of the majority in Parliament. The conviction was fast gaining ground that the imperatives of development and economic transformation called for an Executive President elected directly by the People and exercising authority on the basis of his popular mandate irrespective of any *imprimatur* of the legislature.

This aspiration sought fulfilment in the provisions of the second Republican Constitution of Sri Lanka of 1978. The President is invested with the power to summon, prorogue and dissolve Parliament.[32] The President must perforce depend on Parliament to

have his Statement of Government Policy accepted by it. The President is debarred, constitutionally, from dissolving Parliament if the Statement of Government Policy is rejected by Parliament at the commencement of the first session of Parliament after a General Election.[33] (Article 70 (1) (b)). Consequently, if a party hostile to the policies of the President is returned to Parliament after a General Election, the President has no option but to draft a Statement of Government Policy acceptable to the majority in Parliament.

Nevertheless, subject to this contingency, the power of dissolution places in the hands of the President a potent lever for control of Parliament. Certainly, the President needs the support of Parliament in regard to enactment of legislation and the provision of funds for the carrying on of the administration. However, unlike the Prime Minister under the Westminister model, the Executive President of Sri Lanka has the assurance that he may dissolve Parliament without endangering the continued tenure of his own office. This gives him considerable ascendency over the legislature, in that members of his own party in Parliament may be confronted with the spectre of political oblivion as the price of defiance of the Executive President.

It is true that, in respect of the control of Parliament, there is a marked contrast between the powers conferred by their respective constitutions on the Executive Presidents of the United States and Sri Lanka. The extent of control is appreciably greater in Sri Lanka where, unlike in the United States, the President may dissolve the legislature. Notwithstanding this difference, however, the concept of an Executive Presidency deriving its power directly from the people rather than through acceptability to Parliament is typically, an aspect of American Constitutional jurisprudence. Its absorption into the public law of Sri Lanka strengthens significantly the bond between the constitutional traditions of the two jurisdictions.

Let me, in conclusion, survey briefly the approaches to sovereignty which have been adopted within the framework of the constitutional laws of Sri Lanka and the United States. Both constitutions typify a conception of sovereignty which rejects doctrinal absolutes

and is predicated instead on pragmatic and functional considerations. Sovereignty is seen as a conceptual instrument for the preservation and extension of popular rights rather than as a means of buttressing plenary State power. This is a pivot of Republican sentiment which sustains the constitutions of both countries. Neither in the United States nor in Sri Lanka is the legislative organ of government invested with omnicompetence, in the sense in which Parliament is considered sovereign in British constitutional law. Doctrines having their roots in popular sovereignty and receiving expression through incidents of the separation of powers impose limitations on sovereignty exercisable by the legislature. Variants on the theory of justiciability of legislation impart to the role of the judiciary a dimension which is uncongenial in the public law of the United Kingdom. In the United States as well as in Sri Lanka there are departures from the notion of legislative control of the executive to the extent that these deviations enable the emergence of a strong executive equipped to discharge its responsibilities, without excessive dependence on the vagaries of legislative preference, during the period for which the executive enjoys a popular mandate. In each of these areas, and especially in the context of constitutional adjudication having reference to fundamental rights, the pivotal concepts embodied in the Republican Constitution of Sri Lanka represent a decisive movement away from British constitutional theory and a partial accommodation of mechanisms which derive their inspiration from American doctrine. Naturally, therefore, the courts of Sri Lanka have begun to turn to American constitutional jurisprudence, in such contexts as the postulate of equality of treatment, to give substance to the barebones of normative principles spelt out in the Constitution of Sri Lanka. It is a realistic expectation that constitutional jurisprudence in Sri Lanka will be enriched by the strengthening of this tradition.

NOTES

1. *De Republica* (1586)
2. *Lectures in Jurisprudence* VI, (5th ed.)
3. *The Leviathan*, chap. XIII
4. *Second Treatise on Civil Government* (1690)
5. *The Social Contract* (1762)
6. U.S. Constitution, Art. II s. 1
7. U.S. Constitution, Art. II s. 3
8. U.S. Constitution, Art. I s. 7
9. see f. n. 8
10. U.S. Constitution Art. 11 s. 2
11. U.S. Constitution, Art. I: s. 8
12. U.S. Constitution, Art. II s. 2
13. see f.n. 12
14. U.S. Constitution, Art. II s. 3
15. U.S. Constitution, Art. I: s. 9
16. I Cr. 137 (US 1803)
17. Story, *Commentaries on the Constitution of the United States* (1833) 1570
18. *Report on the Virginia Resolutions*, VI *Writings of Madison*, pp. 386-387
19. U.S. Constitution, Art. I: s. 9
20. Sri Lankan Constitution (1978), Art. 3
21. see f.n. 20
22. Sri Lankan Constitution (1978), Art. 4(a)
23. Sri Lankan Constitution (1978), Chap. XIII
24. Sri Lankan Constitution (1978), Articles 83 and 84 (2)
25. Sri Lankan Constitution (1978), Art. 83(b)
26. Sri Lankan Constitution (1978), Art. 85 (2) read with Art. 80(2)
27. Sri Lankan Constitution (1978), chap. III.
28. *Bribery Commissioner* v. *Ranasinghe* (1964) 66 N.L.R. 73 at p. 78
29. Sri Lankan Constitution (1978), Article 3 and 4(b)
30. Sri Lankan Constitution (1978), Art. 4(b)
31. Sri Lankan Constitution (1978), Art. 30(1)
32. Sri Lankan Constitution (1978), 70(1)
33. Sri Lankan Constitution (1978), Art. 70(1)(b)

3 CONSTITUTIONAL SYSTEM OF U.S.A. AND SRI LANKA : ROLE OF THE PRESIDENT AND THE LEGISLATURE - A COMPARATIVE PERSPECTIVE

W. A. Wiswa Warnapala

Modern constitutions, it has been argued are 'power maps'[1]. And since political science is often defined as 'the study of the shaping and sharing of power' [2] then the political utility of such a 'power map' requires careful interpretation, because some constitutions are deliberately misleading 'power maps'. No constitution, modern or ancient, provides a complete power map because no single document can encompass the complexities found in a dynamic political system of a modern state, and constitutions, therefore, derive inspiration from the political setting within which they are nurtured. An investigation into the working of the US and Sri Lankan Constitutions, therefore, needs to be prefaced with a discussion on the constitutional tradition of the two countries; though the two countries differ in history, culture and geography, they both derived inspiration from the British colonial tradition.

The constitutionalism of England had an impact on the political cultures of the English-speaking peoples, and the English system of free institutions also created a great deal of interest in other countries, including those countries which were directly under British colonial rule. In the colonies the idea of equality of all men came to the forefront of agitation and this heralded a new phase in the constitutionalism of the 18th century. In the British American colonies, especially in the period 1607 to 1776, the English form of government was established, and this later became the foundation of most of the political institutions of the country.[3] The American government was partly an inheritance from the British colonial

tradition of the 18th century and partly a new experiment made to meet the peculiar circumstances of American history. The colonial governments, because of the great distance and slow communications across the Atlantic Ocean, enjoyed a large measure of self-government, and this, in effect, meant that the colonists took for granted the traditional rights of Englishmen. The Declaration of Independence in 1776 recognised the traditional rights of Englishmen, and it was on the basis of this recognition that the American states based their claim to set up governments of their own. James Bryce, perceiving the significance of this tradition, stated that 'between the various colonies there was no other political connection than that which arose from their all belonging to this race and realm, so that the inhabitants of each enjoyed in every one of the others the rights and privileges of British subjects'.[4] The governments of the colonies based on this tradition paved the way for the later state governments, and influenced the shaping of the national constitutions, including the Articles of Confederation under which the states were treated as natural-born sovereigns with the power to exercise in their own territory all the sovereign rights of free Englishmen. During the period of the revolutionary war, the states had established informal legislatures and between 1776 and 1780 they adopted constitutions and established organised governments. When the Constitution of the United States came to be written, it had to be constructed on the basis of the principles that came to be recognised by the Articles of Confederation which, in principle, established that each state was free and independent sovereign in its own right. The interests of the states, as explained by both the Virginia Plan and the New Jersey Plan, were at the forefront and both these plans recognised the separation of powers as a common denominator. The constitutional tradition, from the very inception, contained certain basic features of federalism.

Though Sri Lanka remained a British colony, it began experiencing constitutionalism—very limited constitutional government—since 1833 through a variety of constitutional reforms and experiments, all of which finally aimed at the introduction of full responsible government. As in the United States, the stages of constitutional reform beginning from 1833 illustrate the island's constitutional heritage based on the British tradition and her experience in constitutional government. Sri Lanka, as a premier

colony of the British, became the location for many novel constitutional experiments and this process of constitutional experimentation, with the changes effected in 1910, 1920, 1924, 1931 and 1946 continued till the triumph of the concept of autochthony in 1972. The ultimate objective of self government was implicit in all these constitutional changes effected during the British period, and the slow process of constitutional evolution, as Martin Wight stated in his work titled *The Development of the Legislative Council* 1606-1945, was primarily due to certain inherent weaknesses in colonial territories like that of Sri Lanka.[5] Margery Perham, emphasising this aspect of constitutional development in the colonies, stated that "British colonists may have been weak economically and strategically as communities but they were individually at least as capable of the functions of citizenship in a parliamentary democracy as their cousins in Britain, and indeed, claimed to carry their civic rights with them across the seas. This is obviously not true of most of the coloured dependencies, which, though they claim through their advanced minorities this same parliamentary democracy, show very few of the conditions under which it has hitherto been effectively conducted. Stating further, she argued that 'in most colonies, there is great material and cultural poverty and often cleavages of race and religion so deep that it must be many years before they can be bridged by a sense of unity and by the resultant political compromise which alone can make majority rule practicable.'[6] British colonial policy, therefore, was to train the colonies in the art of self government through a pattern of constitutional evolution, the ultimate goal of which was the establishment of political institutions based on the Westminster model. Carl J. J. Friedrich, while agreeing with the view that the constitutions have been adopted in countries emerging from colonial rule, argues that constitutions were promoted by the colonial power for various reasons.[7] Sri Lanka, in this respect, was a unique experiment which, as in other colonies of Asia and Africa, brought into existence a legislature and an executive competing with each other to obtain control. It was through this general condition of colonial constitutions that a system of semi-representative government developed and in course of time, it evolved into full responsible government. The process of constitutional change, in this way, prepared the independent nations to accept and operate

the parliamentary institutions of the Westminster model and Sri Lanka, deriving inspiration from this constitutional tradition, fashioned its political institutions, including her autochthonous constitutions of 1972 and 1978, on the basis of this experience.

Yet another aspect, which deserves prefacing briefly, is the nature of the two Constitutions of the USA and Sri Lanka. The historic Constitution of the United States, which has to this day undergone surprisingly little textual change in the last 200 years, is a brief document consisting of seven Articles and twenty six amendments. The Constitution of the United States is therefore a brief document in contrast to the Constitution of India and it, as the fundamental law providing the framework of the U.S. constitutional system, remains a unique Constitution adjusting itself to all manner of political and social turbulence in the country. It is this unique feature of the U.S. Constitution, which impelled Bryce to make the following judgement on its unique character. 'And whatever success it has attained', wrote James Bryce, 'must be in large measure ascribed to the political genius, ripened by long experience, of the Anglo-American race, by whom it has been worked, and who might have managed to work even a worse drawn instrument'.[8] Analysing it further, he stated that 'it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity and precision of its language, its judicious mixture of definiteness in principle with elasticity in detail'.[9] The U.S. Constitution, with the patient toil the founding fathers bestowed upon it, created a nation by means of an instrument of government whose traditions were rooted deep in the past. It was this which compelled Bryce to arrive at the conclusion that the U.S. Constitution is 'as old as Magna Charta'.[10] In other words, the U.S. Constitution grew out of the political life of Americans themselves in the colonial and revolutionary periods.

The Sri Lankan Constitution, apart from its relationship to the evolution of constitutional government since the introduction of the limited reforms under the Donoughmore Constitution of 1931, demonstrated a new phase of constitutionalism, the main aspect of which was the triumph of the concept of autochthony.[11] Lalith

Athulathmudali, referring to the significance of this concept in the constitution-making of Sri Lanka, stated that 'the 1978 second Republican Constitution may come to be accepted as the first truly autochthonous constitution'.[12] The principle of constitutional autochthony or the need to produce a constitution rooted in the native soil came to the forefront in 1970, and the enactment of the 1972 Constitution, in my view, represented the first attempt to produce a 'home grown' constitution which can claim that it has been enacted by the people. The primary aim of an autochthonous constitution was to break away with the past and start a new phase in constitutional government. This process of constitution-making began with the Irish State, India, and Pakistan by establishing Constitutions upon the basis of autochthony which was adopted to demonstrate that 'they owe their legal force in no way to the Parliament of the United Kingdom or to any other external sovereign whatever'.[13] In Sri Lanka, the question of the need to enact 'a home grown' constitution came to the forefront in the late fifties. In the period 1965/70, the three political parties which formed the United Front Government in 1970, examined the possibility of enacting a 'home grown' constitution, and in its common programme, which was placed before the people in 1968, stated that a Constituent Assembly would be established to enact a new constitution.[14] In March 1969, the commitment to establish a Constituent Assembly was further strengthened when it stated that it wished 'to seek the mandate of the people to permit the members of Parliament they elect to function simultaneously as a Constituent Assembly'.[15] The process of enacting a constitution, rooted in its own soil, began in this way, and though the 1972 Constitution of Sri Lanka was in its scheme similar to the Soulbury Constitution, it opened a new chapter in the constitutional development in Sri Lanka. Lalith Athulathmudali argued that 'the first Republican Constitution of 1972 though wholly made in Sri Lanka was too much a carbon copy of the Westminster model to be considered locally authentic'.[16] The establishment of the Constituent Assembly and the procedures it adopted for the purpose of constitution-making have not been taken into consideration in making this judgement on the autochthonous character of the 1972 Constitution. In enacting the 1978 Constitution of the Second Republic, which,

in the words of Lalith Athulathmudali, is 'the first truly autochthonous Constitution', a Constituent Assembly deriving its powers and authority from the people, was not established, and the process followed for enacting the 1978 Constitution was through the Second Amendment to the Constitution of 1972 and a Report of the Select Committee on the Constitution. The 1978 Constitution, may be autochthonous but it deviated from certain established traditions of the Sri Lankan polity. Yet this Constitution has been hailed as a unique Constitution which is perhaps the first Constitution to retain democracy in meaningful terms but nevertheless makes very important departures from the Westminster model.'[17] The 1978 Constitution, it has been argued, retains many features that owe a relationship to the constitutional experience of Sri Lanka. In my view, there are many features which do not show any relationship to the constitutional tradition of Sri Lanka, and it, in contrast to the U.S. Constitution, is not truly locally authentic. In the last 200 years, 26 amendments were written into the U.S. Constitution, and this factor alone explains the greatness and the strength of the original document which was shaped by the political genius of the Founding Fathers. The Sri Lankan Constitution, in utter contrast, underwent thirteen amendments, all of which were guided by both political expendiency and crafty opportunism. The need for so many amendments within a period of nine years demonstrates the fact that the Constitution, though supposedly rooted in the national soil, has been built on a shaky foundation.

The place of the concept of separation of powers in the two Constitutions should precede any comparative examination of the important features. The doctrine of the separation of powers is an important issue in any constitution because it provides a key to the understanding of the dynamics of the constitution. In this respect, both the U.S. and Sri Lankan Constitutions contain unique features relating to the doctrine of the separation of powers. Montesquieu, taking the Constitution of England as his model system, ascribed its merits to the division of legislative, executive and judicial functions whose equilibrium is preserved through a system of checks and balances. This doctrine of the separation of powers, expounded by Montesquieu in his celebrated work *Spirit of the Laws* (1948), influenced the American constitution makers. James

Bryce, commenting on the influence of Montesquieu on the Constitution of the United States, stated that 'no general principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom. It had already been made the groundwork of several state constitutions. It is always reappearing in their writings; it was never absent from their thoughts'.[18] Montesquieu was definitely the source of inspiration for the Founding Fathers, and twenty eight years after the publication of Montesquieu's *Spirit of the Laws*, the state of Virginia proclaimed that separation of powers should form the basis of their system of government.[19] The Constitution of Virginia contained a clear statement on the doctrine of the separation of powers, and it formed the basis of the institutional structure of the government.[20] Though the Founding Fathers derived inspiration from Montesquieu's theory of the separation of powers, they were eager to 'accomplish the immediately practical task of safeguarding liberty and property'.[21] They desired liberty as well as limits upon despotism. These considerations coupled with the colonial experience in operating the state legislatures, motivated the Founding Fathers to include the separation of powers in the constitution which, according to Herman Finer, 'is today the most important polity which operates upon that principle'.[22] The theory of the separation of powers agreed with the political experiences of the American colonies, where a governor, a colonial legislature and a judiciary had come to constitute the essential forms of government.[23] The Founding Fathers made different arrangements to justify the distribution of governmental powers. Madison wanted to guard against the combination of a majority against the rights of a minority while John Adams condemned the concentration of legislative, executive and judicial power in one person as a tyranny. He consistently adhered to the theory of the balanced constitution with a system of checks and balances.[24] Jefferson, who initially advocated a balanced system, later turned to the pure doctrine of the separation of powers as the cornerstone of his constitutional thought. By 1787, he had accepted the philosophy of checks and balances and considered the theory of the separation of powers as the first principle of good government and also as the only means of preventing the abuse of power by the separate branches of the government.

The Federalist Papers, the American classic on federalism and constitutional democracy, are replete with references to the doctrine of separation of powers. Madison, for instance, saw separation of powers as 'the sacred maxim of free government', and considered it essential to the preservation of individual liberty.[25] He envisaged no free government without a federal state and the separation of powers. Hamilton saw it as a constitutional requirement to 'check excesses in the majority' and thereby to prevent the concentration of power in the legislative body.[26] The Founding Fathers as the *Federalis* amply demonstrates recognised the doctrine of the separation of power as a means for protection of individual liberty. The introduction of the doctrine of the separation of powers into the American Constitution, therefore, was primarily motivated by the intellectual commitments of the Founding Fathers to the concept of individual liberty. In other words, it surfaced out of their own political genius and the constitutional tradition.

The Sri Lankan tradition, in respect of the separation of powers is wholly different from the unique tradition of the United States which consciously imbibed the ideas of Montesquieu. The Soulbury Constitution, which operated for more than two decades, did not embody the doctrine of the separation of powers, and the Constitution, in the course of its operation, though it recognised the judiciary as a separate power which could not be encroached upon by the legislature and the executive organs of government.[27] This, as C. F. Amerasinghe argued, was due to the independence enjoyed by the colonial judiciary.[28] The Constitution of 1972 made a vital departure from the Soulbury Constitution in respect of the application of the separation of powers. All three powers of government—legislative, executive and judicial—were vested in the National State Assembly which, according to Article 5 of the Constitution, was to be the supreme instrument of State power.[29] This shows that the authors of the Constitution of 1972 preferred a fusion of powers to a separation of powers. The Constitution of 1972 did not embody the separation of powers as in the Constitution of the United States. This question of the need to incorporate the doctrine of the separation of powers in the Constitution, came up before the Constituent Assembly and J. R. Jayewardene, as the Leader of the Opposition, moved an amendment which stated that

(a) the legislative power of the people shall vest in the National State Assembly;

(b) the judicial power of the people shall vest in the judges; and

(c) the executive power of the people shall vest in the Council of Ministers.[30]

The purpose of this resolution, as J. R. Jayewardene argued, was protection of the independence of the judiciary. The separation of powers, he argued, reinforces and strengthens the sovereignty of the people, and referring to the history of the judiciary in the island, he emphasised that the independence of the judiciary could be secured by separation of powers.[31] J. R. Jayewardene's persistent effort to get the Constitution of 1972 to adopt the doctrine of the separation of powers demonstrated his belief in the doctrine, when the opportunity came to him, it was incorporated in the Constitution of 1978.

On the basis of these main comparative perspectives, it is now proposed to examine the role of the legislature and the executive in the political systems of USA and Sri Lanka. The separation of powers, particularly between the legislature and the executive, remains the most characteristic feature of the American constitutional system. It is this aspect, with its relationship to the working of the Constitutions, which needs to be examined in order to highlight the features unique to the two Constitutions. There are fundamental differences as well as important similarities. The rigid nature of the Constitutions, with the special powers of amendment, make them supreme over the legislature. The U.S. Constitution is federal in nature and character while Sri Lanka has a unitary Constitution. Yet another vital feature of the Sri Lanka Constitution is 'the curious combination of the presidential and parliamentary systems'.[32] The legislature in USA is bi-cameral while the Sri Lankan legislature is unicameral in character. The existing Sri Lankan legislature, consisting of 168 members representing constituencies created on the basis of the single-member constituency principle, was elected in 1977 under the 1972 Constitution. The two-thirds majority, which the ruling party enjoys in Parliament, has been used to the advantage of the party in power,

the last decade, it has helped them to entrench themselves in power. The introduction of the system of appointing Members of Parliament and the passage of the sixth Amendment, which prevented the Members of Parliament of the Tamil United Liberation Front (TULF) remaining in Parliament, brought about a considerable change in the composition of the Parliament elected in 1977, and this feature needs to be taken into account in discussing the relationship between the legislature and the executive in Sri Lanka. The system of 'chit MPs' has given the President, who simultaneously functions as the leader of the party, an additional source of influence, and he has been manipulating this to get a very docile and loyal majority in Parliament. Some of these factors, which changed the original composition of the Sri Lankan legislature elected in 1977, came to be introduced solely to strengthen the Presidential Executive in Sri Lanka. The extension of the life of Parliament in 1982 through a fraudulent referendum was primarily a move adopted by the executive to manipulate the legislature to its own advantage. Kenneth Wheare, in his excellent study on legislatures, stated that in certain countries 'the work of the members in the legislature is subordinate to the party organisation outside the legislature'.[33] In the case of the Conservative party in Britain, the party outside the legislature does not control the party in the legislature; the national party organisation is treated as subordinate to the party in the legislature. In Sri Lanka, under the 1978 Constitution, the party within the legislature has been made subordinate to the party apparatus outside the legislature and it is dominated by the present incumbent of the Executive Presidency. In this sense, the party majority in the legislature is very much an appendage of the President—who is not a Member of Parliament. Kenneth Wheare says 'it is common for Communist members of a legislature to have placed their resignations, undated, in the hands of the party organisation, when they are elected'.[34] The President of Sri Lanka, in his capacity as the leader of the party, obtained such 'undated resignation letters' from the Members of Parliament belonging to his party in order to cajole them to follow his policy, and thereby to show them that they remain in Parliament at his own pleasure.

This incident illustrated the way the Sri Lankan executive cajoled the elected members of the legislature. It is an interference with the right of an MP to exercise his functions freely. It directly infringes the MP's rights and privileges supposed to be protected by the Parliamentary Privileges Act. The MP has the sword hanging over him—if he speaks or acts out of turn, his letter of resignation forced out of him by an outsider, even though an exalted one, will be activated. Is this not duress of a pernicious sort? Is such a procedure to be countenanced in a democratic state? It concerns not merely the MPs. It violates all norms and traditions of institutional government. It is the concern of each of us. Has it not been possible for any person or body to get the courts to pronounce on this blatant violation of the sanctity of Parliament proceedings? This is a mockery of democracy. The Constitution of 1978 stated that 'every Parliament shall continue for six years from the date of its first meeting', and this was changed in 1982 in order to maintain the dominance of the executive over the legislature. In the United States, where the executive has no power to dissolve the legislature, the tenure of the legislature is fixed by the Constitution. The term of the House of Representatives is fixed by the constitution at two years, while that of the Senate is six years, with a third retiring every two years. In the United States, there is little room for manipulation because dates of elections are known well ahead of time, and the executive has no power to alter them. In the words of Kenneth Wheare, they are a fixed and indeed a rigid element in American politics.[35] The American legislature, with its bi-cameralism, is something very different from the mother of Parliaments.[36] Several reasons could be attributed to this role; for instance, the legislative powers are generally limited by a written constitution. Some of its powers can be exercised under a constitutional system that leaves the last word to the Supreme Court, and the legislators, when mapping out the strategy, should know the mind of the judges of the Supreme Court. Yet another limitation was its constitutional inability to find out what the executive is doing. The Founding Fathers originally thought that the House of Representatives would be the most powerful body because it was directly representative of the people. The direct election of the President provided the House with a rival and

Jackson's assertion of the principle that the President is the representative of the people, the House lost its significance as an embodiment of popular sovereignty. In a system of separation between legislature and executive as in the United States, it is more worth while to try to influence the legislature rather than the executive. In matters such as making of laws and raising of money, the legislature enjoys a degree of independence of the executive, and all types of pressure groups, therefore, attempt to influence the legislators. The separation of powers in the United States make the legislature a target for lobbying and it is partly related to the nature of the American political parties. The nature of the organisation of the legislature and the network of congressional committees facilitates the work of the organised pressure groups. In Sri Lanka, Parliament was reduced to a subordinate role with the election of the President by an island-wide electorate. His control over the party apparatus and the appointment of Members of Parliament on the basis of the Article 161 (111) of the Constitution have further weakened the role and status of the Sri Lankan Parliament, more about which could be discussed in relation to the Executive Presidency. Before we delve into the powers and functions of the President of the United States, it would be appropriate to examine the reasons which motivated the Founding Fathers to adopt the presidential system of government. Hamilton felt the need for a vigorous executive who could maintain a continous policy'.[37] The risks of foreign war, they argued, required the concentration of executive powers in a single hand; Madison preferred 'a strong executive to checkmate possible legislative usurpations'[38] The belief in the need to have an 'improved copy of the English king', led to the creation of the American Presidency, which according to Carl Friedrich, was 'the most important responsible executive office on the globe'. Though the authors of the Constitution discussed the mode of choosing the President, they did not have in mind a dominant political role for the President. But the Presidency, which the constitution-makers created, fitted into the scheme of checks and balances as an institution that would symbolise both national unity and continuity. They further expected the office to be filled by a gentleman-aristocrat, and they did not expect the power of the President to rest on popular

or party support. The Articles of Confederation, for instance, did not provide for a head of state or a chief executive. Such views came to the forefront due partly to the belief in legislative supremacy and also due to the distrust of executive power rooted in the colonial tradition. Jeffersonians, primarily, wanted no Presidency with broad powers; Hamilton wanted presidential powers were to be moderate. These judgements, in the course of the evolution of the presidential powers, came to be changed, and the Presidency got itself transformed into a powerful political office whose holder has been described, 'the most powerful democratic chief executive in the world'. This process of expansion of presidential power began with certain incumbents of the office of the Presidency; for instance, George Washington's neutrality proclamation in 1793 established the precedent that the President has residual power not spelled out in the Constitution and made him a virtual dictator in times of crisis.

The origin of the Sri Lankan Presidency and the motivations for its introduction surfaced from the belief that the Westminster model of parliamentariasm was a failure in the island. The United National Party, in the first ten years after independence, made no attempt to change the Constitution and it was J. R. Jayewardene who in 1966 expressed the need to change the system of government. He, in his capacity as the Deputy Leader of the United National Party, addressing the 22nd session of the Ceylon Association for the Advancement of Science, proposed a system of government with a strong executive, which should not be 'subject to the whims and fancies of an elected legislature'.[39] Such a system, he further emphasised, would better suit the conditions in a developing country. This advocacy of a strong executive came to the forefront with the establishment of the Constituent Assembly in 1970 by the United Front Government led by Sirimavo Bandaranaike. The Basic Resolution No. 14, adopted by the Steering and Subjects Committee of the Constituent Assembly, covered the power and functions of the President of the Republic in and was this resolution to which an amendment was proposed by J. R. Jayewardena in July, 1971.[40] According to this amendment, the executive power of the State was to be vested in a President elected for seven years by the direct vote of the people.[41] The amendment placed before the Constituent Assembly in 1971, in its totality, represented a

complete departure from the system of government which Sri Lanka enjoyed both before and after independence.[42] Jayewardene's amendment contained three important features; first, that the executive power of the State shall reside in the President or the Republic; secondly, that the President shall be elected by the entire nation on the basis of universal suffrage; and thirdly, that he shall preside over the Cabinet of Ministers who will be chosen from the members of the legislature. Such features demonstrated his desire to construct a system of Government with an Executive Presidency. In the course of the discussion of this amendment, different points of view were expressed with regard to its central idea. There was no unanimity on the amendment within the UNP; A. C. S. Hameed, the present Minister of Foreign Affairs, disagreed with the resolution warning that it could lead to the possibility of dictatorship.[43] The UNP, in its final statement on the adoption of the 1972 Constitution, referred to this section dealing with the President, for it represented a departure from the practice of existing republics. This showed that the party was determined to introduce a presidential system of government, and it came to be reiterated in the election manifesto of 1977, which stated that the executive power was to be vested in a President elected from time to time by the people. The massive mandate, which the UNP obtained in 1977, directly influenced the leadership of the party, primarily its leader who became the Prime Minister, to introduce the Second Amendment to the 1972 Constitution which, through the 22 sections in this amendment, brought into existence a system of government based on an Executive Presidency. Most of the matters, pertaining to the role and functions of the President and the legislature now written into the Constitution of 1978, were incorporated in the Second Amendment to the Constitution of 1972. The failure to involve the people in this process of constitution-making and the haste with which it was introduced perhaps led to the appointment of the Select Committee on the Revision of the Constitution, which, drafting the Constitution of 1978, added some more features to the constitutional framework introduced *via* the Second Amendment which, in its totality, assumed the character of a new Constitution. All these constitutional changes sufficiently illustrate that the presidential system of government—the desire to introduce it—emanated more from the political

strategies of J. R. Jayawardene than from a consensus of the UNP, and this in fact was the reason why the Constitution of 1978 was made to suit the personal ambitions of J. R. Jayawardene. It is against this background that we need to delve into a comparative discussion of the powers and functions of the Executive Presidency.

The Presidents of USA and Sri Lanka are powerful executives and there are features unique to the two systems, and the comparison, therefore, should begin with an examination of the method of election adopted to choose the Presidents of both countries. The original plan adopted in the United States in the form of a constitutional solution to the problem of Presidential selection was to have in each state a number of electors, equal to the whole number of Senators and Representatives. The choosing of the President was in the hands of a selected group of citizens in each state, and the electoral plan was treated as a step towards popular election. The emergence of political parties brought about a change in the system and the Twelfth Amendment adopted in 1804, made some more important changes in the electoral process. Despite suggestions for reform, the basic characteristics of the electoral college system still remained. The election of the President is not a direct result of an indirect election. According to D. W. Brogan, the President's contact with the people is less direct than that of the House of Representatives and the Senate.[44] However, in a special way the American President, though chosen at an indirect election, represents the people. In utter contrast to the American experience, the Sri Lankan President is chosen at a direct election, at which the totality of the island's electorate get itself activated on a nation-wide basis. A person who aspires to the President has to be nominated by a recognised political party, and this is a vital departure from the American Constitution where any citizen can be nominated as a candidate. The practice, however, has limited it two main political parties, the Democratic Party and the Republican Party. The President in Sri Lanka has to be elected; according to Article 94(1) of the Constitution he has to be elected by an absolute majority of the valid votes cast by the registered voters.[45] Second preferences are counted only when a candidate does not obtain this absolute majority. In 1982 President Jayawardene obtained 52.9 percent of the votes. This, in effect, meant that President was elected with an absolute majority, and the ability to obtain this majority beeame a source of enormous power to the Sri Lanka President.

The width and range of power, including the numerous functions which strengthen his plentitude of power, is similar to that of the President of the United States who, unlike the Sri Lankan counterpart, is elected for a period of four years. The executive power, Article II stated, shall be vested in a President of the United States of America.[46] The Constitution, in this respect, enumerates the following:

1. To serve as Commander in Chief of the armed forces
2. To grant reprieves and pardons.
3. To make treaties with advice and consent of the Senate.
4. To appoint, with advice and consent of the Senate, Supreme Court Judges, ambassadors and other public officials.
5. To call special sessions of the Congress.
6. To address the Congress through the State of the Union Message.
7. To receive ambassadors.
8. To exercise a veto over legislative bills.

Bryce, in discussing the powers and duties of the President, grouped them into four classes of powers relating to:—

1. foreign affairs
2. domestic administration
3. legislation, and
4. appointments.[47]

In the case of the President of Sri Lanka, the powers and functions are expressly conferred on him by the Constitution. Articles 30, 33 and 34 assign to him powers similar to those of the American President. In Sri Lanka, the President combines within himself all the powers of the State.[48] The President of Sri Lanka is the Head of the State, the Head of the Executive, the Head of the Government and the Commander in Chief of the Armed Forces. This shows that the Sri Lankan President combines both the 'dignified and active aspects of the Office'.[49] In addition to these powers written into the Constitution, the Executive Presidency as we see in the case of the present incumbent of the office, controls the party apparatus, and his control over the Executive Committee of the United National Party has given him an additional dimension of power. In the United States, the President's national leadership does not depend entirely on the loyalty he commands within the party apparatus.

In the case of the United States, the President must have the support of the Congress to pass legislation, sustain vetoes, ratify treaties and confirm appointments. The President cannot expect Congressional support to come automatically, he has to influence Congress to obtain adequate support. Because of certain characteristics of the Congress—some structural features—the President becomes the dominant instrument of national policy. Even when the Presidency and the Congress command support from the same political party, the weaknesses of the party system and the influence of the interest groups make the President the chief policy maker. Certain in-built features of the Congressional system make it difficult for the President to initiate his own legislative programme. Party loyalty is insufficient as a source of Presidential influence. He, therefore, must use other weapons such as the veto, and the threat of the veto may be used to bargain for changes in a bill. Sri Lankan President uses the threat of a dissolution to influence the party majority and this was covertly used in the case of the Provincial Council Bill and the Thirteenth Amendment. His ability to create 'chit' MPs' is another weapon. The US President's legislative leadership, to a large extent, depends on his informal methods of influence. Though the Presidential power has enormously increased with the growth of government in the United States, is still limited by the role of the Congress. In Sri Lanka, the President has a direct relationship with Parliament through the Cabinet of Ministers, who are members of Parliament. According to Article 42 of the Constitution, the President has been made responsible to Parliament for 'the due exercise and discharge of his powers, duties and functions'.[50] Though it is stated that he is responsible to Parliament, it does not say that he is answerable to Parliament. This gives him enormous power. N. M. Perera, commenting on this aspect, took the view that responsibility to Parliament implied accountability to Parliament.[51] But there is a limitation on the legislature to such an extent that the policy of the President cannot be criticised by Parliament. According to Article 43 (1) of the Constitution, there is a Cabinet of Ministers charged with the direction and control of the Government, which is collectively responsible and answerable to Parliament.[52] The President, who is the head of the Cabinet, is a member of the Cabinet functioning as the Minister in charge of six ministries—Defence,

Plan Implementation, Janata Estate Development, State Plantations Higher Education, and Power and Energy—is not answerable to Parliament while the Cabinet of Ministers, which is carrying out the policy of its head, is responsible to Parliament. The President has got himself insulated from Parliamentary control, and this is an anomalous position which can create a crisis in the working of the Constitution if the President is called upon to head a Cabinet consisting of members of Parliament from another political party. In the United States, this anomalous position does not arise because the President's cabinet is selected from outside the legislature. There was a plan to appoint Presidential Advisers in 1977, through the Second Amendment to the Constitution of 1972 and these Presidential Advisers were to constitute themselves into a super-Cabinet. This was later abandoned. The American Cabinet is composed of ten heads of Departments, under whose control the administrative machinery is placed, and they give advice to the Cabinet. The Sri Lankan Cabinet, which now has 27 Ministers—in addition to the four non-Cabinet Ministers and 37 Deputy Ministers and 24 District Ministers—is based on Presidential patronage. In other words, Cabinet making is a source of Presidential patronage. The role of the American Cabinet can be succinctly described by quoting Abraham Lincoln's assessment: "Noes seven, ayes one, the ayes have it." All members of the Cabinet, though not party activists, are appointed by the President subject to the consent of the Senate. They cannot vote in Congress, and this is to prevent President from 'winning over individual members of the Congress by the allurements of office".[55] He chooses a number of his Cabinet men who have not figured in politics or men of importance and also those to whom he owes his election. The most dignified member of the Cabinet is the Secretary of State, and this goes to the man to whom the President is chiefly indebted for his election. If forming the Cabinet, the President is expected to distribute the offices through various sections of the country, and this does not need to be done on strict party lines. This form of Cabinet making gives the President an opportunity to informing the Cabinet at the very outset to recognise the pluralism of American society in terms of state, party, constituencies and personal experience. The US Cabinet exists to help the President implement his responsibilities and it has no institutional life apart from the

President. It has no independent power, and its will is the will of one man. In these respects, the Sri Lankan Cabinet contains certain variations, the primary factor is that it needs to be constructed from the members of Parliament. The Sri Lankan President, displaying his usual political arrogance, says that he can remain in office without the Cabinet; but he needs the Cabinet to pilot his measures in the legislature. According to Article 42(3), the President shall appoint as Prime Minister the member of Parliament who, in his opinion, commands a majority in Parliament, and this makes it sure for the leader of the majority party to become the Prime Minister. Since the Prime Minister is not consulted in the choice of Ministers, the President is left with an unfettered discretion in choosing Ministers. The assignment of subject is done in consultotion with the Prime Minister and this again is at the discretion of the President. This unfettered discretion in choosing Ministers, as N. M. Perera predicted, can lead to a crisis, resulting in a constitutional deadlock, and thereby making the Constitution unworkable.[54] The President of Sri Lanka, according to Article 44(2), may assign to himself any subject or function, and can remain in charge of any subject not assigned to a Minister.[55] This means that the President, if he wishes to do so, can become a Cabinet by himself and establish an authoritarian Government. President Jayewardene, as I stated earlier, pronounced on a number of occasions that he alone, without both the Cabinet and Parliament, can continue to remain in power. In addition, the Sri Lankan President, in order to widen his base of support in the legislature, can create posts such as Non-Cabinet Ministers, deputy Ministers and District Ministers—who provide him with support to construct 'a government based on personal ambitions', and the country witnessed this particular feature in the last decade of Presidential authoritarianism in Sri Lanka. According to Article 85(2) of the Constitution, the President could use his discretion to submit a bill rejected by Parliament for a verdict at a referendum. This gives the President an opportunity to appeal to the national electorate over the heads of a hostile majority in Parliament. In the United States, the President enjoys the vetoing power, but it can be surmounted by a two thirds majority of Congress. This is an instrument available to the legislature. Similar provision does not exist in Sri Lanka. The President's attempt to place a bill for a verdict at a referendum could not be prevented in Sri Lanka, and the referendum procedure, therefore, gives enormous power to a President inclined to manipulate the political process.

The President of the United States, as the most powerful elected official in the world, plays the role of the chief formulator and executor of the nation's foreign policy.[36] The US role in international affairs led to this enormous growth in the power of the executive establishment over foreign policy. The US Government, under the Constitution, enjoys exclusive power to make treaties and to engage in international relations. The treaty-making power is subject to certain constitutional limitations; the Presidential power in foreign affairs has largely been inherited by the President, and this power is shared with the Senate. The power to enter into a treaty with a foreign country needs to be exercised with advice and consent of two thirds of Senators present. The President's power in making executive agreements, which have the force of treaties, represent an attempt to by-pass the constitutional role of the Senate in treaty making. All these make the President the chief foreign policy maker. With the consent of the Senate, he appoints ambassadors and other representatives in foreign countries and has the power to receive ambassadors. From this power, President derives authority to recognise foreign governments. The President, in his capacity as Commander in Chief, has the power to create a state of war that the Congress may find it difficult to reverse. Presidential power has been used in this way as Truman's commitment to troops to South Korea in 1950, American involvement in Vietnam and Nixon's decision to invade Cambodia in 1970 have demonstrated. In such matters, the Congress was barred from expressing its disapproval, and such Presidential decisions are removed from public scrutiny and criticism. Apart from this role, the President becomes the chief spokesman on foreign policy; he represents the nation at summit meetings. Though the President, as the chief foreign policy maker, has access to the resources and information necessary to formulate foreign policy, the Congress has the power to grant or withhold appropriations for foreign policy programs. In this respect, it has some control over the Presidential foreign policy process. The pressure groups, in this connection, often expressed support to the Congress. In the arena of foreign policy, the President's responsibility to the Congress is still not clear, and new methods are necessary to make it more responsible. The Committees in the Senate play a leading role in this connection, because of the special position which the Senate holds in the conduct of foreign policy in the United States.

In the Sri Lankan situation, the President plays a set role in the arena of foreign policy, and the emergence of ethnic question as a vital foreign policy issue gave a new dimension to the Presidential role in the field of foreign policy in the last decade. According to Article 33 of the Constitution, the President of Sri Lanka is empowered to declare war and peace, and this, as the recent Indo-Lanka Peace Accord demonstrated, has given him enormous power. As in the United States, this treaty making power or the declaration of war and peace is not subject to approval by Parliament, and the Sri Lankan President, in this respect, is more powerful than his US counterpart. He receives, recognises and appoints Ambassadors and other diplomatic agents as in the United States. The Sri Lankan President, imitating the State of the Union Message, makes a Statement of Government Policy at the commencement of each session of Parliament, and this statement, in the last five years, came to be devoted to matters relating to the ethnic question, and it, therefore, fell short of a statement on government policy. This was only a ceremony which generated no popular interest. In the United States, Presidential messages to the Congress provide indications in respect of bills which are to be passed on particular subjects. According to Article 31 (4) of the Constitution, the term of the Sri Lanka President commences on the 4th of February next succeeding the date of election, and this is similar to the inauguration of the President of the United States.[57] In the absence of a post of Vice President in Sri Lanka, a complicated procedure has been written into the Constitution in respect of a successor in the event of the President resigning or vacating his office. The American system provides for the Vice President to fill the vacancy. In Sri Lanka, no arrangement exists for a person to act when the President is away from the country, and in the last nine years no acting President was ever appointed. If the office of the President falls vacant by death or due to physical infirmity, the Parliament, according to Article 50 of the Constitution, elects one of its members by a simple majority to function as President for the remaining period of the term. According to Article 37 of the Constitution, the Prime Minister can act if the President is incapacitated. If the Chief Justice is of the opinion that the President is incapable of functioning in his office, he can call the Prime Minister to act in the

post. If the Parliament petitions the Supreme Court on the same question, the Prime Minister could be called to act for the President. This complicated procedure has been adopted on political considerations, and the internal politics of the party in power influenced the introduction of this complicated procedure. The creation of a Vice Presidency as in the United States or the redesignation of the Prime Minister as the Vice President could have made the question of succession simple. With a view to correcting this position, Dinesh Gunawardene, an Opposition MP of Parliament introduced a Private Member's Bill to amend Article 37 of the Constitution, and thereby to make provision for the appointment of the Prime Minister as the Acting President. The removal of the President from his office is equally complicated and two-thirds majority in Parliament is required to initiate any action in this connection. After the inquiry by the Supreme Court into the allegations, a two thirds majority is necessary for the resolution removing him from office. This procedure entails delay as in the case of the impeachment method in the United States. If President Richard Nixon had allowed the process to run its full course, including a vote of impeachment in the House and a trial in the Senate, the whole process would have taken a year and three months. Such protracted procedure can paralyse a Government, weakening President's leadership over national affairs. In the case of the United States, any member of the House may introduce articles of impeachment, and then it is referred to the Houses Judiciary Committee. In the case of Sri Lanka, the process gave power to the Supreme Court, which now plays a special role in the context of the Constitution. In the US, impeachment requires only a simple majority of those present and voting. In the Senate two thirds of those Senators present and voting must vote to convict. The US Constitution states that a President may be impeached for treason, bribery and high crimes and misdemeanours. Similarly the Sri Lankan Constitution states that a President may be removed when he has been guilty of treason, bribery, misconduct and moral turpitude. One justification for the introduction of a complicated procedure to remove a President from office is the reason that he has been elected by the people. In addition, a protracted and cumbersome procedure enhances the judiciousness of the deliberations.

The immunity enjoyed by the Sri Lankan President is enormous and this, in effect, has become a special source of power. Article 35(1) of the Constitution, no proceedings shall be instituted against the President in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.[58] This is a blanket immunity, and this question of immunity arose in the context of the Mahara By-election Petition Case in 1984. The view of the Judges was that the Article 35 precludes the Court from entertaining an election petition where the conduct of the President is in question.[59] In short, it expressly confers immunity on the President from proceedings but also debars the Court from entertaining such proceedings. The lawyers, however, argued that an election petition is not a proceeding against the President; they also took the view that immunity conferred on the President by Article 35(1) violates the sovereignty of the people and the franchise rights of the people. The important question which later came to be discussed through a private member's bill, was the fact that President, taking cover under Article 35(1) of the Constitution, can abuse his position and power. This, as the Mahara by-election petition demonstrated, can happen because of his active involvement in party politics. Sarath Muththettuwegama, introducing a private member's bill to amend the Article 35(1) of the Constitution, stated that the President, because of his active involvement in such activities as by-elections, should be made a respondent in an election.[60] The immunity conferred on the President shows that a remedy for Watergate is not possible in Sri Lanka. In other words, he can abuse his power and position and take cover under Article 35(1) of the Constitution. The President also possesses emergency powers and the enforcement of emergency regulations interferes with the powers of the legislature; it leads to virtual constitutional dictatorship. Acts committed under emergency regulations too cannot be challenged because of the immunity conferred under Article 35(1) of the Constitution. Mallikarachchi v. Shiva Pasupathi, where a proscription order made under emergency came to be challenged, was another example.[61] The emergency powers enjoyed by the President are subject to control by the legislature, because of the constitutional requirement that the declaration and the continuance of emergency needs parliamentary approval. In the United States, the President enjoys full autonomy in declaring national emergencies. Though the Parliament in Sri Lanka has

certain constitutional checks on the President, the operation of the Executive Presidency *vis-a-vis* the Parliament in the last ten years shows that the President had virtually converted the Parliamentary majority into an appendage of his power base. The collection of the undated resignation letters of MPs immediately after the Presidential election was one example by which the President pressurised the parliamentary majority. This was an act of authoritarianism, and no American President, even if his party enjoys a majority in the Congress, would have to indulge in such a manipulative political gimmick.

The US Constitution, in the course of its two hundred years, saw the emergence of great Presidents who displayed qualities of national leadership, and they, with their commitment to constitutional democracy introduced an element of stability into the American constitutional system. They made a mark on the Presidential style of Government. In the case of Sri Lanka, the President displayed his ability for political manipulation, and the traditions he created bodes no good for the continuity and stability of the system. Sri Lanka experienced total political instability under this Constitution and it unleashed a process of political retardation, the chief feature of which was the growth in the magnitude of political violence in the country. The personalisation of Presidential power is part of the constitutional scheme. His leadership and influence is not totally based on party allegiance and this as the politics of the US Congress indicated, prevented him from manipulating the political system to continue himself in power. The Sri Lankan experience, in contrast to that of the United States, which operated a Presidential system for two centuries, is different because the whole tradition of Presidential Government was new in Sri Lanka. Sri Lanka, up to date, has had only one President who, in the last nine years, manipulated the system to suit his personal ambitions. Traditions have not developed around the institution; political opportunism and flagrant manipulations of politics guided certain changes which cannot be treated as constitutional traditions. The mere display of political arrogance cannot build strong foundations of constitutional government. President Jayewardene's style of presidential leadership interferes with the foundation of constitutional government. Unlike in the United States, there is no critical press to take charge

of a Watergate to restore the public's trust in the Presidency. Two systems, with different traditions, have given birth to different patterns and styles of Presidential government. Therefore there are sufficient variations in the two systems, some of which are very remote from both theory and practice of Presidential Government. This is very much applicable to the Sri Lankan case. Ghana, Tanzania and Pakistan established Presidential systems, making the greatest deviation from the Westminster model. Ayub Khan, like President Jayewardene, stated in 1961 that 'we have adopted the Presidential system as it is simpler to work, more akin to our genius and history and less liable to lead to instability—a luxury that a developing country like ours cannot afford.'[62] The need to create a strong, stable system of government was the manifest consideration. In Pakistan, the basic feature of its Constitution was the concentration of power in the hands of the President. All executive authority was vested in him. In Ghana, the President dominated the Constitution. The Presidential experiment, instead of bringing about political stability and continuity in democratic government in the third world countries, has resulted in political chaos and the erosion of constitutional government and democracy. This is the danger we face today in Sri Lanka, and its major symptoms have haunted the political system in the last decade.

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4 THE PRESIDENT AND PARLIAMENT IN SRI LANKA: CONFLICTS, CHECKS AND BALANCES

J. Uyangoda

Introduction

THE central feature of the Constitution of the Second Republic of Sri Lanka is the creation of an executive presidential system which, as some commentators (Wilson : 1979, Coomaraswamy : 1984) have suggested, parallels the one established by the Fifth Republic of France. When the main features of the Sri Lankan presidential system became a matter of public debate, there were indeed views expressed by some critics that the entire Constitution would result in, or at least pave the way for a semi-authoritarian form of the state. However, the Jayawardene Constitution has so far functioned for nine years, subject to thirteen amendments, without any fundamental alteration introduced by the basic outlines of the presidential system.

From the point of view of the subject-matter of this paper, there is a limitation to a study of conflicts between the President and Parliament, which should be noted at the very beginning. It emanates from the remarkably monolithic and rigid nature of the relationship between the President and Parliament as envisaged by the Constitution itself. The continuation of the term of the same President and virtually of the same legislature which has been dominated by the same majority party with a staggering voting strength, could hardly add anything dramatic to our understanding of executive-legislature relations. However, the monolithic rigidity of that relationship itself is a subject worth exploring, and hence this exercise.

Autonomy of the President.

Let us first ascertain how the Constitution of 1978 defines, in juridical terms, the relationship between the President and Parliament. We may perhaps begin with a qualitative observation on

the political essence of the constitutional project as executed by the framers of the present Constitution. The inauguration of the 1978 Constitution signified a vision of a structural reorganization of the state. The main feature of that vision was the creation of what may be termed as a 'strong state'. The functional apex of the new structure was to be the office of the Executive President.

The very first chapter of the Constitution which deals with the people, the state and sovereignty gives a clear indication of the pre-eminent, or central position of the President in the state structure. The 'inalienable' sovereignty of the people, postulates the Constitution, is exercised by both Parliament and President. According to Article 4 (b) of the Constitution, the executive power of the people including the defence of Sri Lanka, "shall be exercised by the President of the Republic elected by the People" (1978:3). The Parliament, meanwhile, is said to be exercising the legislative and judicial powers of the people. The above position of the President, in terms of the exercise of one component of the sovereignty of the people, may be juxtaposed with the relevant provisions of the 1972 Constitution. Article 5 of that Constitution took up the position that "the National State Assembly is the supreme instrument of state power of the Republic" (1972:3). Emanating from the principle of supremacy of the legislature, it further maintained that the executive power of the people "shall be exercised by the National State Assembly through the President and the Cabinet of Ministers". This comparison of the ways by which the two Constitutions have defined the mode of exercise of sovereignty, points to something more than a matter of mere constitutionalist semantics; it, in fact, shows how the 1978 Constitution has elevated the position of the President to one of sharing the sovereignty of the people with Parliament, while in 1972 the National State Assembly was theoretically considered the supreme instrument of state power. This centrality of the President, as conceptualized in the mode of political division of state power, is necessary for us to assess the relationship between the President and Parliament within the totality of the Constitution.

Constitutions customarily define the institutional domains of powers and functions of each branch of the government. The way in which the network of legislative, executive and judicial

powers are defined and demarcated would manifest, to a considerable degree of accuracy, the problem of state power as it has been approached and conceptualized by the dominant political forces at the time of the framing of any constitution. Keeping this position in mind, let us now see how the 1978 Constitution has defined the powers, functions and the sphere of authority of the President.

Article 3 of the Constitution formulates two fundamental components of the nature of the office of the President. Firstly, the President is "the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces", and secondly, he/she "shall be elected by the people and shall hold office for a term of six years" (1978: 19). Then, Article 43 (2) makes the President a member of the Cabinet of Ministers and more significantly the Head of the Cabinet (1978:30). Wh is, indeed, being condensed into these two seemingly uncomp cated constitutional provisions is an entire phenomenon of t powerful office of an Executive President.

The term "powerful" is used here to denote a distinct position of authority and power that the President is accorded vis a vis Parliament. This particular authority does not rest on any devise that would confer on the President certain legislative powers that are normally vested with Parliament. Instead, it has been created by making the office of the President functionally autonomous and free from parliamentary control. The President, accordingly, is elected directly by the people at an election for a fixed term of six years (Article 30 (2)). The President's term of office, moreover, is not subject to termination due to changes that may occur in the political composition of Parliament. Nor does it coincide with the life of a given Parliament. Parliament cannot remove the President from office either, except by way of the rather complicated, and politically untenable, procedure as laid down in Article 30 (2). Parliament may begin the long process of removing the President if any member initiates a resolution in Parliament to that effect on five grounds as described in Article 30 (2). However, such a resolution should be supported by two thirds of the Members of Parliament and then sent to the Supreme Court for its determination. The matter would not end there. The Suprems Court's

determination, if it concurs with the original resolution for the removal of the President, should also be approved by a two-thirds of the total number of Members of Parliament.

What this rather arduous procedure available for Parliament to remove the President means is that the latter is placed in a status of positional independence *vis-a-vis* the former. In other words, the President is constitutionally protected from Parliament by making his terms of office virtually unalterable, except by an unlikely teaming up of an overwhelming majority of Parliament with a Supreme Court ready to step into a political controversy of great magnitude. This positional autonomy of the President vis-a-vis Parliament is further reinforced by the provision for legislation-through-referendum. Parliament, indeed, is empowered to make laws subject to limitations as specified in Articles 75 and 76. Those limitations are however conventional ones that normally reflect the theoretical basis of the principle of the legislative authority of Parliament. Nonetheless, the mechanism of referendum enables the President to override the will of Parliament on legislation. Article 85 (2) is quite explicit on this when it states that "the President may in his discretion submit to the People by Referendum any Bill.... which has been rejected by Parliament" (1978:55). This provision enables the President to appeal to his own constituency, in case his proposals for legislation are rejected by Parliament, so that laws can be made, if the President so wishes outside the realm of Parliament. It is not however likely that any President, faced with a hostile majority in Parliament, would repeatedly resort to the costly and complicated process of legislation-through-referendum. The point should, nonetheless, be made that an activist President, with a popular or even demagogic appeal, would find this particular provision useful to override the will of an uncooperative Parliament.

The President, Parliament and the Balance of Authority.

No constitution can perhaps guarantee a conflict-free relationship between the executive and the legislature, since the two domains of state power often reflect the existing political equilibrium in society. Constitutions, meanwhile, are made in such a fashion that the relative weight accorded to each branch of the government may illustrate how the political elites in power approach the problem of

the political division of state power. Furthermore, a constitution may be seen as the Soviet jurists prefer to call it, the basic law of the land, then it can be seen as the juridical manifestation of a definite political and economic project which the ruling group in society would seek to execute.

A political reading of the 1978 Constitution and its operation during the past nine years would lead one to observe that the basic framework of the Constitution is designed with a view to minimize, if not neutralize, conflict between the President and Parliament. Furthermore, the mechanism to avoid conflict appears to have been conceptualized and worked out not in terms of clever and subtle system of checks and balances, but rather seeking to strengthen the position of the President *vis-a-vis* Parliament. And this has been done within a specific economy of power, the essence of which is what President Jayawardene has repeatedly emphasized—"political stability".

It is relevant to our discussion to note that the idea of political stability has been conceptualized by J. R. Jayawardene within a particular debate on the question of state power. The empowerment of the state as an effective agent of social and economic reforms has been a key element of the discourse of state power in Sri Lanka at least since 1956. However, it was in 1972, with the inauguration of the Constitution of the First Republic, that an institutional restructuring of the state was first attempted in order to implement a program of what was then termed as 'socialist democracy'. The dominant political debate at that time was centered on the proposition that "socialist" reforms could be carried out through legislation. This belief found its expression on the enhancement of the legislative authority of elected representatives of the people, as formalized in the Constitution of 1972. This perhaps explains why the framers of that Constitution thought it necessary to describe the National State Assembly as "*the supreme instrument* of state power of the Republic" (1972:3, emphasis added).

The focus of the debate, meanwhile, appears to have changed in 1978, although the basic premise of the state being deployed as an agent of change remained unaltered. The UNP regime launched an economic program which stood in sharp contrast with what the United Front Government had envisioned in 1970. The opening

up of the economy for foreign capital and investment and the adaption of an outward-oriented economic strategy constituted the basic economic components of what the Constitution itself defined as the "just social order in which the means of production, distribution and exchange are not concentrated and centralized in the state, state agencies or in the hands of a privileged few". (Article 27(f). 1978:16). This economic objective necessitated the continuation of the state as the central instrument in regulating socio-economic changes, yet with a radical shift in the problematic of how the state should be organized. J. R. Jayawardene introduced the notion of political stability to the political debate and then grounded the immediate question of stability in a critique of the division of state power, as existed under previous constitutions. He took up the position that a strong executive, unhampered by what he termed the whims and fancies of Parliament, was needed to executive the economic and social policies which the UNP regime intended to implement. He appears to have conceptualized the 'strong' government in terms of a re-organized state structure anchored in the Executive Presidency which should exercise its authority unfettered by Parliamentary control. Thus, the Constitution of 1978 marked a distinct reform of the state and that reform signified a clear turning point in the process of state formation in post-colonial Sri Lanka.

A brief examinfirion of the nature of state formation in post-colonial societies and the appearance of the argument for a 'strong' state in the political debate may shed some light on the political question of Executive Presidency in Sri Lanka. In most of the ex-British colonies, the state structure, introduced by the departing colonial power, was generally designed in accordance with the venerable traditions of Westminster parliamentary democracy in which "Parliament (has) established itself as the sole legislative authority and....come to exercise political supremacy by controlling the executive" (Wade and Phillips, 1962:15). However, the experience of these societies shows that they, more often than not, lack the kind of social consensus needed for a smooth functioning of Westminster system of government, under which the Parliament is the central arena of political and social consensus. Indeed, the constitutional notion of the supremacy of Parliament denotes the existence of a social contract generally accepted by the

contenders for governmental power. In such a situation, the legislature elected on the principle of universal suffrage functions as the arena of mediation between the ruling elites and the electorate on the one hand, and among competing sections of the elites themselves. In most of the Third World societies, however, a consensus-based social contract is generally absent. And even if there had existed one at the time of political independence, in most cases, it has been disrupted by social and political conflicts that the state fails, or is unable, to mediate within the framework of parliamentary democracy of the Westminster model. Pakistan and Bangladesh are good examples of this failure in post-colonial South Asia. Pakistan coul not even develop a parliamentary democracy and her failure was dramatically highlighted by the emergence of military rule. Meanwhile, the constitutional experiment of Bangladesh was initially conducted within the framework of Westminster parliamentary democracy, but it was soon abandoned in favour of a presidential system of government which is now being run by the Military. In both these cases, the changes that have occured in the state structure have had two fundamental features: The delegitimization of Parliament and the establishment of the hegemony of the executive over the other organs of government.

Changes in constitutional structures, in this sense, denote more than a mere rearrangement of powers and functions of the branches of the government. The political essence of making and unmaking constitutions can then be better viewed in the context of the process of state formation and specifically in the light of how institutional division of state power between the executive and the legislature is reformulated. The establishment of an Executive Presidency in 1978, with an autonomous base of power and a clearly demarcated and superior domain of authority, and free from parliamentary intervention and control, can actually be seen as representing a general tendency of the state in many Third World societies. The essence of that tendency is the relocation of the center of power in the executive, What is still noteworthy in Sri Lanka is that the structural changes of the state are being experimented within the general framework of the democratic state.

Similarly, the question of checks and balances, as it may arise within the parameters of any particular constitution carries not only a legal, but also a political problem. The notion of checks

and balances, as defined by traditional constitutional wisdom, is grounded in the premise of a 'balanced' government. A government, accordingly, is deemed to be 'balanced' when no one particular branch of the government is accorded with powers and authority to encroach into another. However, the traditional approach concedes that a strict separation of powers among the branches of the government in watertight compartments would make the business of government practically impossible. Therefore, the necessity for a considerable degree of interaction among them is recognized, yet within the political definition of a 'balanced government'. Not only the anti-despotic idealism of Montesquieu but also the practical shrewdness of the Founding Fathers of the American Constitution thus posited the problem of checks and balances in terms of the need, to use the words of Madison, (1961:308) "to provide some practical security for each (branch of the government) against the invasion of the others". This conventional vision of checks and balances has, of course, undergone considerable changes, particularly in view of the highly centralized and bureaucratized nature of the modern state. Therefore, any system of checks and balances incorporated into constitutional foundations of the state cannot be properly understood in isolation. It should rather be accounted for in relation to the respective weight conferred upon each branch of the government within the prevailing mode of political division of state power.

Therefore, our assessment of the system of checks and balances inscribed into the 1978 Constitution should address itself to the centrality of the Executive President inherent in the present structure of the Sri Lankan state.

Let us now briefly examine the impact of the concentration of powers and authority in the hands of the President on the actual working of the government. Many commentators have already highlighted the rather unusual authority that President Jayawardene has been actually able to exercise as the Executive President. Let us quote one of them, A. J. Wilson, whose grudging admiration of the Gaullist spirit of the 1978 Constitution is present throughout his study:

"As Head of the Executive, he (the) President wields powers of considerable importance, powers which make it absolutely clear that he is in effect far more powerful than a Prime Minister could have been under the former system. Firstly, he is no longer *answerable* to the legislature; the Constitution only makes him responsible to Parliament. Then there is the fact that the Standing Orders of the House do not permit any reference to be made to him or have his conduct questioned except on a substantive motion. Furthermore, the Prime Minister, members of the Cabinet and other ministers are entirely dependent on the President for their offices" (1980: 43-44, emphasis in the original).

As the above portrayal of the authority of the President correctly indicates, here is a President who, being a member and the leader of the Cabinet of Ministers, is not subject to parliamentary scrutiny. What is remarkable in this respect is that the President, in addition to being the head of both the state and the executive, is also the head of the Cabinet: yet there is no constitutional mechanism by which he/she can be bound by the will of Parliament. This is notwithstanding Article 42 of the Constitution which makes the President "responsible to Parliament for the due exercise, performance and discharge of his powers, duties and the functions under the Constitution" (1978:30). It is not the author's intention to suggest what could have been included in the Constitution to provide for parliamentary scrutiny of the functions and the performance of the President as the head of various departments and ministries. However, the point that still needs to be made is that the present Constitution intends to make the head of the Political Executive who is also the President of the Republic immune to direct confrontation with Parliament. This is in sharp contrast with the previous system in which the head of the Political Executive, the Prime Minister, was a member of Parliament, and therefore directly responsible to Parliament.

The real problem, however, from the point of view of the legislative-executive relations entails something more than the inability of Parliament to control or even to exercise any constitutionally-sanctioned influence on the President. The crux of the matter is revealed when we turn the above question around and focus our

attention on the network of mechanism—or let us say, checks and balances—available to the President to control Parliament. The system of representation, a little too enthusiastically called as proportional representation, provides a useful key to the understanding of the extent to which the hegemony of the President is institutionalized over Parliament.

The system of proportional representation is one of the novel, and at the same time controversial, features of the 1978 Constitution. Chapter XIV of the Constitution, entitled "Franchise and Election", deals with this method of representation in detail. What is relevant to our discussion at this point are those provisions that have a direct bearing on the relations between the President and Parliament. Article 99 (13) (a) promulgates that "where a Member of Parliament ceases by resignation, expulsion or otherwise to be a member of a recognized political party or independent group on whose nomination paper....his name appeared at the time of his becoming such Member of Parliament, his seat shall become vacant" (1978:68). There certainly is a procedure in the Constitution to regulate this process, enabling the affected member to seek judicial redress. Yet, such procedural matters are immaterial once the Constitution stipulates a rather crucial practice of subjecting the term of an MP to the political will of the party which he/she belongs to. What this particular provision of the present Constitution lays down is a sharp deviation from the normative tradition of representative democracy whereby the individual political loyalties of the Members of Parliament are not restricted by arbitrary control exercised by any other branch of the government. Under two previous Constitutions, for example, an MP could vote against the position of his/her own party, and if that particular Member happened to belong to the ruling party he/she could have crossed over to the opposition and still remained a member of the House. Such acts of individual heroism are definitely ruled out by the present system of representation. Any member whose action may warrant either resignation or expulsion from the party may well be reduced to an ordinary member of the citizenry. What is still alarming in this regard is the absence of a constitutionally-assured opportunity for the electorate to exercise the franchise in order to elect their new representative.

What does the above-described situation mean in terms of the political project of the United National Party and its constitutional theory and practice? Obviously, the political immobility of individual Members of Parliament is designed to assure the objective of political stability. From the point of view of the ruling party, or rather the President, a rigidly imposed purpose of unity could have been a matter of crucial importance, notwithstanding the fact that the UNP has been enjoying a massive majority in the House. And the strategy of controlling the Members of Parliament of the ruling party appears to have worked well for the past nine years with a great deal of success. Nevertheless, let us briefly examine how this process constitutes a part of what I have above termed as the autonomy of the President *vis-a-vis* Parliament.

It is the normal practice in legislative politics that political parties maintain a certain discipline over their members who are also Members of Parliament. As far as the traditional, or rather the generally accepted, practice is concerned, an MP may exercise his/her own individual political judgement to stick to party discipline and vote with the party. Or else the Member could disassociate himself/herself with the party line and may then either resign from the party or face the prospect of being expelled. Yet, the Member would still have remained in Parliament. President Jayawardene whose unique views on Parliamentary politics have largely shaped the strategic basis of the present Constitution, appears to have approached the problem of political movability of Members of Parliament in terms of a critique of coalition politics. Indeed, the Gaullist Constitution of France was also a sharp reaction to a recurring experience of unstable and short-lived coalition governments during and after World War II. Meanwhile, the conceptual position behind the Sri Lankan Constitution appears to constitute an argument for a strong executive backed by a stable Parliament. The absence of room in Parliament for shifting political loyalties among the Members is supposed to secure a government strong and stable enough to implement what President Jayawardene has repeatedly termed as "unpopular yet essential' measure of economic and social reform. Indeed, the question of political stability itself may beg a critique from the point of view of the actual experience of past nine years. Yet, for the time being let us merely

make the point that the Presidential Authority and power, as formulated in the present Constitution, subsumes the political autonomy of Parliament.

Examples of subjecting Parliament to the will of President are quite instructive in their own right. Let us take one instance, that is the acceptance by President Jayawardene of letters of resignation from his Members of Parliament on the eve of the Presidential election and referendum in late 1982. When the Presidential election campaign was on, President Jayawardene stated that he intended to remove some of his Members of Parliament on the ground that their unpopularity has generated opposition in their constituencies against the government, and by extension to the President. As Warnapala and Hewagama (1983:121) record, President Jayawardene, after having obtained the necessary Cabinet approval, requested all Members of Government Parliamentary Group to voluntarily tender their resignation, so that he could reconstitute the Group. All Members of Parliament of the ruling party, then, "signed undated letters of resignation and handed them over to the President J. R. Jayawardene who, in turn, informed them that the letters of resignation would be acted upon on a later date as he thinks appropriate" (ibid : 121). President Jayawardene is supposed to have returned to the Members of Parliament those undated letters of resignation long after he was re-elected for another term in office, that was in 1986!

This rather ingenious act of political expediency raises some important questions not just in terms of imposing the party discipline over Members of Parliament, but also in relation to the notion of institutional and political autonomy of Parliament *vis-a-vis* the executive. From the procedural point of view, President Jayawardene sought and obtained the approval of the Cabinet as well as the Parliamentary Group of his party before he actually asked for those letters of resignation. Yet, the procedural correctness should not obscure a matter of parliamentary principle. Indeed, one main objective of President Jayawardene in resorting to this rather unique course of action is to secure what he would have termed as the loyalty of the majority of Parliament. This brings us back to our original assessment of the political essence of the present Constitution, i.e., the need to minimize and neutralize

dissent in Parliament. Some scholare of course, read this particular episode with grave seriousness. Warnapala and Hewagama for example, raise two fundamental questions with regard to sovereignty —or rather the encroachment of it—of Parliament. They first question the authority of the UNP Working Committee "to interfere with the rights of an elected Member of Parliament and indeed his very existence as an MP" (1978:122). Then they note that "it related to the constitutional basis of which President Jayawardene requested the elected Members of Parliament to resign their seats" (*ibid*). Their conclusion, coming from a perspective that upholds the unfettered sovereignty of Parliament, is that the "demand for resignation from the entire body of Members of Parliament in the Government Parliament Group, on the basis of criteria adopted by the Working Committee of the party in power, constituted a form of political intimidation, resulting in the very destruction of representative government in Sri Lanka" (p. ibid 122).

Destruction of the basis of representative government or not, this episode of undated letters of resignation signifies a fundamentally new development in the political process of Sri Lanka. That is that the assertion and deployment of the instrument of political party in such a way that the authority and the political agenda of the President could subsume the political will of Parliament. The network of leadership positions that the President holds is not limited to such formal and state institutions as the executive and the cabinet. He is also, the leader of the ruling party and he chairs the party's parliamentary group meetings. Formally speaking, there is nothing wrong or illegitimate about the President's controlling his Members of Parliament through the institution of the political party. What appears rather controversial, nonetheless, is the tendency to manipulate the behaviour of Parliament by the executive in such a way that the autonomy of the former is delegitimized and, to say the least, undermined. A novel way of establishing a conflict-free relationship between the President and Parliament, indeed.

Stability and Survivability of the Constitution.

The above discussion now leads us to the question of political stability and the survivability of the Constitution. Let us, first deal with some issues that emanate from the Constitution itself and

then move onto an assessment of the project of stability in terms of the actual political process against which the Constitution has until now functioned.

Many commentators on the 1978 Constitution have expressed some reservations about the proper functioning of the present system of government in an event of the Executive President facing a hostile majority in Parliament. President Jayawardene himself has spoken about the likelihood of such a prospect although the system of proportional representation is not supposed to reflect in the political composition of Parliament any dramatic swing of the electorate from, let us say, the UNP to any opposition party. However, the theoretical possibility that a coalition of parties, politically opposed to the President, constituting the majority in the House cannot be ruled out. Can the President, hostile to each other, work in harmony as presupposed by the Constitution? The problem may become extremely vexed and complicated particularly because the President, according to the Constitution, is the Head of the Cabinet of Ministers. The Constitution, nonetheless, provides the President with certain options to try out in case of such a political impasse. Or, as Wilson (1978:46) has noted, there could be a reversion to prime ministerial government with the President functioning as a constitutional head. Both these options will be sure to generate grave constitutional problems and serious political conflicts between the President and Parliament.

Let us now ask a more fundamental, though simple, question about the above scenario of conflicts: why is it that the President and a Parliament of different political persuasions cannot be pictured working in harmony? In France and the United States, the political systems have worked, and are currently working, despite the fact that the executive and the legislature are controlled by individuals of rival political parities. Why cannot Sri Lanka be like France and the United States? For an explanation of the above question one may find it useful to read the Constitution of 1978 from the perspective of the question itself.

Such a reading can usefully begin with identifying some basic political anomalies inherent in the constitutional enterprise of 1978. For that purpose, let us dissect the theory and practice of 'political

stability' as enunciated in the politics of the present regime for the past nine years or so. The most viable contradiction of President Jayawardene's project of stability is the attempt to realize a rather exaggerated degree of political consensus by projecting his authority as the Executive President and the power of his party as the overwhelming dominant force in Parliament. Moreover, J. R. Jayawardene appears to have conceptualized the notion of stability by creating his own image of being the President of the Republic as something akin to the supreme arbiter or mediater between the state and the civil society. A distinct epistomology of power hovers over that conceptualization; consensus, created and backed by the coercive power of the state, thus, came from above as a means of political control and social discipline.

However, this particular model of consensus appears to have given rise to some contradictions of fundamental nature in the body politic. They have emerged despite the fact that the President has been successful in creating a rigid and monolithic structure of unity within the ruling party. It is a remarkable irony that the open economy has necessitated a closed political system. The theory and practice of the strong state has now produced sharp political cleavages in society, characterized by a kind of multi-polar differentiation of political and social forces. The intensification of the national question, the widening gulf between the Sinhala, Tamil, and Muslim ethnic communities, and the growing isolation of the regime from the people are some of the most visible symbols of the current phase of the Sri Lankan state in crisis. Indeed, one major feature of the crisis today is the absence of a stable and viable link between the state and the civil society. Parodoxically, overzealous concern for stability appears to have created an illusion of rather a state of instability.

The constitutional process, nonetheless, has to take its course against this political backdrop, saddled with a crisis described above. The survivability of the present Constitution, then, is closely linked with the broader question of the stability of the political system. Against this background, let us now examine the hypothetical situation of an opposition party or a coalition of opposition parties capturing the majority in Parliament. Such possibilities as the postponement of parliamentary elections, or holding a referendum

to extend the life of the present 'long parliament', or electoral manipulations in favour of the ruling party etc., should not interfere with our exercise, since we are only dealing with a hypothetical scenario.

The survivability of the present Constitution, in an event of a political party-based cleavage between the President and Parliament, will largely depend on the ability of two institutions to work in harmony. But harmony or conflict will basically be a matter of the nature of the relationship between contending political parties. The examples of France and the United States show that existence of broad social consensus among leading classes of political parties has provided the basis for a tradition of the executive and the legislature "working together". Sri Lanka has not so far even attempted at establishing such a practice, let alone a tradition. Furthermore, a harmonious relationship between the President and the majority Parliament, whenever they represent different party alignments, would practically be a political coalition. Would such a coalition at higher level be possible, for instance between the United National Party and the Sri Lanka Freedom Party? Given the intensity of political polarization and sometimes enmity between the two parties, some radical changes in the political balance of forces in society should be there to bring them into a President-Parliament coalition.

Will a flexible relationship among leading political parties. provide an opportunity for the President and Parliament, in the above scenario, to work together? By way of finding an answer to this question, let us see what the experiences of the United States has to offer. The kind of separation of powers that exist between the Executive branch and the Legislature is such that, historically the strengthening of the position of the President has not led to a delegitimization of the position of the Congress. Depending on the nature of political balance of forces in a given situation, Congress is in a position, as a part of an established practice either to enter into a compromise with the President or to assert itself against the Executive. On the other hand the Executive manoeuverability has been made easier by the relative flexibility of the party system. A democrat will not be expelled from the party for voting in favour of President Reagan's Central American policy or farm legislation.

And perhaps, the Republican Presidents know that some of their best allies can be found among the Democratic Senators and Congress persons. In the United States, the political judgement and action of individual members of the Senate and the House is not restricted by strictly-imposed constitutional provisions. This enables the President to strike a mode of co-existence with a politically hostile legislature. "Compromise", is perhaps one of the key words in American politics, and there, the essence of social and political consensus has evolved into a state of compromise, rather than confrontation. This is, in a way, symbolic of what the American Constitution itself is—as Charles Beard said, a bundle of compromises. A compromise between the UNP and the SLFP, aiming at a working coalition of the President and Parliament, seems to be a far cry from reality, in view of the already intensified political rivalry between the two parties. Indeed, in an event of the SLFP constituting a majority in parliament and J. R. Jayawardene continuing to occupy the office of President, a major clash between the two institutions can be envisaged particularly in the context of their mutually exclusive approaches to the Tamil national question. A protracted conflict between executive and legislature on major policy issues can certainly worsen the political crisis. If the leading political parties continue to fail to solve the crisis, such a constitutional dual-power situation may not last long, because no political system can function without establishing a state of equilibrium. What will invariably be vulnerable in a situation of acute political crisis is the Constitution which lacks the necessary flexibility to make sense of changing political balance of forces in society. The source of such challenges to the Constitution may not necessarily be limited to a party or a coalition of parties that may constitute a majority in Parliament. A political crisis, if it is really acute in the sense of persistent disequilibrium, may bring to the forefront of politics all sorts of adventurers. Political adventurers are known to abrogate, not to preserve, existing constitutions.

Conclusion

By way of conclusion, let us summarize the central argument developed in this paper. The 1978 Costitution was introduced in order to provide the institutional foundations of a strong govern-

ment. This constitutes the essence of the relationship between the President and Parliament. However, the actual political process of the past decade or so appears to have set in motion a series of political and social reactions that may ultimately call into question the very visibility of that stability project. The structural maladjustment of the political system developed in the course of executing the present Constitution will largely decide the stability of the state as well as the survivability of the Constitution.

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5 LEGITIMACY, AND THE SRI LANKAN CONSTITUTION

(With Special Reference to the Amendment Process and the Referendum)

Radhika Coomaraswamy

LEGITIMACY and the State has been the subject of much research in political science theory. This paper 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. In addition 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 paper, however, is more concerned with legitimacy in the general sense of constitutionalism and legality. In fact 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 Constitution. 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 consti-

tutions 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. Let me outline his argument.

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 Constitutuion 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, coercion 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 accept the autonomy of the law and accept 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 presupposes 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 as well as India for a variety of reasons besides those outlined by Upendra 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 even in the home countries. 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 then there is no gurarantee 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 bureacracy. This was not always the case. In the 1960's with the Supreme Court of India 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 70's of 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 groundnorm, the essential social contact.[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 Westminister 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 amendsment and resort to more controversial provisions, give us a better sense of the nature of the constitution as it works in the real world, ie, — 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 paper that the process of amendment to the 1978 Constitution was in fact 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 reference not very constructively but also in the spirit of delegitimisation. This is especially relevant in the context of the recent 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 Sirimavo 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 your seat, if after a Select Committee inquiry the majority of the House seeks to expell the member.[7] Though in written form this appears to be fair (ie. the House being the judge of its members) in real terms what it means is that Government M.P.s who are expelled from the party will lose their seats, opposition M.Ps will not. They can in fact cross over and strengthen the government. The second Amendment was therefore to provide for a tactical advantage for the government in power. Mr. Rajadurai from the T.U.L.F. crossed over and joined the ranks of the Government The M.Ps who abstained from voting for the Thireeenth 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 for example four years. In the Westminister model, the government can in fact choose the time of elections. This is to give 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] It does not couch itself in any general democratic lang uage. It merely states that the life of the first Parliament is extended. By focusing on a national mandate, it deprived citizens 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 of the 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 death-knell 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 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 in fact 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. This is really no safeguard at all. Though both these, 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 the 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 in-offensive. 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 due to the ethnic factor, 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, (a view that I share) 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 political party will ever reject the framework of 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, is perhaps going to be one of the most long lasting.

Traditionally, the amendment of a constitution was considered to be a rare and uexceptional 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 questioned. It becomes a "periodical", as 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 onlythrough the House and the Senate but also a need for its ratification by States. In India the famous Kesavananda case decided during the times of emergency, entrenched certain provisions of the Constitution and

stated that they were beond the amendment powers of the Nationa Legislature.[13] The confrontation between the Indian Supreme Court and 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—

> "Not withstanding 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 life 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 vested 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 case, the Courts have prevented a very blatant and unprecendented 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 for a constitution to be fundamental law, to be legitimate and long-lasting, it 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 referendum can lead to a 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 types of roles. In fact, I would claim that the referendum which, at the inception of the Constitution, had the promise of broadening democracy has 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 as 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 ac-

commodation 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, if any of these pieces of legislation was 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 13th 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 both in fact, and as a rallying cry, 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 then it is a negative tool with fundamentally anti-democratic characteristics. Up to date, we have only witnessed 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 the 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, those which gives sustenance and spirit to the Constitution. Precisely because it is a powerful tool, the referendum has to be used sparingly. Expecially in third world countries, 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 centers 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 it 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 dis-

course 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 system borrowed from Westminister and British legal practice. From the 1970's 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 Tamil history and the Tamil 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 resonance 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 Westminister, 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 inititutions which are still primarily controlled by the English speaking elites, is perhaps 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.

6 SOME CONSTITUTIONAL ASPECTS OF FOREIGN POLICYMAKING: USA AND SRI LANKA

Amal Jayawardene

Any comparison of foreign policymaking between the USA and Sri Lanka may appear somewhat awkward, because the two situations are incomparable in their contextual, organizational, procedural, and behavioural aspects. For example, the Presidents of both countries have constitutional authority to act as the Commander-in-Chief of the Armed Forces, but their actual capacity to make use of such powers is vastly different. Being a super power, which has the world's greatest arsenal, the United States has the power not only to defend its own territory but also to decide the fate of many other nations in the world. Likewise, the influence of the legislature of a country on foreign policymaking depends not only on its constitutional prerogatives but also on the position of that country in relation to the international political and economic system. The US Congress may pass legislation on domestic issues such as inflation, agriculture, industry, and energy but they are bound to have enormous international ramifications. The US federal budget deficit has been cited as one of the major factors in the recent collapse of the prices in the Wall Street stock market, which in turn caused panic and chaos in other international financial centres. Any measure directed towards controlling inflation at home tends to determine the value of the dollar overseas. Thus, apart from its legitimate constitutional powers to engage in foreign policymaking, the US Congress can also influence the country's foreign policy through legislation on domestic issues. Being a small and poor country, Sri Lanka's capacity to influence the course of international politics is very limited. As recent events have shown, even her capacity to conduct her own internal affairs without outside interference has diminished.

What has been attempted in this paper is not a comparative study of the foreign policy processes of the two countries. As James N. Rosenau has correctly observed: "Comparison is a method, not a body of knowledge."[1] Within the limits of the subject matter of this essay—the constitutional basis of the foreign policy process—and also because of the vast differences between the two situations, it would be difficult to use the kind of methodology that has been employed in the field of comparative study of foreign policy. What I have proposed to do here is rather to juxtapose the foreign policy processes of the USA and Sri Lanka in order to make some observations as to whether the constitutional formulae adopted by the two countries have succeeded in attaining their policy goals. The final objective of the foreign policy of any country, large or small, is the promotion of its national interests. As Cecil V. Crabb has described:

> Reduced to its most fundamental ingredients, foreign policy consists of two elements: national objectives to be achieved and means for achieving them. The interaction between national goals and the resources for attaining them is the perennial subject of statecraft. In its ingredients the foreign policy of all nations, great or small is the same.[2]

The American Experience

A. 1. Historical Background

One of the fascinating features of the American constitution is that the twin principles of separation of power and checks and balances have been applied not only to the domestic political process but also to foreign policy-making.

The Founding Fathers of the American Republic had a profound anxiety about the dangers of concentrated power in the hands of the executive. They were fully aware of the fact that the abuse of power by executive officials like King George III, the British Prime Minister, and the royal governors of the Colonies, was one of the major factors which brought about the American revolution. As Edward S. Corwin has observed, "the colonial period ended with the belief prevalent that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty."[3]

In the present context, much of the prestige and importance of the President of the United States is derived from his involvement in foreign affairs. Many of the framers of the Constitution, however, had entertained isolationist attitudes, and as such, thought that the American involvement in foreign countries should be restricted as much as possible. Therefore, the authority to conclude treaties with foreign countries and to commit American forces overseas was not left to the sole discretion of the President.

It should be mentioned, however, that the framers of the Constitution were also quite aware of the "mismanagement of foreign affairs" by Congress during the period of the Articles of Confederation. Therefore, despite their fears and anxieties about executive power, they felt the need to have a strong executive for the efficient management of foreign affairs.[4] In drafting the constitution, therefore, an attempt was made to create an effective executive, but in order to minimize risks, Congress was vested with important powers enabling it to share responsibility with the President in the formulation and conduct of foreign policy.

A. 2. The President's Constitutional Prerogatives

The constitutional authority of the President in the formulation and conduct of foreign policy has been derived from the following provisions of the constitution.

According to Article II, Section 1, the executive power has been vested in the President. By virtue of his office as the chief executive, he can act on his own in the conduct of foreign relations with other countries, and therefore, the President's primacy in the making of foreign policy is recognized by the constitution.

Before assuming his duties as the chief executive, he is required to take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, Preserve, Protect and Defend the Constitution of the United States." This provision, by implication, has strengthened the presidential responsibility in the conduct of war, because he is required to "protect and defend" the country against any threat from within or without. Article II, Section 2, has directly conferred upon him war-conducting powers

by virtue of his position as the "Commander-in-Chief of the Army and Navy of the United States" (in the modern context, the Air-force too).

Article II, Section 2, of the Constitution has also conferred upon him treaty-making powers, but, subject to the provision that Senate approval is obtained for the ratification of treaties negotiated by the President.

According to Article II, Section 2, the President can nominate and, appoint, subject to senatorial confirmation, ambassadors to foreign countries. Article II, Section 3, states that "he shall receive Ambassadors" from foreign countries. This provision has been interpreted to say that the President has the sole authority either to grant or to withhold diplomatic recognition to other countries.[5]

The President can also initiate legislation by sending recommendations to Congress. Article II, Section 3, provides that the President can "recommend to their (Congress) consideration such measures as he shall judge necessary and expedient."

A. 3. Constitutional Responsibilities of Congress

The Constitution has assigned to Congress some important constitutional responsibilities in the formulation and conduct of foreign policy. Some of these prerogatives belong to the Senate alone and others are shared by both the Senate and the House of Representatives.

Two constitutional prerogatives which come under the exclusive authority of the Senate are stated in Article II, Section 2, of the Constitution. Accordingly, the President, "shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and consent of the Senate, shall appoint Ambassadors.." Thus, the President can negotiate treaties with other nations, but Senate approval is necessary for their ratification. Also confirmation of the executive appointments in the foreign service requires the approval of the Senate.

According to the British system, which the Founding Fathers were aware of, the monarch had the power to initiate and declare

war. The Founding Fathers did not wish to give the executive the authority to declare war, except for the powers to repel sudden attacks. This thinking has reflected in Article I, Section 8, of the Constitution, which gives Congress the sole authority to "declare war". This power is vested in the Congress as a whole which includes both the Senate and the House of Representatives.

One of the most effective ways in which Congress can successfully wield its influence over the foreign policy process is to use its constitutional powers regarding the appropriation of funds. Historically, even the British Parliament used similar powers—what has been traditionally known as "the power of the purse"—to assert its authority over the British monarchy.[6] Article I, Section 9, states that "no money shall be drawn from the Treasury, but in consequence of appropriation made by law." The implication of this provision in the field of foreign policy is that no money can be allocated for foreign policy programmes without the approval of Congress. Congress can even deny the President the appropriations necessary for the conduct of war.

Article I, Section 8, confers upon Congress certain other powers which have important bearings on the conduct of foreign relations with other countries. Accordingly, Congress has the power to levy and collect taxes; to impose tariffs; to regulate commerce with foreign countries; to borrow money; to establish a uniform Rule of Naturalization; and to coin money and regulate its value.

A. 4. Executive-Legislative Interaction in the Foreign Policy Process

Thomas L. Brewer is correct in observing that the "facts about congressional-executive relations in foreign policymaking require modification of the common notion that their relationship is one of separated powers or functions. In fact, only institutions are separated; the powers (or functions) are actually shared, not separated."

However, as Brewer himself has recognised, one can witness a "constant struggle between Congress and the executive branch over authority in foreign policy-making."[7] Although this conflict has been exacerbated in the recent past, it is not at all a novel development. It has been a recurrent phenomenon for the past two hundred

years, and one could even argue that it is the very essence of the American Constitution. As Edward S. Corwin, an eminent American constitutional lawyer, has aptly described, "the constitution....is an invitation to struggle for the privilege of directing American foreign policy."[8]

One can notice two major developments that have taken place in the American foreign policy process. On the one hand, the institutional balance, created by the Constitution, between the executive and Congress has eroded over a long period of time and this has resulted in executive predominance in foreign policymaking. On the other hand, Congress from time to time has vigorously reasserted its constitutional prerogatives in foreign affairs, and continues to play an important role in the conduct of US foreign policy.

Constitutionally, it is Congress which has the sole authority to declare war, but the President, as the Commander-in-Chief can commit US forces in conflicts abroad without formal congressional authorization. During the period from 1789 up to the Vietnam War, US troops had been deployed on Presidential orders in 150 armed conflicts, but Congress had formally declared war only on five occasions (War of 1812, Mexican War, Spanish-American War, First World War, Second World War).[9] Prolonged and costly involvements such as the Korean War (1950-52) and the Vietnam War (1964-1975) were "undeclared" wars.

In a nuclear age, the President takes upon himself the responsibility of making the final decision on the use of nuclear weapons. The decision to drop atomic bombs in Hiroshima and Nagasaki were taken personally by President Truman. During the Cuban Missile Crisis, which had the potential of developing into a nuclear war, President Kennedy took personal control over the situation and did not consult Congress.[10] The group of advisors (ExCom) who assisted him during the crisis did not include any members of Congress. "Although the Constitution," says Graham T. Allison, "assigned to Congress the authority to declare war, technology and time have, it appears, amended the Constitution."[11]

Unlike in the period which the framers of the Constitution were familiar with, the declaration of war has become "outmoded" today, because countries rarely declare war before engaging in actual hostilities.[12] The continuance of hostilities can take the form of an undeclared war. In such a situation, the President could conduct war operations without formal authorization by Congress.

Congress, however, still serves an important purpose in the conduct of wars. The President's capacity in conducting wars can be enhanced by Congress by passing joint resolutions in order to provide him with legislative authority in advance. The Formosa Straits Resolution (1955), The Middle-East Resolution (1957), and the Gulf of Tonkin Resolution (1965) are some cases in point.[13] Also, it is Congress that has the power to approve defense appropriation bills and supplemental appropriations, without which the President cannot continue war operations.

Although congressional resolutions are important in strengthening the President's credibility, he can however conduct war operations even without such legislative support or even in the midst of congressional opposition. When Congress repealed the Gulf of Tonkin Resolution in 1971, President Nixon argued that he had sufficient constitutional powers as the Commander-in-Chief to continue US involvement in Vietnam even without the support of legislative resolutions.[14] Therefore, he continued bombing attacks in Cambodia, ordered the mining of North-Vietnamese ports, and conducted carpet-bombing raids over Hanoi during the Christmas season of 1972.

The legal issues regarding war powers of the President have never been resolved by the Supreme Court as they are brushed aside as political issues. As John Spanier and Eric Uslaner have noted, "in the past, the Court has generally been reluctant to challenge the President's exercise of his power, even when he has exercised it in unprecedented ways".[15] The Supreme Court refused to examine whether the President had any legal or constitutional right to deploy troops in Vietnam and Cambodia, in a war which was not formally declared by the Congress.

Congress, however, made a very decisive attempt at curtailing presidential war powers by passing (over President Nixon's Veto) the War Powers Act of 1973.[16] Accordingly, the President is required to obtain congressional approval before deploying US military forces in conflicts abroad for a period longer than 60 days.

Some have argued that the War Powers Act has strengthened congressional control over the conduct of wars and would prevent the possibility of "another Vietnam." Others have however expressed the opinion that it "represents an abdication of the Congress' authority to declare war," because it recognizes that the President can initiate military action and continue it until the speci fied time limit. Senator Thomas Engleton criticized it as "a horrible mistake," as it would give the President "unilateral authority to commit troops anywhere in the world for 60 to 90 days."[17]

The War Powers Act also requires that the President consult with the Congress "in every possible instance," and Congress be informed of any such event within 48 hours of having taken action. However, when the American merchant ship Mayaguez was seized by the Cambodians in May 1975, President Ford ordered American troops to rescue it, but did not formally consult Congress before taking action. However, he informed Congress within 48 hours of the incident.[18]

The treaty-making process can be described as another important area of executive-congressional conflicts. Constitutionally, the ratification of treaties negotiated by the President requires the approval of the Senate. Except for some rare occasions, like the rejection of the Versailles Treaty in 1920, the Senate normally ratifies treaties presented by President. For the last two centuries, it has given its approval for 1200 treaties while rejecting only eleven.[19]

The Senate may eventually ratify a treaty but in the process, it might also introduce various amendments and reservations; therefore, the President is compelled to establish a close rapport with the Senate in order to get its approval for any treaty. A noteworthy trend in the recent years has been the efforts of the President to involve Senators in the treaty—negotiating process.

The President, however, has some extra-constitutional devices at his disposal, if he wishes to bypass the Senate in concluding agreements with foreign countries. The so-called "executive agreements" require no Senate approval, but as the Supreme Court decided, they have the same legal effect as that of a formal treaty. "The principal limitations," says Herman Pritchett, "on their use are political in nature—the degree to which it is wise to exclude the Senate from its constitutional foreign-policy role."[20] As Henry T. Nash has observed:

> The tendency of Presidents to circumvent the constitutional requirement for Senate approval of Treaties by concluding executive agreements has grown significantly since the end of World War II. For example, in the 150 years prior to 1939, the United States was a party to 799 treaties and 1,182 executive agreements, one and one half times as many executive agreements as treaties. In the years from 1945 to 1973, 368 treaties were concluded while 15 times that many executive agreements were signed.[21]

Congress also has the power to investigate into the activities of the executive branch. Congressional oversight of the executive is not a function specifically mentioned in the constitution, but Congress itself has evolved this procedure to oversee the implementation of legislation by the administration. Apart from its regular congressional committees and sub-committees that carry out these functions, Congress can also institute special investigations into controversial issues. The key officials of the executive branch can refuse to testify before congressional committees by claiming executive privilege, but it cannot be indiscriminately used, because the reputation of the executive is at stake. Some congressional hearings are even televised, and the executive branch cannot afford to give the public any impression of a cover-up. The Senate investigation in the late 1960's on the American involvement in the Vietnam War was given wide publicity, and it helped to intensify the anti-war movement. The more recent investigation into the so-called Iran-Contra Affair clearly shows the extent to which Congress can expose certain illegal activities of the executive branch.

The discussion so far indicates that the executive has succeeded in gaining a predominant role in foreign policymaking. This does not mean that Congress has been dwarfed by the President. The legislative assertiveness is very much a force to be reckoned with. The roles originally assigned by the Constitution to the executive and the legislature have changed in some important respects, but the intention of the Founding Fathers to make foreign policy-making a "shared power" has not yet been lost.

The Sri Lankan Experience

B. 1. Historical Background

The situation which Sri Lanka was faced with on the eve of her independence was very different from that of the British Colonies in America in the late 18th century. Great Britain by the middle of the twentieth century could offer to her colonies an attractive model of parliamentary democracy to be adopted after their independence. As discussed earlier, the Founding Fathers of the American Republic had a profound anxiety about the dangers of concentrated power in the hands of the executive. Such fears were of little concern to Sri Lanka, because the British parliamentary system itself had successfully evolved certain mechanisms to prevent the arbitrary use of such power. In other words, countries like Sri Lanka did not find it necessary to develop a new model or to look elsewhere beyond England for a different type of political system.

Unlike India, Sri Lanka won her independence in an orderly and peaceful manner without a militant nationalist struggle, and she wanted to maintain close ties with Britain even after independence.[21] She did not want to repeal the Independence Act in order to adopt a new constitution; instead, she retained the Soulbury Constitution, which was basically a creation of the British Parliament. Even though India framed a new constitution through a constituent assembly, she also did not want to give up the British parliamentary system of government. Thus, the colonial heritage became not an impediment but an encouragement for the colonies to adopt the Westminster type of parliamentary system.

After independence, however, some political leaders thought that the Westminster model was unsuitable for a developing country like Sri Lanka. Since the cabinet has to resign whenever it loses the confidence of the Parliament, the stability and continuity of the government could not be guaranteed under the British parliamentary system. As far back as 1966, J. R. Jayewardene said:

> Our cabinet, the executive government, is chosen from the legislature and throughout its life is dependent on its maintaining a majority therein. We have followed the British Constitution in this respect... The new French Constitution is a combination of the British and the American systems. Such an executive is a strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature, not afraid to take correct but unpopular decisions because of censure from its parliamentary party. This seems to me a very necessary requirement in a developing country faced with grave problems such as we are faced with today.[23]

When he came to power in 1977, he implemented his long-advocated proposal of introducing a strong executive system.

It is clear that the logic of the political discourse that went on in America at the time of the framing of her Constitution was alien to the thinking of the 1978 Sri Lankan Constitution, insofar as the position of the executive is concerned. Even the modern American political system was not totally acceptable; although America has developed a strong and stable presidential system, the President's control over the legislature has many limitations. The 1978 Constitution was an attempt to free the executive from such parliamentary controls as existed under the previous system. "The presidential system," says A. J. Wilson, "stands midway between classical democracy and contemporary authoritarianism."[24]

B. 2. The Position of the Prime Minister/Executive President in Foreign Policymaking

The constitutional basis of foreign policymaking in Sri Lanka should be analysed on the basis of the three constitutions which were in operation during the period from independence upto the

present; The Soulbury Constitution (1948—1972); the Constitution of the First Republic (1972—78); the Constitution of the Second Republic (1978—).

Even under the Soulbury Constitution, the Prime Minister had a key role to play in the formulation and conduct of Sri Lanka's foreign policy. The executive power was vested in the British sovereign; however, Section 4 (2) of the Constitution states that His Majesty or his representative in Ceylon may exercise their powers "in accordance with the constitutional conventions" practised in the United Kingdom. In effect, this meant that they must act on the advice of the Prime Minister.

On behalf of the British sovereign, His Majesty's executive powers were exercised in Sri Lanka by the governor-general, but "certain functions including the making of treaties, the appointment of ambassadors and other diplomatic and consular agents, the issue of exequatur to consuls, and the declaration of war, are not delegated to the Governor-General."[25] Although the British sovereign was vested with power to declare war, it did not mean, however, that Ceylon was obliged to go to war whenever Britain was at war with another country.[26] In matters relating to Sri Lanka, it was understood that decisions should be made only in consultation with the Prime Minister.

With the 1972 Constitution, the constitutional ties with Great Britain came to an end. Article 5(b) provided that the National State Assembly exercises "the executive power of the people, including the defence of Sri Lanka, through the President and the Cabinet of Ministers."

The President acted as the Head of the Executive and the Commander-in-Chief of the armed forces (Article 20). He was vested with powers to declare war and peace; to receive and recognize, appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents (Article 21). However, the President was appointed on the nomination of the Prime Minister. He was also required by Article 27(1) to act on the advice of the Prime Minister. He was therefore considered only a nominal head of the government, and the actual power was in the hands of the Prime Minister and the Cabinet.

The Soulbury Constitution recognized the special position of the Prime Minister in the conduct of foreign affairs. Section 46(4) states that the Prime Minister shall be in charge of the Ministry of Defence and External Affairs. This practice continued even under the Second Republic, although the 1972 Constitution did not specifically assign that Ministry to the Prime Minister. When J. R. Jayewardene came to power in July 1977, he created a separate Ministry of Foreign Affairs, but, as Prime Minister, he retained under him the portfolio of Defence. The creation of a separate Ministry of Foreign Affairs did not, however, result in the lessening of his authority in the conduct of foreign policy, and as will be discussed later, President Jayewardena continued to wield enormous influence in shaping the direction of Sri Lanka's foreign affairs.

In the United States, it is the President who indicates the direction of American foreign policy at a given time. A similar role was performed in Sri Lanka by the Prime Minister/Executive President. Personal initiatives on the part of the Prime Ministers were mostly responsible for the launching of two different types of foreign policy directions under the same constitution. The strong pro-western foreign policy during the period from 1948-1956 was initiated by D. S. Senanayake, who believed that "the British people helped us to become a free nation once again. They can keep us free even from the intrusion of the Russian menace."[27] S. W. R. D. Bandaranaike, who came to power in 1956, had a different world outlook, and was bent upon a policy of non-alignment. Although the Defence Agreement concluded by D. S. Senanayake with Great Britain was not formally abrogated, it became a dead letter, as the British were requested to withdraw their naval and airbases at Trincomalee and Katunayake. Unlike in the past, he also developed close ties with the Soviet Union and other Communist countries.

Sirimavo Bandaranaike also actively participated in the non-aligned movement, and sponsored the proposal to make the Indian Ocean a Zone of Peace, She also developed a special relationship with China.[28] President Jayewardene's initiatives were important in developing closer ties with Japan, Singapore and Pakistan. He reversed Sirimavo Bandaranaike's policy on Israel by establishing diplomatic links with her even at a low level. The Indo-Lankan

Accord of July 29 1987 also shows the kind of authority that the Executive President has in committing the nation to very controversial foreign policy undertakings.

B. 3. The Contribution of the Legislature to the Foreign Policy Process

Both under the Soulbury Constitution and the Constitution of the First Republic, the Prime Minister and his Cabinet Ministers remained members of the legislature too. Under the present Constitution, all the Cabinet Ministers, except for the President, are members of the legislature. Therefore, they are exposed to discussions and criticisms made in Parliament on foreign policy issues. They are required to answer any question raised by a member of parliament. Article 42(1) states that cabinet "shall be collectively responsible and answerable to Parliament."

Unlike in the United States, the role of the legislature in foreign policymaking in Sri Lanka is very limited. However, it is in the area of foreign policy debates that Parliament can make the most important contribution to enlighten not only the government but also the public. The richness of the legislative contribution, however, depends a great deal on the strength of the opposition as well as on the active interest of the member of parliament on foreign policy matters.

In the United States, the members of the House and the Senate have a large staff to provide them with expert advice and information on international issues. As one study of Congress has commented, "Congress, in the last five years, has developed a virtual counter-State Department composed of predominantly young, experienced, and aggressive experts who are out to make their own marks on the foreign policy map."[29] Most of the Senators in the United States today have at least one foreign policy specialist on their personal staff.[30] Therefore, Congress does out always have to depend on the executive branch for information on foreign policy matters.

In Sri Lanka, however, the members of parliament have no such institutional facilities to obtain expert advice. For that matter, even the Ministry of Foreign Affairs does not have an elaborate system of obtaining information and engaging in research on

foreign policy issues. As one observer has commented, "it has no been unknown for ministry officials to seek the assistance of foreign embassies in Colombo in the preparation of their briefs. In such a context, it is not surprising that the range of advice and background data which the Foreign Affairs Minister could draw upon in a given situation from his Ministry officials is necessarily limited."[31] It is precisely because of these institutional drawbacks that members of Parliament should take a personal interest in foreign policy matters, if they are to make an important contribution in the Parliament. If not, they would only be advocating their party stand without much originality. Since the members of Parliament are governed by a rigid party discipline today, sometimes they are restrained from expressing views contrary to their party stand.

Since independence, the appropriation of funds for governmental programmes is a constitutional power vested in Parliament. However, the Sri Lankan Parliament has not so far used the so-called "power of the purse" to assert its authority in the area of foreign policy. On the one hand, Sri Lanka's foreign policy commitments which involved monetary allocations were limited, and on the other hand, they were mostly non-controversial. Also, the Sri Lankan governments, until 1978, were based on the Westminster parliamentary model, under which the Prime Minister and his cabinet could exercise considerable control over Parliament. At present, the UNP has an overwhelming majority in Parliament, and as such, the President can rest assured of parliamentary support for his proposals. However, there can be situations in the future where he might be faced with a hostile majority in Parliament belonging to a different political party, and in such a situation, his proposals could suffer denial of funds.

The creation of parliamentary consultative committees and select committees has been an innovation introduced by the present government after 1978. They came into existence not through the constitution, but as a result of an amendment to the existing standing orders.[32] One such select committee of Parliament scrutinizes the suitability of nominees proposed by the government to head diplomatic missions abroad. This committee, chaired by the Prime Minister, also includes the Leader of the Opposition.

The kind of aggressive and ambitious manner in which the American Congressional Committees perform their "oversight functions" by carrying out extensive and far-reaching investigations into foreign policy affairs cannot be seen in the work of the consultative and select committees of the Sri Lankan Parliament.

Some other aspects relating to the executive-legislative interaction in foreign policymaking will be discussed in the next section on the Indo-Lanka Accord.

B. 4. Indo-Lanka Accord: Some Constitutional Implications

The Indo-Sri Lanka Accord of July 29 1987 has aroused some controversy as to its legal validity. It is obvious that the implementation of certain provisions of the accord (the creation of provincial councils, the introduction of Tamil as an official language etc.) does require parliamentary legislation in order to amend the constitution. The controversy has arisen regarding the exchange of letters that took place as a part of the agreement between President Jayewardene and Prime Minister Gandhi. Some have argued that the letters by themselves have no legal effect unless a treaty is signed on the basis of those letters and parliamentary approval obtained with a two-thirds majority. They have further argued that Article 1 of the Constitution describes Sri Lanka as a "Sovereign," country, and therefore, any agreement affecting that position will have to go before the Courts and Parliament.[33]

It should be noted, however, that there is a difference between an accord and a bill. As Jaya Pathirana, a former Judge of the Supreme Court, has pointed out:

> "The Indo-Sri Lanka Accord need not be presented to Parliament because it is not a bill. However, if the Accord is gazetted as a bill, then it will come before Parliament and any member of the public could petition the Supreme Court to question its constitutionality or whether it subjugates the sovereignty of the people."[34]

President Jayewardene himself has commented, in his interview with the Correspondents of the *London Times* and *the New York Times*, that "the letters have nothing to do with constitutional procedure in Parliament."[35] It appears that the contents of the

letters could be implemented without obtaining the formal approval of Parliament. Even in the case of treaties, the Constitution of Sri Lanka, unlike the Constitution of the United States, does not specifically state that legislative approval is necessary for the implementation of treaties negotiated by the President. It appears that article 157, which deals with international treaties and agreements refers only to those intended "for the promotion and protection of the investments in Sri Lanka.'.

Article 33 (e & f) has empowered the President "to declare war and peace," and "to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he is required or authorised to do." The Indo-Sri Lanka Accord can be interpreted as a measure designed to bring about peace in the country, and as such, it comes under the purview of Presidential powers to "declare war and peace". Even otherwise, the Executive President has constitutional authority to enter into agreement with other countries.

It should be noted that the question as to whether the contents of the letters have impinged on the sovereignty of Sri Lanka is a domestic issue. Such agreements are valid for all practical purposes in the conduct of bilateral relations between countries. The exchange of letters with the signing of an agreement is not at all a novel feature. When the Treaty of Peace and Friendship was signed between India and Nepal on July 31, 1950, some letters were also exchanged on the same day. As one can clearly see, the letters in some respects "contained more important provisions than the clauses of the Treaty."[36] These letters were kept secret till 1950, but they had an important bearing on the conduct of Indo-Nepalese relations during this period.

As in the case of Nepal, India will also consider the letters exchanged between the two countries as valid for all practical purposes. As reported in the *Hindu*, the Minister of State for External Affairs, Natwar Singh, speaking at the Lok Sabha, has stated that the letters exchanged between the two leaders have "the status similar to that of the agreement proper as they had been written in their official capacity as the Prime Minister of India and the President of Sri Lanka."[37]

It should also be mentioned that presidential acts are not always based on their constitutional prerogatives. They also resort to extra-constitutional powers in conducting foreign relations. The situation in the United States should provide us with some good insights as to the nature of "executive agreements" concluded by the US President by using his extra-constitutional powers.

An executive agreement "is an understanding between heads of State; it may be either written or oral."[38] It can also take the form of a secret agreement. As Crabb has pointed out, "while executive agreements are not mentioned in the Constitution, they have a venerable tradition not going back to the earliest days of the Republic."[39]

According to the U.S. Constitution, the ratification of treaties negotiated by the President requires the approval of the Senate with a two-thirds majority. The executive agreements, however, require no Senate approval but, as the Supreme Court has decided, they have the same legal effect as a treaty.[40] Some of the important executive agreements arrived at during the post-war period are the Teheran, Yalta and Potsdam accords, agreements with Spain since 1953, promising military support in return for military bases in that country, agreements with Israel regarding her security, pledges of military support for Saigon during the 1950's and 1960's.

There are advantages as well as dangers inherent in the practice of concluding executive agreements. In order to restrain the President when making national commitments to foreign countries, the U.S. Senate has insisted that such agreements should be introduced as "statutory agreements," which "require that Congress be informed of their existence; that Congress be allowed to veto understanding with foreign countries, to which it objects; or in some cases, that they either receive the approval of both houses of Congress, or be resubmitted to the Senate in the form of a Treaty before they become operative."[41]

Although the President has legal authority to conclude executive agreements, their implementation would require congressional approval, if they involve any major financial commitments.

As pointed out earlier, the executive agreements require no Senate approval but have the same legal effect as that of a treaty. Theo-

retically, a President is not obliged to adhere to an agreement concluded by his predecessors; in practice, however, US Presidents have taken upon themselves the responsibility of fulfilling obligations promised by the previous administration.[42]

Considering Sri Lanka's weak position vis-a-vis India, a future government would not be able to turn its back on the accord, except for trying to re-negotiate it with India.

Since both Sri Lanka and India have expressed a desire to enter into a formal treaty based on the contents of the letters, it can be assumed that the present legal controversy would gradually fade away. However, the constitutional and legal aspects of the accord should be studied in detail, because similar situations may arise in the future too.

ii. Besides the legal controversy, the Indo-Lanka Accord has highlighted several other aspects regarding the presidential role in foreign policymaking. The President himself acknowledged that his Foreign Minister was not aware of the negotiations that led to the signing of the Accord.[43] Neither the Prime Minister nor the National Security Minister was consulted in the process of negotiations. It was only the Minister of Lands and Mahaweli Development, Gamini Dissanayake, who was actively involved in the negotiating process.

Compared to other countries, it appears that it is not an unusual practice for the President to assume personal responsibility in making foreign policy decisions. Even in Britain, there have been instances, as in the case of the Suez Expedition of 1956, where the decisions were taken by the Prime Minister on his own without consulting the Cabinet as a whole.[44] In the United States also, there have been a number of occasions, where the Presidents had taken unilateral decisions without consulting the Secretary of State. President Nixon made crucial foreign policy decisions with his National Security Advisor, Henry Kissinger, having bypassed the State Department.

The Sri Lankan situation, however, is somewhat different in certain respects. The British Prime Minister is a member of Parliament, and therefore, has to face Parliament in person. In

the United States, neither the President nor his Cabinet ministers are members of Congress. But in Sri Lanka, except for the President, all the other Cabinet Ministers are members of Parliament. As N. M. Perera observed several years ago:

> "Ministers may be questioned and criticized in the House for acts of omission and commission for which the Ministers may have had no hand....Yet it is the policy of the President that is being brought into issue....He is not there to answer the criticism that is levelled at the government although he is the fountain head of that policy. In accordance with the procedure of Parliament as governed by the standing orders, the President of the Republic cannot be the subject of any adverse comment."[45]

iii. At the Joint Press Conference addressed by the Sri Lankan President and the Indian Prime Minister, President Jayewardene said:

> "When I bring legislation in Parliament and Parliament does not pass it, I will dissolve Parliament. I don't need a fresh mandate. Parliament may need it."[46]

In other words, the President gave a clear choice to his Parliament: either Parliament should pass his legislation or face another election.

As the President himself called it, Sri Lanka's is a "unique constitution." In the United States, the President has no power to dissolve the House of the Senate; once elected, they have to complete the full term. Sri Lanka has adopted the French system where the President can dissolve the National Assembly. In adopting the French system, however, certain modifications have been introduced thereby further strengthening the discretionary powers of the President. The French President is required, before the dissolution of the National Assembly, to consult the Premier and the Presidents of the two houses of Parliament.[47] The Sri Lanka President has no such constraints; he can dissolve Parliament anytime after one year without consulting anybody.

iv. At the Annual General Meeting of the Ceylon Planters' Society on September 19, 1987, President Jayewardene said that his party would "vote en block for the Accord. Make no mistake

about it."[48] This again shows the kind of control that the Sri Lankan President can exercise over the legislature in getting his proposals approved by Parliament.

In the United States also, the President happens to be the leader of his political party; however, he could not always count on the support of his party members in Congress. For example, President's Carter's Democratic Party had a majority in both the House and the Senate but he had a very difficult time with Congress.

In the United States, the President becomes the leader of his party by virtue of his election. In Sri Lanka, however, the person who normally contests from a particular political party at a presidential election is an established leader of that party; therefore, he has more control within the party. Besides, there is a strict party discipline in Sri Lanka, which has been reinforced by the Constitution. According to the 1978 constitution, if a member is expelled from the political party to which he belongs, he forfeits his seat in Parliament. The President, as the leader of his political party, can be instrumental in expelling a member of parliament from his party. As N. M. Perera noted, this situation "virtually condemns a member not merely to be subservient and silent but also to be an automaton."[49]

Some Observations

Foreign policymaking poses a great dilemma in a democratic society. Alexis de Tocqueville seems to believe that there is a basic contradiction between the effective conduct of foreign policy and the democratic form of government. As he puts it: "Foreign politics demand scarcely any of those qualities which democracy possesses; and they require, on the contrary, the perfect use of almost all those it is deficient." If the democratic governments are handicapped in their competition with authoritarian governments, should the executive be left alone to conduct its own foreign policy? It seems that this is not the best way out of the dilemma. Arthur Schlesinger, Jr. has highlighted the crux of the problem when he raised the question: "If foreign policy becomes the property of the executive, what happens to democratic control?"[50]

The Founding Fathers of the US Constitution made foreign policymaking a "shared power" between the executive and the legislative branches, and it appears that this solution is of lasting value. Some have argued that the US Constitution survived despite the problems it created by diffusing responsibilities between two rival institutions. I would, however, think that the US Constitution survived because of this very concept of sharing power.

Maybe it has certain weaknesses. For example, Congress cannot present a consistent and coherent foreign policy because of its decentralized nature. It is not uncommon for a foreign official to tell a US diplomat: "Ah yes, no doubt that is your government's intention, but what will Congress do?"[51] However, the executive —congressional conflict has its benefits too. As Destler noted, "Panama certainly conceded more because of the need for Senate ratification, and more than once a 'threat' of unfavourable congressional action has induced Japan to make trade concessions. Last but not least, policy conflict helps to protect us from arbitrary government power."[52]

The survivability of the constitution can also be attributed to its ability to respond to the needs of time. When America came out of its traditional isolationist shell into the post-war era of globalism, the advent of the Cold War demanded the presence of a strong executive, and the institution of presidency was strong enough to provide that leadership. However, with the Vietnam debacle, people began to express serious concern over the growing powers of the "imperial presidency." The vigorous reassertiveness on the part of Congress since the mid-1960's gave an expression to this public concern, and therefore, has earned public legitimacy for its actions.[53] As some have pointed out, executive or legislative predominance in foreign affairs has a cyclical pattern which corresponds to the needs of time.

It should also be mentioned that executive—Congressional competition does not necessarily lead to a kind of zero-sum situation, where the gains for one party equal the losses of another. As Steven J. Baker noted, "as the range of government activities has expanded, there are more foreign policy roles to play; if this is true, then an expanded congressional role need not necessarily be

at the expense of the President, and Congress may have regained some of its lost power—but without really weakening the presidency."[54]

In analyzing the situation in Sri Lanka, we may have to look at the problem from a different angle. Being a powerful country, America can keep other nations waiting until she makes up her own mind on a particular issue. For example, she can keep bargaining with the Soviet Union, until she is completely satisfied with the verification provisions of the proposed INF treaty. Even the signing of the treaty would not automatically guarantee its approval by the Senate. In the case of Sri Lanka, however, was she ever in a position to say 'no', when India proposed the idea of signing an accord between the two countries? The refusal to do so would have resulted in a situation similar to that which arose when Sri Lanka refused the entry of Indian boats carrying relief supplies to Jaffna. Does this justify the need to have a strong executive who can take decisive but unpopular decisions? Having signed the Accord, the President needs to get his legislation approved by Parliament in order to implement certain provisions of the Agreement. Does this justify the kind of control the present President has over the legislature?

Those who do not agree with this kind of reasoning may put forward a different argument. They might argue that the situation which led to the signing of the Accord was brought about by the mismanagement of foreign policy as well as of the ethnic problem. What was needed, therefore, was not the strengthening of the executive but the democratization of the society and the conduct of a rational foreign policy.

The present Constitution is still less than ten years old and it is too short a period to judge its potential for survival. For any constitution to survive in its true democratic spirit, it is necessary that the institutions it has created should also be supported by public legitimacy. If a government attempts at surviving without public legitimacy, then it will pave the way towards authoritarianism where constitutional legitimacy becomes only an instrument for sustaining power.

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7 FOREIGN POLICY AND THE DEMOCRATIC PROCESS : THE UNITED STATES AND SRI LANKA

S. U. Kodikara

In his impressive study of the contemporary American Presidency, Arthur M. Schlesinger, Jr., comments that by the early 1970s the American President had become on issues of war and peace the "most absolute monarch (with the possible exception of Mao Tsetung of China) among the great powers of the world".[1] Schlesinger's book concerned itself essentially with the shift in the constitutional balance between the executive and legislative branches of the government, from the position originally envisaged for them by the Founding Fathers of the U.S. Constitution. The shift in this balance, he found, was especially relevant in the field of foreign policy.

What Schlesinger called "the Imperial Presidency" may have received a jolt from the recent revelations and hearings about what has come to be known as the *Iran-Contra affair* and the contemporary debate in the United States is turning round the constitutional implications of this affair, with Congress attempting to reassert its constitutional role as a co-ordinate authority in foreign policy making. In delving into the constitutional implications of that debate, this article will also discuss the larger issue of foreign policy making and the democratic process, and compare the American foreign policy process with that of Sri Lanka.

One of the basic problems of American politics has long been the problem of how the separation of powers can be made to work. What the Founding Fathers envisaged in the sphere of foreign policy was "joint possession" by Congress and the Presidency. The Constitution brought the Senate squarely into the treaty-making process by requiring that the President should obtain ratification

by two-thirds its membership for treaties negotiated by the President. The Constitution also gave Congress a further wide range of powers relevant to foreign policy. All the President's important officials, including his diplomatic representatives, needed to have Senate approval before appointment. Congress also had the power to make appropriations, to raise and maintain the armed forces, to control naturalization and immigration, to impose tariffs, and above all to declare war. Among the powers assigned to Congress, the power to declare war (Article I (8)) was of paramount importance. The Founding Fathers were quite deliberate in their design of denying to one man "the sole prerogative of making war and peace". Thus the Constitution gave Congress the power to *declare war* but reserved to the Executive branch the power to respond to surprise attacks and the general power to initiate hostilities. Madison's rationale for this was expressed in a letter he wrote to Jefferson in 1798:

> The constitution supposes what the history of all governments demonstrates, that the Executive is the branch of power most interested in war and most prone to it. It has accordingly, with studied care, vested the question of war in the Legislature.[2]

Command of the Army and Navy, however, was vested in the President. Thus, once Congress had authorized war, the President as Commander-in-Chief had full power to conduct military operations. In addition to these powers, the Constitution also gave the President the power to receive foreign envoys, to appoint ambassadors with the advice and consent of the Congress, as well as to negotiate treaties subject, again, to Senate ratification. Beyond these, the Constitution had nothing specific to say about the President's role in foreign affairs. In due course, as the Constitution came to be worked out in practice, what Schlesinger has called the 'executive perspective' began to emerge, which gradually and imperceptibly had the effect of enhancing the President's powers in relation to Congress, especially in foreign affairs.

There were many reasons for this, among the most important of which were access to information relevant to negotiations and treaty-making the need for secrecy and dispatch, and the necessity to present a facade of unity to foreign powers and agents, which

could hardly have been expected of Congress. The fact that unity within the Executive branch itself has suffered erosion in consequence of America's elevation to Great Power status and the enormous escalation of its international responsibilities needs mention at this stage, though it still remains relevant considering the diversity of views which exists on any foreign policy problem at any time within the Congress. As Dean Acheson once said, the difficulty of the United States in consulting with its allies was that it was itself an alliance of great satraps like the State Department, Pentagon, Atomic Energy Commission, CIA, let alone both Houses of Congress and various entrenched lobbies and interests. By the time the varying views and positions of these great semi-autonomous organizations had been reconciled, decision-makers had neither the time nor the energy to incorporate into their thinking the views of other countries.[3]

All the same, the transaction of business with foreign nations, as Jefferson recognised in 1790, "is Executive altogether".[4] The 'executive perspective' quickly decided, for example, the way in which the United States recognised foreign governments. For the President's power to receive Ambassadors carried with it also recognition of a legitimate government with which the U.S. should have diplomatic relations.

Control of information was another area which gave the Executive branch a decided advantage over Congress in foreign as well as domestic policy. The Executive could release information selectively to Congress, or withhold information altogether, as Congress learned, to its great dismay, over the Iran-Contra affair. Senator Barry Goldwater, Chairman of the Senate Intelligence Committee, was astounded to learn from the newspapers in April 1984, that the United States had taken a direct hand in mining the harbours of Nicaragua and that the CIA Director, in briefing his Committee earlier had actually given the impression that the mining was the work of U.S. supported Nicaraguan Contras.[5] Answering the question "What went wrong"? in the Iran-Contra affair, Representative Lee H. Hamilton, Chairman of the House selected Committee on the Iran-Contra affair asserted:

> Significant foreign policy decisions..were made in secret. For months, some individuals in and out of government went to 'great lengths to conceal activities from the Congress, from

> the appropriate officials in the executive branch and from the American people....This excessive secrecy led policy astray. A small number of officials made policy outside the democratic process.[6]

Senator Daniel K. Inouye, Chairman of the Senate's own Select Committee, summarized the constitutional position involved in the Iran-Contra affair in the following words:

> The formulation of American foreign policy has always been a matter of discourse between the President and Congress. Without detracting from their own primary responsibility, presidents have understood that Congress has an indispensable role in foreign policy.
>
> We must ratify the treaties, confirm the major foreign policy officials, authorize and appropriate the funds and exercise the oversight. Bipartisanship in the execution of foreign policy requires prior consultation in (its) development..it is a working partnership. The president may be the senior partner in foreign policy, but he is not the sole proprietor.[7]

Giving his own prognosis of the issues involved in the Iran-Contra affair, Senator Inouye said:

> The story is one....of covert foreign policy. Not secret diplomacy, which Congress has always accepted, but secret policy-making, which the Constitution has always rejected. It is a tale of working outside the system and of utilizing irregular channels and private parties—accountable to no one—on matters of national security....[8]

Schlesinger has shown how the genesis of the "imperial Presidency" was related to the appropriation of the war-making power by the President. The Founding Fathers had made a deliberate attempt to divide the control of the war powers. They vested in Congress the authority to commence and authorize war, whether that war was declared or undeclared. At the same time, they vested in the Presidency the conduct of both ongoing foreign relations and ongoing war, as well as the right to respond to sudden attack when Congress was not in session. One might take the view, as

Schlesinger does, that this division of powers was "inherently unstable".[9] However that may be, in time the theory of defence against imminent as well as actual attack began to obliterate the distinction the Founding Fathers had made between offensive and defensive war. When the increasingly elastic theory of defensive war added to the presidential control of diplomatic relations with foreign states, there began to accummulate within the Presidency the means to force the issue of war on Congress. For the Presidency had the power to continue circumstances which left Congress little choice but to ratify his policy.[10] Nuclearisation of the offensive capabilities of the Big Powers only accentuated this tendency *vis-a-vis* relations between Congress and President. To be sure, as Thomas E. Cronin has pointed out, "the exact dimensions of Executive power at any given moment is largely the consequence of the incumbent's character and energy combined with the overarching needs of the day, the challenges to system survival and regeneration."

> Some presidents have been power maximisers. The Jacksons, Lincoln and Rooseveits are illustrative. Certain of them became shrewd party leaders. Some saw themselves as direct agents of the American people, as the peoples' choice with mandates to carry out in exchange for the grant of powers. Still others employed the "take care that the laws be faithfully executed" clause of the Constitution to broaden the notion of executive power well beyond the boundaries envissioned by most of the framers of the Constitution. Plainly, an office undefined on paper became enlarged with accumulated traditions and with the cumulative legacy of some often brilliant achievements.[11]

The war power flowed into the Presidency most particularly, as Lincoln saw it, in the presidential role as Commander-in-Chief. Since the Constitution vested in the President the *office* and not the *function* of commanding the Army and the Navy, it gave him the office with functions undefined, and therefore expansible. Lincoln began to regard the Commander-in-Chief as the "locus", if not the source, of the war power, and said specifically: "I think the Constitution invests the C-in-C alone with the law of war, in time of war".[12] After Lincoln's time, America's rise as a superpower, and the related enlargement of the role of the President as

Commander-in-chief served to enhance the role of the imperial Presidency. It is true that the Vietnam war and Watergate gave a serious blow to presidential authority and predominance. In 1973, Congress enacted the War Powers Resolution, which declared that thenceforth the President could commit U.S. armed forces pursuant only to (1) a declaration of war by Congress, (2) specific statutory authorization, or (3) in a national emergency created by an attack on the United States or its armed forces. And the President was required to report immediately to Congress in cases of troop commitment by the U.S. and such commitment was to be terminated within sixty days unless Congress had declared war in interim.[13] In 1974 Congress passed The Hughes-Ryan Act, requiring a presidential finding "that any covert action of the Executive branch was in the national interest, and requiring also that Congress be informed of such covert actions without delay. The War Powers Resolution represented the Congress reaction to the inordinate accumulation of power in the Presidency in the context of the Vietnam war, and the Hughes-Ryan Act was intended to obviate the risks of covert actions (precisely in the genre of the Iran-Contra affair) by placing Congressional limits on the executive.

"But the Iran-Contra affair made a mockery of the Hughes-Ryan Act and it is a matter of debate whether the War Powers Resolution actually curbed presidential war-making power or granted a President more power than he had previously enjoyed in respect of undertaking short-term interventions abroad.[14] At the conclusion of Colonel Oliver North's testimony before the joint Congressional Committee on the Iran-Contra affair, co-chairman Lee Hamilton reiterated his indictment that policy on this matter had been "driven by a series of lies—lies to the Iranians, lies to the Central Intelligence Agency, lies to the Attorney General, lies to our friends and allies, lies to the Congress and lies to the American people."[15]

However much the Presidency might have become the object of concern, suspicion, and even of disrepute in the context of Vietnam, Watergate and of the Iran-Contra affair, there was also a powerful body of opinion in America which held that the President's constitutional rights of governing the country could not or should not be made subject to controls which would stultify the carrying out of

these rights. Even as pungent a critic of the imperial Presidency as Professor Schlesinger would argue for the logic of presidential power, as against the abuse of this power:

> Whatever tragedy the imperial Presidency had brought to the nation, a pogrom against the Presidency was not the answer. Abuse of presidential power was not an argument against presidential power *per se*.. Stripping the President of all his independent authority was no more advisable from the viewpoint of the national interest than it was possible constitutionally or functionally. The Founding Fathers had been right to repose wide powers in the executive branch. Only the President could administer the processes of foreign relations..Only the President could serve as Commander-in-Chief of the armed forces. He could initiate the use of force to repel sudden attack or, within limits, to rescue American citizens; he had absolute control over the use of force in war; and again it was undoubtedly sound that this should be so. And, if one defined emergencies as threats so imperious as to preclude resort to Congress, obviously only the President was left to take the lead in emergency situations.[16]

As regards the treaty-making powers, too, although the framers of the Constitution had envisaged a genuine exercise in concurrent authority, later practice enhanced presidential power at the expense of the Senate. The Senate had already lost to Washington himself its claim for a say in treaty negotiations, and later its power to confirm the negotiators. The Senate did strengthen its power to modify or reject a treaty. In 1868 it amplified its Standing rules and began asserting the right of amending treaties by a simple majority. No important treaty was ratified by the Senate between 1871 and 1898. But with the rise of the U.S. as a world power after 1898, there was again a swing back towards presidential power. Woodrow Wilson, an earlier advocate of Congressional government, wrote in 1900 that "the Executive must of necessity be the guide of the nation when foreign affairs dominated its policy".[17] The executive agreement became a device through which Presidents could, if they so desired, bypass the Senate's treaty-making powers. In general three classes of executive agreements develop. There were those made pursuant to existing treaties, in which case no problem of conflict with Congress was involved. There was a

second category of agreement entered into with prior or subsequent legislative authorization, in which case also there was no problem with Congress. But there was a third class of agreements made by Presidents in areas where they had the constitutional authority to act without the consent of Congress. The President, for example, could recognize foreign governments and settle foreign claims without congressional intervention or he could, as Commander-in-Chief, arrange cease-fires or armistice agreements. He could in addition make what were not quite agreements but unilateral commitments like the Monroe Doctrine or the Carter Doctrine, or take important foreign policy initiatives involving agreement with foreign powers, as Nixon did in the case of China. Woodrow Wilson's Fourteen Points was a major policy declaration but they came entirely from a presidential initiative without congressional consultation and approval.

Congress did try unsuccessfully to get back the concurrent authority in foreign affairs, to which it was entitled, during the period 1919-1939, but there was again a "grand revival of Presidential power after Pearl Harbour."[18] This prerogative received a tremendous boost with the Supreme Court judgment in the Curtiss-Wright case, when it was held that the inherent authority of the President in foreign affairs found sanction not only in past history but in present necessity. It was President, not Congress, who had the better opportunity of knowing the conditions which prevailed in foreign countries....He had his confidential sources of information, and secrecy in respect of information gathered by them may be highly necessary. Premature disclosure of information might be productive of harmful results. Constitutional, historical, and practical reasons therefore required that congressional participation in the exercise of power over foreign policy be significantly limited. Any doubts about the constitutional validity of executive agreements was also resolved in the Belmont case when the Supreme Court ruled that international compacts did not always have to be treaties requiring the participation of the Senate.[19]

This line of reasoning—that legislative intrusion into foreign policy making was intrinsically unsound—has had a very respectable background of advocacy and plausibility throughout

American history despite upsurges of Congressional dominance and resentment due to issues such as Watergate or Vietnam or "Irangate". De Tocqueville's famous diatribe against democratic foreign policy-making, though much quoted, bears repetition: "As for myself," he said:

> I have no hesitation in avowing my conviction that it is most especially in the conduct of foreign relations that democratic governments appear to me to be decidedly inferior to governments carried on upon different principles....
>
> Foreign politics demand scarcely any of those qualities which a democracy possesses; and they require on the contrary, the perfect use of almost all those faculties in which it is deficient.[20]

Leading the "realist" critique of American foreign policy in the post-war years, Hans Morgenthau gave it as his opinion that:

> A democratically conducted foreign policy is of necessity a compromise between the rational requirements of good foreign policy and the emotional preferences of public opinion. If one wanted to overstate the case, one might say that a democratically conducted foreign policy is of necessity bad foreign policy.[21]

Morgenthau was here setting up the distinction between good foreign policy, which should be rationally conceived, and bad foreign policy, which is emotionally conceived. The implication is that any rational foreign policy (and for Morgenthau the ultimate test of foreign policy is its rationality and its "reality"), which compromises with the emotional preferences of public opinion in the name of democracy was compromising, in effect, with its chances of success. This was a problem which greatly preoccupied Kennan too. "A good deal of our trouble," he said, "seems to have stemmed from the extent to which the executive has felt itself beholden to short term trends of public opinion in the country, and from what we might call the erratic and subjective nature of public reaction to foreign policy questions."[22] Elsewhere Kennan had written:

> If you say that mistakes of the past were unavoidable because of our domestic predilections and habits of thought, you are saying that what stopped us from being more effective than we were was democracy as practised in this country. And if that is true, let us recognize it, and measure the full seriousness of it—and find something to do about it.[23]

And Walter Lippmann himself, calling attention to the inertia, and to what he called the negative philosophy which characterised the public mind on foreign policy issues in a democracy, had written about this same theme:

> Experience since 1917 indicates that in matters of war and peace the popular answer in the democracies is likely to be No. For everything connected with war has become dangerous, painful, disagreeable and exhausting to nearly everyone. The rule to which there are few exceptions is....that at the critical junctures, when the stakes are high, the prevailing mass opinion will impose what amounts to a veto upon changing the course on which the government is at the time proceeding.[24]

Lippmann himself gave the familiar argument for the Executive prerogative in foreign policy when he said:

> Strategic and diplomatic decisions call for a kind of knowledge —not to speak of an experience and a seasoned judgement— which cannot be had by glancing at newspapers, listening to snatches of radio comment, watching politicians perform on television, hearing occasional lectures, and reading a few books.[25]

All this was written before Watergate, the American involvement in Indochina, and the Iran-Contra scandal, and one can argue with Schlesinger that Congress could hardly have made "a worse botch of things" than was made by the national security establishment in the "ghastly war in Indochina,"[26] He later quoted Lord Bryce to the effect that "though secrecy in diplomacy is occasionally unavoidable, it has its perils....Publicity may cause some losses, but may avert some misfortunes."[27]

The "botch of things" which the national security establishment had perpetrated over the Iran-Contra affair was not known to Schlesinger at his time of writing, but it certainly would not have

changed his opinion of the imperial Presidency. For here was a case when this establishment was persisting in covert support for resistance forces (Contras) opposed to the Nicaraguan Sandinista government when Congressional legislation (the Boland Amendment) specifically barred the Central Intelligence Agency and the Department of Defence from spending funds toward overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.[28] The Boland Amendment was passed by Congress in December 1982, and the Fiscal Year 1985 DOD Appropriations Act provided that during this fiscal year, no funds available to the CIA, DOD, or any other agency or entity of the U.S. involved in intelligence activities should be spent or earmarked for purposes which would have the effect of supporting directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual. Yet, the national security establishment, with or without the direct knowledge of the President, bypassed the Boland Amendment by procuring non-congressional funds for Contra operations in Nicaragua by diverting the proceeds of funds obtained from the sale of TOW and Hawk missiles to Iran, at first indirectly from stocks held by Israel, which were to be replaced from U.S. sources, later directly from the U.S. itself, and even from donations solicited from foreign governments.[29]

The policy of the U.S. government in respect of Iran and in respect of the Contras was originally intended as two separate parts of a process which was no doubt well-intentioned: namely, furtherance of the national interest. In its implementation, however, these two processes became connected, to the detriment, as it turned out, of this national interest.

In its Iran initiative, the U.S. Government was motivated in part by its desire to normalise relations with Iran, to open ways of communicating with moderate groups in Iran, and also by its anxiety to secure the release of seven U.S. citizens abducted in Beirut, Lebanon, at various times between May 7, 1984, and June 9, 1985, and being held in Lebanon by a fundamentalist Shiite terrorist group (Hezbollah), which had links with the Ayatollah Khomeini regime.

At some stage in the execution of this two-pronged policy to normalise relations with Iran and secure the release of American hostages, however, the issue of trading arms to Iran in exchange for the release of hostages from Lebanon came to be introduced, with Congress being kept completely in the dark about these covert operations. As the Tower Commission put it:

> The initiative to Iran was a covert operation directly at odds with important and well-publicised policies of the Executive Branch. But the initiative itself embodied a fundamental contradiction. Two objectives were apparent from the outset: a strategic opening to Iran, and release of the U.S. citizens held hostage in Lebanon. The sale of arms to Iran appeared to provide a means to achieve both these objectives. It also played into the hands of those who had other interests—some of them personal financial gain—engaging the United States in an arms deal with Iran.[30]

According to the Tower Commission, U.S. officials involved in the Iran initiative appeared to have held three distinct views: Some were principally interested in the strategic opening to Iran. Others made the strategic opening to Iran a device to secure the release of the hostages through arms sales. For still others, "the initiative appeared clearly as an arms-for-hostages deal from first to last."

The Boland Amendment was subsequently revoked, and Congress resumed military assistance to the Contras in Nicaragua, as it had done before the amendment became law. But the Iran-contra affair, and Congressional hearings into the conduct of the executive branch during this covert operation revived as perhaps never before the old debate and conflict between the executive and legislative branches over conduct of foreign policy. From one point of view, Senator Warren Rudman, Vice-chairman of the Senate Select Committee investigating the affair, put it: "The ability of Congress to discover the facts and expose improper conduct in the executive branch is one of the key "checks" in the brilliant system of checks and balances devised by the Founding Fathers". From another point of view, Professor George McKenna of the City College, New York, citing the Supreme Court ruling in the Curtiss-Wright case to the effect that the President is "the sole organ of the Federal

government in the field of international relations," has pointed out: "This ruling has never been overturned. The President is the sole organ. Not Mr. Boland. Not even 535 Mr. Bolands".[32]

Professor Schlesinger does not agree. In a post-"Iran-Contra" analysis of U.S. foreign policy, he has stated unequivocally:

> When pressed, defenders of the Imperial Presidency *redevivus* like Colonel North, invoke the case of *United States* v. *Curtiss-Wright Export Corp.* in 1936. Those who do so could not have read the decision. For what the Supreme Court did in *Curtiss-Wright* was to impose an arms embargo and further to affirm the right of Congress to delegate to the President the power to institute such an embargo. As Justice Robert H. Jackson later put it, *Curtiss-Wright* "involved not the question of the President's right to act without congressional authority, but the question of his right to act under and in accordance with an Act of Congress." The decision sanctioned Presidential action within a frame-work ordained by Congress. It did not sanction independent presidential action.[33]

The debate about the conduct of American foreign policy, therefore, continues. James Reston, the veteran American journalist commented in the *New York Times*:

> One thing the Iran-contra hearings have demonstrated is that this country needs a presidential election.[34]

II

Sri Lanka's 1978 constitution established a Presidential form of government, replacing a political system based on the Westminster parliamentary model, which had been in force since independence in 1948. Article 4(b) vested the "executive power of the people, including the defence of Sri Lanka" in the President of the Republic who, as in the United States, was elected by the people. Even though the new constitution was heir to the parliamentary traditions which had been observed earlier, in many respects under the earlier dispensation, foreign policy decision-making was not a matter on which Parliament shared a coordinate authority with the President. The President of Sri Lanka was Head of the State,

Head of the Executive and the Government, and Commander-in-Chief of the Armed Forces. Under Article 33 he had the power, among other things, to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament, to receive and recognize, and to appoint and accredit, Ambassadors, High Commissioners, Plenipotentaries and other diplomatic agents, to declare war and peace, and "to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he is required or authorized to do."

These constitutional rights have not obviated the Sri Lanka Parliament from exercising the customary executive prerogatives which have been available to legislatures in parliamentary systems. For example, apart from the purely declaratory aspects of foreign policy, implementing important foreign policy decisions requires funds, and like Congress, in Sri Lanka too Parliament controls appropriations, and may not always support a foreign policy which is very controversial. Before the inauguration of the present Constitution, for thirty years from 1948 to 1978, the Prime Minister had stood at the apex of the foreign policy decision-making process in Sri Lanka. Section 46(4) of the independence (Soulbury) constitution had required that the Prime Minister should also hold the portfolios of Defence and External Affairs, and even when this constitutional requirement was done away with under the First Republican Constitution in 1972, the then Prime Minister Sirimavo Bandaranaike, continued to hold these portfolios until the change of government in 1977. After the July 1977 elections, J. R. Jayewardene as Prime Minister retained the office of Minister of Defence, but for the first time appointed a separate Minister of Foreign Affairs. When the Second Republican Constitution instituted a Presidential form of government in place of the Westminister model, J. R. Jayewardene as first Executive President, Head of State as well as Head of Government, continued to impart initiatives and give directives on important foreign policy issues, apart from conducting personal diplomacy in his official capacity. It was not merely that in this respect J. R. Jayewardene was continuing a long-established tradition in foreign policy decision-making in Sri Lanka, where the Head of Government has customarily had a large, perhaps the largest say, in the formulation of foreign policy.[35]

But the advent of the Jayewardene government to power in 1977 also involved what amounted to a "new course" in foreign policy initiating a larger shift in emphasis in the non-aligned Sri Lankan approach to international affairs than was customary when governments changed in the past. In 1977 J. R. Jayewardene embarked on a domestic policy of establishing a free market in Sri Lanka based on private enterprise, the abolition as far as was possible of import and foreign exchange controls, and a massive programme of agricultural development based on the multi-purpose Mahaweli River Diversion Scheme. This latter project and the lifting of controls, made Sri Lanka heavily dependent on foreign development assistance.

Sri Lanka's foreign policy since 1977, therefore, took a sharp turn towards the West and was geared not to displease western aid donors. Another facet of President Jayewardene's personal diplomacy was his development of a special relationship with Japan, to which he had endeared himself as far back as 1951 when, as Sri Lanka's chief delegate to the San Francisco Japanese Peace Treaty conference, he had waived reparations for damage done by Japanese bombing attacks on Trincomalee and Colombo in 1942. Japan now became, during his administration, Sri Lanka's chief aid donor.

The President of Sri Lanka is not subject to the same institutional controls as the President of the United States in the conduct of his foreign relations. No approximation to the Congressional-style committees on the American model were set up in Sri Lanka's Parliament after the adoption of Presidential government under the Second Republic in Sri Lanka and, as observed above, all executive powers including defence remained firmly vested in the President of the Republic. By the amendment of Parliament's Standing Orders, however, Sri Lanka established Ministry Consultative Committees, including a Consultative Committee on Foreign Affairs, on the Indian and French models. This innovation did not have any visible impact on Indian foreign policy decision-making,[36] and it does not appear to have had any visible impact in Sri Lanka either. The Parliamentary Select Committee which reviews appointments to ambassadorial and other high appointments in the Second Republic is also an innovation outside the framework of the Constitution, but here, too, there has so far been no instance of any

high appointment recommended by the Cabinet which has been turned down by the Select Committee, as has frequently been the case in the United States, and there is certainly no grilling of candidates for diplomatic and other high government nominees as is the custom in the Senate Committee in the United States.

But in Sri Lanka, too, as in the United States, foreign policy has remained a subject that cannot easily be brought under the purview of parliamentary control. The necessity to ensure secrecy in diplomatic negotiations, the need for quick responses to international crisis situations, and for foreign policy decisions to be made even when Parliament is in recess or under dissolution, have all made subordinate the role of Parliament in democratic politics in the matter of foreign policy decision-making, and Sri Lanka is no exception to the rule.

In the same Tocqueville-Lippmann tradition, British writers like Max Beloff and Joseph Frankel have reiterated the view that the proper conduct of foreign policy was incompatible with democratic controls expressed through Parliaments. Frankel, for example, averred that, "as large clumsy bodies, parliaments cannot effectively exercise initiative, and their participation upsets diplomacy."[37]

Even so, in Sri Lanka, it is in Parliament that the Foreign Minister is exposed to the most important public discussions on foreign policy. A specific issue of foreign policy might lead to the discussion of a substantive motion; or a foreign policy statement of the Prime Minister/Foreign Minister may lead to a debate; or foreign policy generally may be discussed in the context of the debate on the President's Address, or on the Appropriation Bill when the votes of the Ministry of Foreign Affairs are being discussed; or an Opposition Member of Parliament may move the suspension of Standing Orders to discuss a current topic of international affairs. Further, the Foreign Minister, or someone in his behalf, is obliged to reply to the Opposition at Question Time, and on all these occasions the Prime Minister/Foreign Minister and other members of the Government are called upon to defend their policies.

It might be argued, therefore, that there are greater opportunities for discussing foreign policy issues in the Sri Lanka Parliament than there are in the U.S. Congress. The Sri Lankan President,

like the U.S. President, is not a member of the legislature. But, unlike the U.S. President, the President of Sri Lanka is responsible to Parliament "for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security", (Article 42). Under Article 43, the Cabinet of Ministers charged with "direction and control of the Government of the Republic," shall be collectively responsible and answerable to Parliament", and the President is a member of the Cabinet of Ministers and its Head.

The constitutional position of the President of Sri Lanka in these respects approximates more to the French model than the American model, and the 1978 Sri Lanka constitution has been likened to the French Gaullist system.[37] Perhaps it might be more appropriate to call it a mixture of the American and French models, but certainly, as regards the position of the President and Prime Minister and relations between them, the French analogy would appear to be more apposite. There is the same inherent possibility of conflict between President and Prime Minister in Sri Lanka as is present in the French Gaullist system. Although such a conflict has not so far surfaced in Sri Lanka, a situation can be envisaged where President and Prime Minister may belong to different political parties and espouse totally divergent policies on some issues comparable to the present position of the U.S. President *vis a vis* Congress.

The signing of the Indo-Lanka Agreement of July 1987 provides an interesting case-study of the conflict which could arise between President and Parliament in the conduct of foreign policy. This agreement, signed purely on a Presidential initiative, became controversial within the Cabinet and among some members of the Government Parliamentary Party, and it was speculative, in the immediate aftermath of its signing, whether the enabling legislation necessary to implement the Agreement on the Sri Lanka side would be passed. Eventually, the Thirteenth Amendment to the constitution was passed, providing for the establishment of Provincial Councils as envisaged in the Agreement, with only one Cabinet Minister resigning over the Agreement, and party unity being maintained under the tight disciplinary control of the President.

But this Agreement also clearly pointed to the fact that foreign policy could never be, in Sri Lanka as in the United States, an area of exclusive executive privilege.

Notes

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15. See comment in *Foreign Affairs* Vol. 66, No. 1, (Fall 1987), p. 3
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28. See *Tower Commission Report*, Appendix C, p. 450

29. *ibid.*, pp. 437-49, 451.

30. *ibid.*, p. 63

31. *The Washington Post*, May 6, 1987, p. A 23

32. Professor George Mckenna, "Iran-Contra Hearings Undermine Foreign Policy", *New York Times*, June 5, 1987

33. Arthur Schlesinger, Jr. "A Democrat Looks at Foreign Policy" *Foreign Affairs*, Vol. 66, No. 2, Winter 1987-88 p. 272.

34. Quoted in *Foreign Affairs* Vol. 66, No. 1, Fall 1987, p. 5

35. Foreign Policy Decision-making in Sri Lanka is discussed in greater detail in my *Foreign Policy of Sri Lanka: A Third World Perspective*, New Delhi, 1982, pp. 1-20.

36. See K. P. Mistra, *Foreign Policy and its Planning*, Bombay, 1970, pp. 34-44.

37. Joseph Frankel, *The Making of Foreign Policy: An Analysis of Decision-Making*, London, 1963, p. 25; see also Max Beloff, *Foreign Policy and the Democratic Process*, Baltimore, Johns Hopkins Press, pp. 85-86.

8 POWER SHARING BETWEEN THE CENTRE AND THE STATES IN A FEDERAL STATE: THE U.S. AND INDIA-LESSONS FOR SRI LANKA

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The Constitution of the United States of America is not only the oldest written constitution in the world, it is also the first constitution under which political power is shared between a centre and several constituent units., This aspect of the US Constitution has been followed by many successive constitution makers who desired a devolution of power. The reasons for the adoption of power sharing arrangements have varied from country to country. The need to accommodate regional and ethnic interests, practical problems of administering a very large country from a distant centre and the lessons learnt from the experience of the British colonial rulers convinced the Constitution makers of modern India of the value of sharing power between a powerful centre and a large number of state units. The basic arrangements established in India have remained without much change for nearly forty years. Sri Lanka, having experimented with a wide variety of decentralized administrative arrangements under a strong central authority for a long time, has now decided to devolve power to a significant degree to a number of provincial governments. The measures to share power were added to the Sri Lankan constitution as part of a package to solve the serious political crisis resulting from the violent movement for the establishment of a separate state by the main ethnic minority, the Tamils. However, a clear understanding of the dynamics of power sharing in Sri Lanka may not be possible until the Provincial Councils begin to function. In the following pages an attempt will be made to understand the nature of power sharing in the classic federation of the United States of America and to examine the reflections of this power sharing arrangement in the Constitutions of India and Sri Lanka.

1. United States of America

The concept of federalism and the principles of federal government are among the most significant innovations contributed by the Founding Fathers of the US Constitution to the theory and practice of modern government. The structure of the government and the principles underlying it formulated in 1787 are unprecedented. The new government was based upon a different and a novel principle: the principle of a division of powers between general and regional government each independent within a sphere. As this government developed, the new principle became firmly established and by the end of the civil war it became the accepted doctrine of the Constitution. The special way in which power has been divided between the general government and the associate states is the fundamental characteristic of the federal state of the United States of America. This arrangement has been summarized as follows: "Powers are divided between general government which in certain matters is independent of the governments of the associated states, and on the other hand, state governments which in certain matters are in their turn independent of the general government. As a matter of law the field of government is divided between a general authority and regional authorities which are not subordinate one to another but coordinate with each other. The states are co-equally supreme within their sphere, in no legal sense they are subordinate corporations."[1] An examination of the provisions of the U.S. Constitution including amendments will enable us to understand this special relationship between the centre and the states.

The constitution makers of the US, unlike their many successors, did not have a model to follow in delineating the spheres of the general government and the regional governments. Perhaps it was a blessing. Historical circumstances of the period, their own experiences—particularly during the brief confederation period—and their perceptions of the state requirements served as the guide.

At the time of drafting the new constitution the U.S.A. was a society which reflected characteristics of pre-industrial society-less complex, agrarian and with a minimum of inter-regional communications. There were no national political parties or formations

and hence no conscious effort was made to unify the territorially segmented political forces. Economic and social problems were essentially intra-regional, and very rarely transcended state boundaries. The drafters of the Constitution themselves were delegates representing different units which were being administered as separate entities and were deeply concerned with their special identities. Under the circumstances, the Founding Fathers of the American Constitution could demarcate between local affairs which could appropriately be handled by the states and matters of general concern which should be vested in the general government, and the two sets of authorities, state and general, were formulated in a manner that they were in their different spheres both coordinate and independent.

The approach of the founders was to assign certain specific powers to the general government and to reserve the remainder to the states. This method was adopted because of the unwillingness of the confederating states to part with their supremacy to any appreciable extent. Article 1 of the Constitution which deals with the organization and powers of the legislative branch of the general government, defines the powers of the Congress.[2] Here the Constitution mentions only the legislative powers but it is assumed that the government will also have administrative power over the spheres in which it has the power to legislate. In eighteen clauses the powers of the Union government are positively stated. These provisions empower the Congress to levy and collect taxes, duties, imports and excise, to regulate international and interstate commerce, coinage, to declare war and raise forces, to establish post offices and post roads etc.

Article 4 (3) allows the Congress to admit new states into the Union and to dispose of and make all rules and regulations in respect of the territory or other property belonging to the United States.

Having specified several items definitively in the above manner the Constitution, under the 18th clause of this section, makes a declaration that leaves room for interpretations favouring the general government. This statement empowers the Congress "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States".

However the Constitution lays down certain limitations on the law making powers of the Congress in Section 9. For instance, this section prohibits the Congress to levy any tax on articles exported from any state or to legislate with retrospective effect. Further restrictions on the law making power of the Congress were added after the adoption of the Constitution. The first nine Amendments deal with the right of citizens and therefore restrict the power of the Congress. For instance, the First Amendment prohibits the Congress from making laws restricting the freedom of speech, press or the right of the people to assemble. Two other Amendments approved much later have conferred additional powers to the Congress. The Thirteenth Amendment gave power to the Congress to legislate in order to enforce the Article on the prohibition of slavery; and the Sixteenth Amendment empowered the Congress to levy and collect income tax, removing a major obstacle for the Union government's power of taxation.

The US Constitution enumerated only the powers (and restrictions to the powers) of the federal government and not those of the states. By implication the powers allowed to the centre are outside the jurisdiction of the states. Powers not enumerated as within the Congress would be the territory of the states. The Tenth Amendment makes this explicit: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." The states which had asserted their right of full sovereignty after renouncing their allegiance to the British Crown were not left with all the powers that were not given over to the central authority. In practical terms, now they no longer had the power to regulate international or interstate commerce, or coin money or issue legal tender or establish post offices or declare war etc. Yet they were left with a large sphere of jurisdiction in which were included law and order, civil law, criminal law, local government, education, public health, the raising of militias and police powers.

In other words, powers which were of local nature were left in the hands of the states, and the powers, the execution of which affects and involves more than one state (e.g. inter state commerce) or powers which were best carried out by one common authority (e.g. defence or foreign affairs) were given to the Union. As

Hamilton remarked: "The principal purpose to be answered by Union are—the common defence of the members, preservation of the public peace, as well against internal convulsions as external attack; the superintendence of our intercourse, political and commercial, with foreign countries."[3]

This arrangement established by the US Constitution and reinforced by the first few Amendments neatly fits into power sharing arrangement that was thought to embody the essential element of federalism. "By the federal principle I mean the method of dividing power so that the general and regional governments are each within a sphere coordinate and independent."[4] In this definition Where emphasizes the autonomy and independence of the centre and the component units. Long before him, Dicey defined federalism in similar vein: "Federalism means the *distribution of the force of the state* (as opposed to its concentration in the hands of one like in a unitary state) among a number of coordinate bodies each originating in and controlled by the constitution."[5] The question to pose is to what extent does this model approximate the power sharing arrangements that actually exist today in the U.S.A., as well as in other federations such as Switzerland, Canada and Australia? All these federations have undergone a process of change and adaptation in the face of new socio-economic and political developments. These developments have altered in significant ways the balance of power sharing between the centre and the states. In the U.S.A. the following factors have contributed to these developments: (a) industrialization (b) international relations (c) judicial interpretation of constitutional provisions and (d) the rise of the welfare state. An attempt will be made below to discuss some of these factors and their impact on the centre-state power balance in relation to the U.S.A.

The judicial interpretation of certain provisions of the Constitution have in general been in favour of the centre and thereby have helped to enhance its power *vis-a-vis* the states. Two clauses of the Constitution, in particular, clause 1 ("to provide for the general welfare of the U.S.") and clause 18 ("to make all laws which shall be necessary and proper") have been interpreted by the Supreme Court on many occasions in a way that would expand the powers of the Congress beyond the sphere enumerated in the

Constitution. The beginnings of broad interpretation of federal powers by the Supreme Court may be traced to the days of Chief Justice Marshall. Marshall laid down the principle that if a congressional law could be articulated to any provision, article or section of the Constitution even when there is no specific enumeration of that particular power, that law would be valid. This doctrine of "implied powers" has been responsible for the very large increase in the powers of the Union Government. On the question of the State of Maryland's attempt to tax the Bank of U.S.[6] the Chief Justice declared the tax unconstitutional and void. More importantly this verdict upheld the principle of preponderence of the federal legislature over the state legislature:

> The States have no power, by taxation or otherwise to retard, impede, burden or in any manner control the operations of the constitutional law enacted by Congress to carry into execution the powers vested in the general government.

Later, the Supreme Court in its decision in Stewart Machine Co. vs Davis upheld the congressional power to legislate on social security measures, an area of state jurisdiction.[7] In relation to the treaty making power and their implementation the Supreme Court has consistently tended to favour the national centre. These and many other judicial interpretations have opened up new spheres of jurisdiction for the Union while at the same time curtailing what has already been allowed to the states.

With industrialization, increased urbanization and the rise of the welfare state another trend of events, which had a serious impact on the centre-state power balance, took place. The welfare state of the industrial society was expected to be actively engaged in the promotion of welfare of the citizens. The major sphere of welfare activities such as education, health and sanitation, weaker groups in society, labour etc. fall within the jurisdiction of the states. However in terms of funding, expertise and other resources these tasks were beyond the capabilities of the states. Activities such as education, sanitation and business which were once purely local in nature had now become matters of inter-state importance. The involvement of the national government for legislation, funding and for setting uniform standards became essential during the post

depression period—the era of "cooperative federalism"—with the federal involvement in welfare and other social and economic spheres reaching new heights. Today the federal government is shouldering the major share of the burden of the great domestic programmes ranging from public welfare to public recreation and police protection.

A contemporary scholar on American federalism[8] has compiled data on the extension of responsibility sharing between the centre and state on three important aspects of the economy: business, labour and agriculture. His chart shows the wide role central authorities have assumed today in such local areas as bankruptcy, price support, industrial and business subsidies, business licensing, occupational safety, prevention of racial and religious discrimination, workmen's compensation, rights of labour, provision of employment offices, developing field projects in agriculture, sanitary inspection and the disposal of stored agricultural surpluses.[9] This is a very clear indication of the extent of sharing between the centre and unit. Today this has become routine and institutionalized. He also gives a breakdown of federal legislation between 1965 and 1982 which illustrates the pace at which central authorities have broken into state spheres where there was prior state laws (supercession) sometimes amounting to preemption of fields where state activity has been serious and extensive. The pieces of legislation he has cited are drawn from five areas:[10] health and industrial safety (18 Acts); environmental protection and conservation (11); consumer protection (7); agricultural standards (3); civil rights (5); unspecified (14).

The other factor that contributed to the enhancement of the federal share of power has been its financial superiority *vis-a-vis* the states. The power to tax and spend has been awarded to both the centre and the states by the Constitution. However, from the earliest times of the federation the centre has been in a better position as far as financial resources are concerned. With the adoption of the 16th Amendment which permitted direct federal income taxes this position has become stronger. Taxes on income have been one of the simplest and most elastic sources of revenue collection available for governments. In the fiscal year 1981 the federal government collected 61% of all tax revenue in the U.S.A.

As the activities of the centre increased its expenditure too kept increasing. The states on their part have tried to maximise their share of federal expenditure. Now there is a trend, which had its origins in the Carter era, and has become more prominent under the Reagan administration towards reducing federal expenditure. Federal grants as a percentage of state/local receipts from their own sources has risen from 16% in 1960's gradually as the Great Society programme began to have an impact and reached a peak of 31.7% in 1978. The more the states came to depend on federal financial support the greater became its power over the states' sphere of activities. Federal authorities could always hold the threat of withdrawal of funds to states for non-compliance to its instructions.

Thus, a significant transformation has taken place over the years in the balance of power-sharing established in the Constitution of the U.S.A. The sphere of the central government has expanded immensely and most of the states activities are no longer within their exclusive control; power over those areas are today enjoyed concurrently by the centre and the states. It is to be noted also that the centre's ascendency should not be explained simply as a usurpation of the states power. It really is a partnership in which the national authorities play the leading role. The term "cooperative federalism" is quite apt in describing this new arrangement of power sharing. There are many instances where states have invaded the spheres which generally fell within the jurisdiction of the centre. For instance Minnesota has initiated action on the problem of the rising level of atmospheric radiation and water pollution. On the other hand, Illinois and Iowa acted on their own, on the question of absorbing South East Asian refugees. Furthermore, certain activities have now become joint federal/states areas though they originally fell within the purview of the Federal government; e.g. improvement of navigational waters. In some spheres the federal authorities have turned over certain powers given to them by judicial interpretation to the states: e.g. ownership of submerged oil lands (tidelands), regulation of the insurance business and pre-emptive powers in the field of labour legislation.

On the whole, the nature of power sharing in the federal state of the U.S.A. has undergone a transformation during the last 200 years. Changed socio-economic conditions, exigencies of relations

between nations in the modern period, problems in relation to the maintenance of the welfare state, and the changed nature of the modern state itself have all contributed to enhance the share of power of the centre at the expense of the states.

The constitution makers of the federations that emerged after the U.S. Constitution, have adopted modified versions of the power sharing arrangements obtained in the U.S. Constitution. Of course there has been no generally accepted pattern of power sharing in modern federations. Australia, for instance, followed the American scheme of power sharing to a great extent. In Switzerland the powers of the federal legislature are enumerated and the residue are left to the cantons, as in the U.S.A. However there exists a concurrent list on which the federal power prevails in case of conflict. The division of powers under the Canadian Constitution is noteworthy. It departs from the pattern set by the U.S.A. greatly. There, the powers are enumerated in 3 lists: Dominion, Provincial and Concurrent. The residuary powers are vested on the Dominion, i.e. the centre. In case of conflict on the concurrent list precedence is given to the centre. In all these federations one dominant trend is clearly observable—enhancement of the powers of the centre. In each successive federation the centre has been given more powers. India provides one of the most glaring example of this trend.

2. Centre - State power sharing in India

The framers of the Indian Constitution had to operate under conditions different from those obtained in the U.S.A. Under British rule India was administered from a single centre with only a minimum of devolution. The needs and aspirations of the newly independent India demanded an ever expanding role in social and economic development and welfare activities. The leaders of the Constituent Assembly took care to point out that India had adopted the "federal model". At the time the Constitution was taking its final shape Nehru described that it was "federal" in form and that it was based on the American Constitution.[11] Ambedkar characterised it as a federal constitution on the grounds that it establishes a "dual polity" consisting of "the Unions at the centre and states at periphery endowed with sovereign powers to be excercised

in the field assigned to them respectively by the Constution."[12] To describe states in India as having "sovereign powers" actually conceals the superior position in which the founding fathers of the Indian Constitution placed the Union government. This tilt towards the centre appears to be the central feature in the allocation of powers between the centre and states in the Indian federation. In the balance of power-sharing between the centre and states the Indian Constitution surpasses all other federations established before it on the principle of awarding more power to the centre.

Apart from the common factors that led to the gradual increase of central powers in the classic federations of the past there were certain special conditions that guided the Indian Constituent Assembly to provide for a centre with enhanced powers *vis-a-vis* the states. The historical experience of India during the last decades of the British rule was one of provincial devolution but with enormous powers at the centre. Because of this immediate experience the leaders of the future Constituent Assembly such as Nehru, were inclined towards having a federal India with a "great deal of unitary control"[13] as early as 1936. Further there were no states' right lobbies similar to those operating in Philadelphia in 1787 or in Canada much later. In fact, questions of communal rights and status were much more politically significant than states' rights in India. The geographical dispersion of the minorities prevented the movements for communal assertion taking a path towards the creation of autonomous territorial units for minorities except in the case of Muslims and to a lesser extent Sikhs. On the other hand, the movement for Pakistan, and later the partition and the tragic events that followed showed the disastrous potentialities of territorially linked communal rights movements. Naturally all the key sub-committees of the Constituent Assembly and the leaders favoured a power sharing arrangement where the centre will have enhanced powers. The Union Powers Committee declared that "it would be injurious to the interests of the country to provide for a weak central authority. The soundest framework for our Constitution is a federation with a strong centre."[14] Even the Sapru Committee which favoured awarding residuary powers to the provincial governments stressed the need for a powerful centre. The exigencies of the contemporary period, i.e. at the

time the Constituent Assembly was in session convinced the framers of the Constitution of the vital necessity of a centre with enhanced powers: the communal violence, the problem of refugees, the enormous administrative tasks relating to the partition and the transfer of powers that the central government had under the 1935 Constitution then in force. The only effective mass political organization—the Indian National Congress through its provincial organizations did not assume the role of protector of provincial rights. Moreover, at this time there were no powerful regional based parties like the ones that we find in India today, which could have exerted pressure in favour of increased powers for the regions. Further, the framers of the Indian Constitution believed that the classic federal framework does not allow much flexibility to the government structure, a quality considered ossential for the Indian Constitution. In this context referring to the U.S. Constitution Ambedkar said that America was caught in a "tight mould of federalism"[15] which he wanted India to avoid. The grant of more powers to the centre was one way of remedying this problem. Ambedkar was intent on making the Constitution "both unitary as well as federal according to the requirements of time and circumstances".

In the allocation of powers, as in many other respects, the Constitution of India has followed the arrangements obtained in the Parliament Act of India, 1935. The principles of distribution of subject matter between 3 lists and the vesting of the residuary powers on 3 heads resembles the Canadian power sharing scheme and is very different from the tradition established by the Constitution makers of the U.S.A. The vesting of residuary powers on the centre too follows the Canadian practice. In terms of the extent of powers given to the centre in its exclusive list and in the enlarged concurrent list the Indian scheme goes beyond either the Canadian or the Australian mould.

The basic provisions, laying down the distribution of powers between the Union and the States, are found in Part XI of the Constitution. However, throughout the Constitution, there are other articles and clauses which have a bearing on the nature of power sharing between the Union and State governments. The emergency provisions in their entirety bear directly on the distribution of

powers. Similarly, provisions for the distribution of revenue, the establishment of Rajya Sabha, the single judicial system, one election commission with nation-wide authority and the amending process weigh heavily the scales of power in favour of the centre.

The first two articles of Part XI of the Constitution deal with the most central aspect of the distribution of powers. Here the legislative competence of the Union and State governments are given on the basis of "legislative lists" appearing as Schedule VII of the Constitution. These lists are quite comprehensive and were thought of as a sound basis for a federal system. The Union list is the longest and contains 97 items on which the Union Parliament has exclusive legislative power.[16] The lengthiness of the list is partly due to the general practice of spelling out the powers in detail adopted by the Indian Constitution makers. This list includes items of national importance such as those of defence, war and peace, atomic energy, currency and coinage, railways, post and telegraph, preventive detention, citizenship, foreign trade, inter-state trade and commerce, ports, airways, national industries, highways, banking, insurance and financial corporations, inter-state rivers and river valleys, film censorship, standards of higher education, scientific and technical institutions, constitution and organization of Supreme Court and High Courts, oil fields, production of salt, auditing of Union and State accounts. On the revenue side taxes on incomes other than agricultural income, customs duties, excise duties, corporation tax, taxes on the capital value of the assets exclusive of agricultural land, estate duty, taxes on goods and passengers carried by land, sea and air all come within the purview of the Union legislature.

The state list contains 66 items on which the state legislatures have exclusive authority to legislate. This list is prepared considering the peculiarities and variety of local problems and conditions which require differentiated treatment. It includes public order, police, administration of justice, local government, prisons, public health and sanitation, land, education, forests, intra-state commerce and state industries. The taxing power of the states is extended to cover land revenue, income from agriculture, sales tax, vehicles tax, tolls, entertainment, court fees etc. It must be noted here that since the inauguration of the Constitution the state list has been subjected to a high degree of pruning.[17]

The third list, the concurrent list consists of 47 items. This feature which is quite common in federations today, contains items over which both the centre and the states possess jurisdiction such as criminal law and procedure, marriage, divorce, adoption, succession, economic and social planning, trade unions, labour welfare, newspapers, legal and medical professions, shipping and navigation, price control, stamp duties and books.

In the Constitution of India with this kind of exhaustive enumeration of subjects the scope for residuary powers is very limited. The article 248 confers such powers exclusively to the Union Parliament. In spite of all these demarcations there was still a possibility of inconsistencies between legislation of the Union and the states. To prevent such situations leading to a constitutional crisis the Constitution has laid down that in cases of conflict between the two laws, the state law shall be void to the extent of its repugnancy.[18]

These lists show in great detail the spheres of jurisdiction allowed for the Union government and the governments of the states in India. The sphere assigned to the centre by the Constitution for exclusive legislation in India differed from the spheres assigned to the federal government in U.S.A. in that it was slightly wider due to the inclusion of items such as railways, industries, corporations, oil fields, salt, cinema, higher education and industrial disputes. The Indian central government's concurrent powers are no greater than those enjoyed by the federal government in the U.S.A. today. The main difference in terms of powers, lies in the fact that in India the central government has constitutional authority enabling it to encroach on the states' spheres and thereby negate the idea of an exclusive area of jurisdiction to the states. The area assigned to the States through the state list and the concurrent list are no doubt important. Arears such as agriculture, land, land tenure, education, police, prisons, lower courts, law and order, local government, forests, state industries, water and irrigation, state public service imply a remarkable array of powers and responsibilities. The concurrent list adds further to this legislative capability. But the exercise and implementation of their powers are limited by the powers of the centre. Several important factors, some constitutional and some extra-constitutional, give the centre in India superordinate powers over the states' sphere.

The balance of power sharing between the centre and states established by the Constitution is not un-alterable. It is true that the provisions relating to power allocation are entrenched in terms of amendment procedures. Still there are several distinct ways in which the nature of power sharing between the Union and the states could be changed to a great extent.

Firstly, under the emergency provisions, as given in article 250, the centre can direct a state in administering its powers or takeover by itself the powers assigned to the states. Under the provisions of this article the Governor of a state can take over the state's administration on behalf of the central government. Alternatively, this power could be delegated to a centrally appointed officer. This Article empowers the Union Parliament to legislate on behalf of the state on any subject in the State list when a condition of emergency is in operation. In other federations like U.S.A. or Australia too the power of the centre can be used increasingly during emergencies, but there is no room for the federal legislatures there to legislate on state lists. In view of this it is correct to say that under conditions of emergency India becomes for all practical purposes a unitary state.

Secondly, the Constitution has provision to transfer to the centre, though temporarily, the power to legislate on behalf of the states. According to these provisions[19] the Union Parliament is authorised to legislate on subjects included in the state lists whenever the Council of States (Rajya Sabha) passes a resolution to that effect with a two thirds majority declaring that such a transfer of authority is necessary and expedient in the national interest. The validity of such a resolution lasts for six months but it could be extended. In 1950 itself, the central government took over the authority to legislate on the production, supply and distribution of goods in the states under these provisions. These provisions were supported in the Constituent Assembly on grounds that they introduced a degree of flexibility to the Indian federal system.

Thirdly, the legislative powers of the states may be transferred to the centre under the provisions of Article 252. This Article authorises the Union Parliament to legislate on matters reserved

for State Legislatures if one or more states request the Union Parliament to do so. The validity of such legislation could be extended to any state if the relevant legislative assemblies adopt resolutions to that effect.

Fourthly, the treaty making power conferred on the Union under Article 253 recognizes the treaty power as a specific legislative power. According to this Article "Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention or any decisions made at any international conference, association or other body," and this power is not confined to the matters given in the Union list. This of course has the advantage of avoiding immense difficulties which treaty implementation has encountered in other federations. Nevertheless, it allows the centre to encroach on the sphere reserved for states' jurisdiction.[20]

Another method by which the power relationship between the centre and states may change is by the use of executive power. Normally, the Union executive authority extends only to the subjects on the Union list; yet according to Article 73 Parliament may extend its authority to the concurrent list. Articles 256 and 257 provide that the executive powers of a state must be exercised so as to comply with Union laws and not to impede or prejudice the exercise of the Union's executive authority. To ensure that both the stipulations are met the Union executive may give directions to provincial governments as to the manner in which it should act, and if a provincial government does not comply with these directions, the Union, under the emergency provisions may take over the administration of the recalcitrant state.

The Constitution has provided that certain types of bills passed by the state legislatures should be reserved by the Governor for Presidential consideration. This power, used not infrequently,[21] is also a constraint on the law making powers of the states. The Governor who is appointed by the centre is considered an agent of the central government. With his discretionary powers he is generally thought of as an obstacle for the free exercise of states' executive authority.

The power relationship between the centre and the state is profoundly affected by another important factor, that of finances. The Constitution has distributed the power to collect various taxes between the centre and the states so that both may have separate sources of income. The taxes that have an inter-state base are vested within the jurisdiction of the centre while those with a local base are kept in the hands of the state. However, all centre taxes are not meant for the use of the centre alone—some of these are distributed in their entirety among the states (Union excise duties, estate duties), some others are given to the states (income tax) as recommended by the Financial Commission. The inadequacy of the tax base of the states has made them dependent on centre handouts to a great degree. Over the years their indebtedness to the centre has also increased. This financial dependency further emphasises the preponderence of the centre in the balance of sharing. The operations of the party system, mainly the dominance exerted by the same party at the centre and in the states for a considerable length of time has also contributed enormously towards this centre oriented tilt.

The crucial factor in the centre-state power relations in India is this marked tilt towards the centre. The centre is endowed with an array of constitutional and extra-constitutional means enabling it to encroach the sphere of the states, particularly during times of conflict and crises.

3. Power sharing in Sri Lanka: Mitigated federalism ?

In the USA several units which existed independently came together to form a political system in which power is distributed between a general government and constituent units. In that union security was the foremost consideration. India which had been administered from a powerful centre for a long time has remained, politically and administratively, as a single entity during much of its modern history. Compulsions of cultural particularism and administrative considerations paved the way for a process of devolution there during the last decades of British rule. The creation of the 1950 constitution with a central government and several state governments each with defined spheres of jurisdiction represent the high point of that process of devolution. Sri Lanka too has been administered as a single political unit from a single

centre of power uninterruptedly since 1815. It did experiment with a variety of decentralization strategies since independence. The enactment of legislation for the establishment of 'Provincial Councils' turns a new page in Sri Lanka's constitutional and political history. For the first time political power was devolved on territorially demarcated areas under these enactments. The authority for this devolution flows from the Constitution itself.[22] No measure of decentralization had the authority of the Constitution previously.

The powers, functions and the organization of the Provincial Councils are given in the Chapter XVII 'A' of the Constitution added by means of the Thirteenth Amendment. According to these provisions the Provincial Councils are established for each of the nine provinces of Sri Lanka. They will have the power to make "statutes" on a sphere of activities specified in a legislative list.[23] In consultation with the Parliament the Provincial Councils are capable of law making over another list of subjects given in the Schedule IX, the "Concurrent List." In case of a conflict between the Parliament and the Provincial Council on an item given in the Concurrent List the law of the Parliament prevails. The 37 classes of items included in the Provincial List could be categorised under five main headings:

1. Law and order (Police, Borstals and Reformatories)
2. Agriculture, land and irrigation (Agrarian services, Land and Land tenure, Minor Irrigation and Agricultural Research.
3. Health and social welfare (Health, Sanitation, Social Services, Rehabilitation, Disabled and Destitutes and Education)
4. Provincial development work (Plan implementation, Housing and Construction, Roads and Bridges, Mines and Rural Development)
5. Local government (Markets & Fairs, Cooperatives, Burial grounds, Liquor and Incorporation).

If the items given in the Concurrent List are also included, the Provincial Councils' statute making power extends to cover subjects such as higher education, planning, fisheries, registration,

employment, tourism, newspapers, books and price control as well. The sources of revenue for the Councils are also specified in the Constitution. These include taxes and fees with a local base such as turn-over tax, betting tax, liquor and vehicle licences and stamp duty on property transfers. The Constitution also provides for an allocation to be made from the annual budget to each Provincial Council. The other list in the Schedule IX called the "Reserved List" specifies the exclusive area of legislative competence of the National Parliament. This list includes all items generally vested in the central government in federal states with a few changes. The legislative power over any residuary items is also vested on the National Parliament. The National Government has been provided with a wide base for taxation, which includes taxes on income, capital, wealth, company and corporation tax, and more importantly, customs and excise duties.

The three-list system adopted in Sri Lanka follows quite closely the Indian example of allocation of powers between the National government and to Provincial Council. The executive authority of the two levels of govenment is co-extensive and coterminous with the legislative sphere. Even in the matter of allocating subjects between the three lists Sri Lanka has emulated the Indian system with certain exceptions. For instance, subjects such as Provincial Courts, and Provincial Councils themselves-including their powers and privileges, emoluments of members and the election of the Councils-which under the Indian system are retained in the states' list, are included in the Reserved List in Sri Lanka. The National Parliament is also empowered to legislate for the entire country without being restricted by the lists to facilitate the implementation of treaties or agreements it enters into. Further, under conditions of emergency or break-down of constitutional government the Parliament will legislate on behalf of the affected Provinces. Parallels to these powers are to be found in India itself, where the centre-tilt of the balance of centre/state power is most prominent. Nevertheless, there is a definite provincial sphere over which the authority of the Provincial Council prevails. Moreover, there is constitutional provision to make any existing law relating to subjects in the Provincial List which are inconsistent with the relevant Provincial statute to be made non-effective. Under these constitutional provisions the Provincial Councils will be left with a

wide range of activities which are closely related to day to day lives and cultural needs of the people in the regions. In that sphere they will have power to make statutes, implement them and to raise the revenue needed for these activities. In other words, if implemented, the Provincial Council arrangements will imply the creation of nine regional centres of power to co-exist with a national government. This certainly will be more than mere "emphasized decentralization."

The experience of the USA and India can guide Sri Lanka regarding the operational problems of maintaining devolved power. The question of revenue sharing is one area on which problems have arisen in both the above countries. Legislative power not backed by financial power is futile. Both in the U.S.A. and India the resources of the units have found to be inadequate to meet the growing demands of the welfare state. Central revenue sources generally appear to be more sound and elastic than those of the constituent units. The states in the U.S.A., which were by and large able to manage with their own resources before 1930s have come to realize that the resource flow from the centre as being essential today for their effective operation. The states in both these countries are naturally keen to obtain central financial support with no strings attached. In the U.S. the much preferred type has been unconditional grants which enable the states to utilize them in state budgets. In India "discretionary grants" which have become the most important form of centre's financial support are not favoured for obvious reasons.[24] The allocations made on the basis of the recommendations of the Finance Commission are favoured in India. In fact there is agitation from the states that the Finance Commission be given the responsibility of handling all central allocations to the states.[25] There is also pressure to raise the proportion of the share of income tax apportioned to the states, and for inclusion of growing tax sources like corporate tax among the taxes the proceeds of which are to be distributed among the states. Sri Lanka has followed India in setting up a Finance Commission although it does not appear to be of permanent nature as the Indian counterpart. It consists of the Governor of the Central Bank and the Secretary to the Ministry of Finance and three members to be selected from among the three communities. It is expected to

recommend the basis of allocating funds from the national budget to the Provinces. The Finance Commission is to take into account variables such as population and disparity in per capita income between provinces in making the recommendations. In India the weightage is given on the basis of population and the collection of income tax made by each state. To remedy the interstate disparities in terms of taxability in India certain states are provided with special allocations, e.g. Assam on account of tribal people, and West Bengal in lieu of duty on export of jute. In view of the varying circumstances of central and provincial finances it may be useful to have the Finance Commission operating on a regular basis.

The ambiguous position in which the Provincial Governor has been placed in Sri Lanka appears to have been influenced by the Indian example. India opted for the British type of nominated Governor who would function as a constitutional head in his relations with the state even when some members of the Constituent Assembly preferred the American type of elected state Governors.. The Centre-appointed Governor in India is expected to function as an agent of the Centre and is expected to protect the regional government from forces of disruption and secure its stability and integrity. In case of a dispute between the centre and state he is expected to uphold the national interest. In the use of his discretionary powers or during emergencies or when there is no clear majority for the party in power in the state the role of the Governor will be of crucial importance. The Indian experience shows this at its worst when the party in power at the state differs from that at the centre. The ambiguity of the Governor's position really reflects the continuing conflict in the country on centre control and, state autonomy in general. In India it has been suggested that a special board be established to function as the centre's intermediary in the state and thereby make the Governor a mere ornament, a 'bird in a golden cage', as a former State Governor Sarojini Naidu, said.

Both countries, the U.S.A. and India, show the significant role that the political parties play in sustaining the balance of power sharing at an operational level. The absence of highly centralized national parties and the fragmented nature of American parties in general played a positive role in maintaining the federal system in

the U.S.A. In India, the Congress has been a colossal unifying force. Even when the states led by Congress governments do not look towards Delhi for its role as an administrative centre, they look towards Congress headquarters for political leadership and guidance. This raises another problem—that of relations between non-Congress led governments of the state and the Congress dominated centre. In such situations the elements of the cooperative nature of the power relationship get disrupted. The use of direct-centre authority over states has materialized mostly in such contexts. In Sri Lanka where all the major parties are highly unified and centralized the centre/province power relations will get profoundly affected in situations of two different parties in control at the two levels of governments. This will get more complicated if a regionally based, culturally oriented party holds power in a Province where the major parties are not powerful like in the Northern Province.

The most important lesson that Sri Lanka can learn from the experience of U.S.A. and India relates to the question of democracy and democratic institutions. Power sharing is not merely a technical problem of allocation of functions and responsibilities on an agreed basis between structures of government at different territorial levels. It is a matter that concerns people who are considered the "repository" of all political power. Outside the context of establishing means and institutions enabling the people to participate in the exercise of devalued power no devolution arrangement would be effective. The legitimacy that is essential for the long term persistence of any power sharing arrangement has to be derived from the people alone.

Notes

1. K. C. Wheare *Federal Government*, London, Oxford University Press 1963, Fourth Edition, p. 2.
2. *The Constitution of the United States of America*, Article one, section five, United States Information Agency, Washington, 1986 p. 13.
3. *The Federal Papers*, XXIII.
4. Wheare, op. cit., p. 75.

5. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* London, Macmillan and Company, 1941, Nineth Edition, p. 157.
6. McCulloch V. Maryland (1819), cited in A. T. Mason and W. M. Beaney, *American Constitutional Law*, New York, 1954, p. 154.
7. Ibid. p. 154.
8. Daniel J. Elazar *American Federalism: A View from the States*, New York, Harper & Row, 1984, Third Edition.
9. Ibid., p. 52-53
10. Ibid., p. 55.
11. *Nehru Speeches*, 1949-53, Government of India, Delhi, 1957, Second Edition, p. 122.
12. *Constituent Assembly Debates*, Manager of Publications, Government of India, Delhi, 1946-1950. vol. vii, Part 1, p. 33-34.
13. Cited in Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, Bombay, 1972, Indian Edition, p. 189.
14. Ibid., p. 190.
15. *Constituent Assembly Debates*, VII, I, p. 33-34.
16. Item number 33 of the original list is deleted. Two additions 92 A and 92 B have been made under 6th Amendment and 46th Amendment respectively.
17. Five items, items 11, 19, 20, 29, 36 have been deleted in favour of the Union. Some other items, e.g. no. 54, 12 and 24 have been narrowed again favouring the Union.
18. Article 254 (1) of the Constitution of India.
19. Article 249 (1).
20. The Canadian Constitution which also embodies a similar provision makes it explicit that the legislation for treaty implementation shall not infringe on the jurisdiction of the Provincial Governments. McGregor Dawson, *The Government of Canada*, Toronto, 1960, p. 114.
21. In 1982 there were 36 such bills awaiting President's assent. One of these, West Bengal Trade Union Amendment Bill, was received at the centre in 1969.
22. *Thirteenth Amendment to the Constitution, a Bill*, supplement to the Gazette of the Democratic Republic of Sri Lanka, Department of Government Printing, Sri Lanka, 1-10-1987.
23. List I, Provincial List (IXth Schedule) in *Thirteenth Amendment to the Constitution, A Bill* op cit.
24. A. K. Ghosal, Need for a New Look at Centre-State Relations in India after 1967, *Indian Journal of Political Science*, vol. 30 1969, pp. 373-382.
25. See C. M. Jain, Centre—State Relations in India—A case study of Rajasthan, *Indian Journal of Political Science*, vol. 31, 1970 pp. 281-290

9 REGIONAL DEVOLUTION OF POWER : POSSIBILITIES, PROBLEMS AND CONFLICTS IN A UNITARY STATE

Shirani Bandaranayake

I. Introduction

Since the latter part of the previous decade there has been much discussion in devolving authority to local councils. It seems that Sri Lanka felt the effects of the increasing interest in devolving authority for planning and administration to state, regional, district and local agencies, field units of central ministries and local governments in Asia, Latin America and Africa.[1] An examination of the development of local government in the island since the mid nineteenth century and the various attempts made by the government since 1928 to establish Provincial, Regional or District Councils in the island and the failures of these attempts demonstrate vividly, the desire of the then government to devolve authority to local councils and the possibilities and the difficulties they had to face in doing so. This factor itself indicates the complex situation a unitary state would have to countenance in attempting to devolve authority to the regions. Correspondingly, this dilemma could be discussed taking the Sri Lankan experience as a case in point.

A historical perspective clearly emphasizes the fact that since early 1920s various attempts have been made to introduce Regional and Provincial Councils to the country with the intention of devolving power to regional centres. For example, during the period between 1928 and 1948 four attempts were made to establish Provincial Councils in the country. The Select Committee on Local Government appointed in 1926, the Donoughmore Commission of 1927, the Executive Committee of Local Administration in 1940 and S. W. R. D. Bandaranaike in 1947 made several attempts to achieve the aim of devolving power by establishing Provincial or

Regional Councils. However, it should be noted that none of these recommendations was in fact implemented. Moreover, in 1957 and in 1965 two attempts were made by the SLFP and the UNP respectively to devolve authority to the regions. These attempts vividly demonstrate the fact that there are possibilities as well as problems and conflicts in a unitary state in devolving authority to regional centres. To support this argument we would first be drawing our attention to the concept of devolution of power. The salient features in unitary and federal states with regard to devolution of power would be discussed in Part II. In Part III, the workable feasibilities in devolving power to regions and the divergent problems and conflicts a unitary state would be confronted with, in taking a decision in devolving authority to regional centres of the island would be analyzed.

II. Devolution of Power

The Concise Oxford Dictionary of Current English defines the word "devolution", as "deputing or delegation of work or power to local or regional administration.[2] Accordingly it would be said that the power is delegated from the central authority to territorial units of self-rule,[3] and this brings us to the argument that devolution of power implies that local government units would have the necessary authority to function not as units of the central government but as independent councils situated at the regional centres. Thus in a theoretical or a legal perspective, devolution of power to local authorities could be specified in the following manner. Firstly, it is apparent that the government should demarcate the boundaries of the local authorities of the country. Secondly, the local authorities should be given the status of corporations and should be granted the power to secure their resources to perform the functions. Thirdly, the functions of the local authorities should be specified in detail and finally there should be very little or no control over the local councils by the central government.

This concept thus implies, as Sherwood[4] and Rondinelli[5] have argued:

> Local Governments discharge obligations as part of a rational political system and not as dependent elements of a central hierarchy. The concept of devolution is non-hierarchical in the sense that it posits a number of governments having a coordinate system relationship with one another on an independent, reciprocating basis[6]

Discussing the different methods of devolving authority to regional centres Ivo Duchacek points out four distinguishable categories.[7] Out of these four systems, the first two describe the situations where agencies and officials are appointed by the centre.[8] The first category has appointed officials to run territorial subdivisions. They will have to look into local problems and to solve them and report on the challenging ones back to the centre.[9] The second system, consists of officials appointed by the central authority. The appointments are confirmed by elections.[10] The third category has a combination of centrally appointed officials in charge of local government with locally elected councils. As Ivo Duchacek points out:

> although the centrally appointed official is responsible to the centre, the locally elected bodies are responsible and accountable to their local electorates.[11]

This points out that in all these three systems the most central feature is the official element in carrying out regional duties. Accordingly it could be argued that, although these methods are used for delegating power to regional centres, these should more or less be treated as methods of decentralizing the administration. This argument could be demonstrated by taking the structural organization and the role of the District Minister in Development Councils in Sri Lanka.

The Development Councils were introduced in 1981, under the Development Councils Act No. 35 of 1980. However, the President appointed District Ministers for each district in the island on the 5th October 1978, as a preliminary step for the establishment of the Development Councils in the island. It should be said that the District Minister is the key figure in the Development Council system as his power includes the formulation of the District Development Plan, maintaining and evaluating its implementation, identifying bottle-necks, advising on corrective action and directly supervising interdepartmental activities within the district.[12] Moreover, the District Minister is involved with the Executive Committee of the Development Council. Under the Development Councils Act provision was made for an Executive Committee for the Council. According to the Act:

There shall be an Executive Committee of a Development Council consisting of the District Minister, the Chairman of the Development Council and not more than two other members of the Council appointed by the District Minister in consultation with the Chairman.[13]

The Act further provides:

The District Minister shall be the head of the Executive Committee and shall in consultation with the Chairman and with the concurrence of the President determine the nature of the functions to be assigned to each member of the Executive Committee.[14]

Although structurally this was a good arrangement, a few prominent features of the District Ministry system confirm the argument that the District Minister is more or less a representative of the government than a representative of the people of the district. The District Ministers were appointed by the President.[15] Moreover, there is no necessity for the District Minister to work in the same district in which he was elected as a Member of Parliament.[16] For instance during the period 1981 to 1982 the District Minister of the Anuradhapura Development Council was the Member of Parliament of a constituency of the Kurunegala district.

However, the fourth category, excludes totally any form of central appointment in connection with provincial or local autonomy.[17] Instead it prescribes an electoral basis for all subnational and national levels of Government.[18] Duchacek points out Japan as an example which comes under this category. According to Duchacek:

Its contribution proclaims the principle that there shall be territorial autonomy and that local officials must be elected by direct popular vote, although before World War II they used to be appointed by Tokyo, like the prefects in France. The constitution further stipulates (Article 93) that local authorities have the right to manage their property affairs and administration, and prescribes (Article 93) that 'local public entities.. establish assemblies as their deliberative organs'.[19]

This provides that there are possibilities in devolving authority to regional centres without the interference of the central government over the regional administration. However, before we analyze the possibilities in devolving power without any central government involvement at the regional level, it is necessary to identify the salient features of a unitary constitution and the differences between unitary and federal countries. This is essential as a nation would have to devolve the power to region within the limits laid down by its constitution.

III. Unitary and Federal Constitutions: The Salient Features

The simplest method in defining and examining the "unitary" constitution would be to compare this with a "federal" constitution. In constitutional law the term unitary is used in contradistinction to the term federal which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the centre.[20] Discussing the nature of unitary and federal constitutions, C. F. Strong was of the opinion that a unitary state is a place where "the habitual exercise of supreme legislative authority is carried out by one central power", while a federal state is "a political formation intended to reconcile national unity and power with the maintenance of state rights".[21] Accordingly, a unitary system differs from a federal system in the way the division of power is made. In a unitary system the central government defines and by hypothesis may redefine, the powers of local government.[22]

A country under a unitary constitution is one unit without any division and the regional administration is carried out under the central authority. For example, in a unitary state there is no division of sovereign legislative power. In a federal state on the other hand, the legislative authority is divided between a central or federal power and also among small units such as the Cantons in Switzerland. Accordingly the power of local government in a federal state derives from a constitution that is not subject to change by the central government. In other terms, the powers of state government in a federal state are not under the legislative body of the central government.[23]

Hence, the essence of a unitary state is that its sovereignty is undivided, which indicates that under a unitary constitution there is no other law-making body other than the central one. Discussing this factor, it has been stated:

> Various forms of state power can be delegated with supervisory control being retained by the centre, as in the case of delegated legislation. A Town Council or a Corporation of a Government Department may have delegated legislative power, but this entitles it only to exact subordinate legislation. This subordinate legislation must have the express or implied assent of the centre if it is to have a legally binding character. The delegate can never legislate completely in its own right[24]

This provides an example as to the limits of unitary state in devolving power to regional centres. It emphasizes the fact that although the Central Government could devolve authority to the regions, the supervisory power over "reserved" subjects would remain with the central government. This discussion implies some of the characteristic features of a unitary state.[25] Firstly, if the central government which functions under a unitary state feels that it would be convenient for them to delegate power to minor bodies such as a local authority, it is doing so not because the constitution has authorized that act, but because as a government it feels that it could carry out such an act in its own authority.[26]

Secondly, in a unitary state although there could be bodies which are involved in subsidiary law-making, the central authority would always have the discretion of abolishing them. That means in simple terms that if there are such bodies in a unitary state they would have to function essentially under the authority of the central government. However, such a body or a council would not be regarded as a subsidiary sovereign body as the ultimate authority has at the centre.[27] Thirdly, and finally, it is coherent that there is no possibility for the central government to have a conflict with a local authority in which the central government has no legal power to cope with.[29] This brings us to the essential qualities of a unitary state:

1. the supremacy of the central parliament,

2. the absence of subsidiary sovereign bodies.

With regard to the supremacy of the central parliament, it could be said that there are certain types of acts which the constitution would not allow the central legislature to enact, except under special conditions. If we compare and contrast this factor with a federal state it is clearly evident that a federal constitution would point out the means of changing the constitutions as well as give an indication as to the power of the federal authorities. Accordingly, in a unitary state there would only be one constitution whereas in a federal state there would be two, that is one constitution for the federal government and the other for the state government. While in a unitary state the constitution would be absolutely supreme, the federal state would have different units with powers to carry out various sorts of functions.

With regard to this second point, which deals with the absence of subsidiary sovereign bodies, a few important points could be listed out. Firstly, there is a distinction between subsidiary law-making bodies and subsidiary sovereign bodies. The distinction between the powers granted to a local authority in a unitary state and the authority allocated to state authorities in a federal state such as in the case of United States of America, demonstrates the differences between these two categories. Discussing this factor, Strong points out:

> This distinction is realized as soon as we think of the state authority in a federation in relation to the federal authority rather than in relation to the constitution. The state authority has rights which the federal authority is incapable of enhancing or diminishing. The only power that can do that, is the constitution itself when it undergoes, amendment in that direction, a process which can be achieved only by consulting the desires of the various states forming the federation[29]

Accordingly, a state authority of the United States of America, has absolute power in certain directions and this is secured by its constitution. The state authority cannot be deprived of these powers until the constitution is changed and for this purpose as

pointed out earlier the consultation of the state authorities would be essential. On the other hand, the Municipal Council or the Development Council of Colombo, has powers granted to it, not by the constitution of Sri Lanka, but, by an act of our Parliament, namely the Municipal Councils Ordinance or the Development Councils Act, respectively. Hence, at any time, the Parliament could deprive of any act or all of such powers granted to the councils by its own act. Moreover, although the United States of America could under no circumstances abolish one of its state authorities, the Parliament of Sri Lanka could abolish the Colombo Municipal Council or the Colombo Development Council without reference to any superior force.

Correspondingly, in simple terms, in a federal state there are state authorities beneath the central authority and the centre has no power to interfere with these state governments other than in the way laid down in the constitution. On the other hand in a unitary state the central government would be the supreme authority and it would have the power to create local government authorities as well as to abolish them, according to the will of the central government.

It is thus evident that the indispensable quality of a federal state is the distribution of powers of government between the federal authority and federalizing units. However, the types of federal states vary from place to place and time to time. The most interesting feature however to note is that when it comes to devolving power there will be no restrictions under a federal constitution and also that it is not impossible to devolve authority to regions under a unitary constitution. Especially, if the devolution of power is carried out mainly as a solution to a prevailing ethnic rift in a country which seeks unity, federalism would not be the desired answer. B. C. Smith has pointed out, three important factors in this respect.[30]

Firstly, under a federal constitution, there are powers which are reserved for the Central Government and they are so entrusted that only very little are left exclusively to the republics.[31] "India is another federation" says Smith, "in which such extensive powers are confined on the national government that little of importance

is left to the constituent parts"[32] Secondly, according to the way in which federations have evolved it has made the formal definitions in terms of division of power, relatively useless.[33] Thirdly, according to Smith, "it is possible for a unitary state to devolve substantial power to provincial governments so that a quasi-federal arrangement exists."[34]

This brings us to the preliminary stages of our conclusion that it is feasible to devolve power to regional centres under a unitary constitution.

IV. Devolution of Power in a Unitary State: the Possibilities

Devolving power to regional centres in a unitary state is feasible, if certain conditions are fulfilled. The principal requirement in this respect is that the regional councils should be created and could be abolished at the will of the central government. As discussed earlier in a unitary state the sovereignty is undivided and there is no other law-making body other than the central one. Accordingly, a unitary state could provide for a combination of territorial autonomy with central supervision,[35] and these regional units with such significant territorial autonomy may be viewed constitutionally as impermanent and destructible by a decision of the central government.[36]

The People's Republic of China could be pointed out as one such example, where a unitary state has devolved power to regional centres under central supervision. The constitution of the Chinese Republic, stresses the unitary nature of the country which provides different levels of broad regional-ethnic autonomy. According to Article 3 of the Chinese Constitution:

> The People's Republic of China is a unitary multinational state.. Regional Autonomy applies in areas where a minority nationality live in a compact community. All the national autonomous areas are inseparable parts of the People's Republic of China.

The country is divided into provinces, autonomous regions, and cities directly under the central authority. Provinces and autonomous regions are divided into autonomous sub regions, counties, auto-

nomous counties and cities. Counties and autonomous counties are divided into districts, nationality districts, and towns while autonomous sub regions are divided into counties, autonomous counties and cities.[37]

In all these units, people's congresses and people's councils, which are the legislative assemblies and executive organs respectively, represent local authorities. The Chinese Constitution has made provision that the organs of self government exercise autonomy within the limits prescribed by the constitution.[38] This includes the administration of finances in the region and organizing the public security forces etc.[39] However, it is interesting to note Article 72 of the Chinese Constitution which pronounces:

> The higher organs of the state should fully safeguard the exercise of autonomy by organs of self-government of autonomous regions.... and autonomous counties....[40]

Discussing the Chinese experience Duchacek is of the opinion that the constitutional provisions are quite elaborate and detailed. In his words:

> The constitutional provisions for territorial autonomy in unitary China are as may be seen, quite elaborate and detailed. The Nationalities Committee somewhat reminds us of the Scottish Committee in England, and a foreign observer could also reach the conclusion that the Chinese constitution contains very significant federal features. Of course, this would be denied by official Chinese spokesmen. The Chairman of the Nationalities Committee, emphasized that China was 'not a federation of republics but a unitary republic in which all ethnic groups have equal standing'[41]

Another prominent feature with regard to the possibilities in devolving authority to regional centres in a unitary state is the ability to carry out certain fundamental and structural changes without any legislative authority. The introduction of the English Local Government Act in 1972 could be pointed out as a fine example which illustrates this possibility. According to B.C. Smith:

> The Local Government Act of 1972 completely altered the system of local government in England, Scotland and Wales. This fundamental and far-reaching change required no special legislative procedure. A simple majority in parliament, as with all other legislation, was all that was required to effect this constitutional change[42]

The introduction of the Development Councils in 1981[43] in Sri Lanka could be put forward as a more recent example which illustrates this possibility in changing certain fundamental and structural changes within the constitutional framework, without any legislative procedure. Prior to 1980, the system of local government in Sri Lanka consisted of four councils, namely, the Municipal, Urban, Town and Village Councils which functioned under the direct supervisory authority of the Ministry of Local Government. Moreover, this system comprised of a single tier scheme which has no inter-relationship within the Councils. In 1980, with the enactment of the Development Councils Act and the subsequent amendments made to it in 1981,[44] a three-tier structure was introduced to the Sri Lankan local government system. For this fundamental structural change no special procedures were required.

One may agree, at this point that the recently introduced Provincial Councils could be taken as an outstanding example as to the possibility in introducing fundamental structural changes to a unitary constitution. However, a detailed examination of the provisions contained in the thirteenth amendment to the Constitution reveal that certain arrangements made under the amendment to create Provincial Councils are structurally in conflict with the provisions under our Constitution. Justice R. S. Wanasundera, in his minority dissenting judgment re the Thirteenth Amendment to the Constitution and the Provincial Act, rightly was of the opinion that:

> It would be seen from the foregoing that the Thirteenth Amendment seeks to create an arrangement which is structurally in conflict with the structure of the Constitution and with its provision both express and implied. Further the provisions of the Thirteenth Amendment also contravene both the express and implied provisions of the Constitution[45]

It should be noted that, in a unitary state, if there is a conflict with the provisions of the Constitution and the relevant Bill for the suggested structural change, then it is necessary at least to obtain the approval of the people at a referendum. Accordingly, a fundamental change would not be feasible in a unitary state if the people do not approve the proposed change at a referendum which indicates that there would be problems and conflicts in devolving power to regional centres.

V. Regional Devolution of Power: Problems and Conflicts

A closer examination of the possibilities in devolving power to regional centres clearly reveals the fact that a unitary state would have to face numerous types of problems and conflicts in this respect. The attempts made by the government in Sri Lanka, since the 1920's and the various difficulties the government had to encounter in these attempts could be pointed out as a fine example to demonstrate the different types of problems and conflicts a unitary state would have to face in devolving authority. An analysis of these problems and conflicts reveal that generally these could be categorised into two major groups, viz:

i. political and social problems,
ii. constitutional conflicts.

i. Political and Social Problems

According to the Sri Lankan experience, the most significant feature seen in the attempts to devolve power to the regions was that the introduction of Regional or Provincial Councils was mostly based on political agreements between the Sinhalese and Tamil political parties.

Sri Lanka, with its long-standing traditions, is a multi-racial and multi-religious nation. It has been inhabited by the Sinhalese, Tamils, Moors, Malays and Burghers for number of centuries since the sixth century B.C. According to the ancient chronological evidence, it is said that Prince Vijaya arrived in sixth century B.C. and that this was the beginning of the Sinhalese community in the island.[46] Of minority groups residing in the island, the Tamils are the majority, numbering 1,871,531,[47] a percentage of 12.6%,[48] out of a total population of 14,850,001.[49]

Out of the total population of Tamils only 792,246 lived in Jaffna in 1981[50], the capital of the Northern peninsula of the country. The others live in the areas of Mannar, Vavuniya and Mullaitivu of the Northern Province, the Eastern Province, Colombo, and even in other parts of the island among the Sinhalese people. In particular the Indian Tamils reside in the hill country at the centre of the island, where most of them work in tea estates.

With the passage of time the rift between the Sinhala majority and the Tamil minority was increasing rapidly. Discussing the ethnic conflict in Sri Lanka, C. R. de Silva said:

> ....These two communities have had distinet languages and cultures for a long period. The impact of colonial rule, however, had significant effects on both groups. Threatened by Westernisation both groups began to emphasise the distinctiveness of their own cultural heritage, inevitably emphasising thereby the elements that separated one from the other. Rivalry for lucrative positions in state service and the professions as well as the workings of an adversarial political system as it developed in the last years of British colonial rule heightened tensions between the two groups.[51]

The Sinhalese population of just over eleven million is the only such community in Asia. The language spoken by the Sinhalese community is limited to Sri Lanka and is different from the Tamil language spoken by the Tamils. In India itself there are over fifty million inhabitants who speak the Tamil language and who have connections with the Tamils in Sri Lanka.

An analysis of the problems the government had to face since the mid 1950s, reveal the social and political complexities a government would have to countenance in devolving authority to regions. According to the Sri Lankan experience it is interesting to note that the ethnic diversity of the country began to dominate the politics in the island while the political compromises put forward for ethnic reconciliations were met with storms of protest.

Although a case was set out for a federal structure of government in the mid 1920's by S. W. R. D. Bandaranaike, no support was received for this proposal from the Tamil minority in the island.[52] However, by 1956 autonomy for the Northern and Eastern Provinces under a federal constitution was one of the major demands of the Tamils. In addition to this, their demands included, parity of status for the Sinhalese and Tamil languages and a satisfactory settlement for the Indian Tamil plantation workers of the island.[53] In seeking a settlement to the growing ethnic conflict S. W. R. D. Bandaranaike entered into a compromise agreement with S. J. V. Chelvanayagam, the leader of the Federal Party in 1957. Discussing this event, A. J. Wilson pointed out:

> Under the pact, the Prime Minister agreed to have Tamil declared an additional official language, without prejudice to Sinhalese in Ceylon living in Tamil majority Northern and Eastern Provinces and to a scheme of devolving administrative power to Regional Councils. The latter was a concession to the Federal Party's demand for federalism.[54]

The Regional Councils were to have powers over education, agriculture and land settement. Also it was agreed to restrict settlement of Sinhalese colonists in irrigation schemes in the Northern and Eastern Provinces to enable the Tamils to maintain the majority position in those areas.[55] However, it is interesting to note the outcome of these proposals. As soon as the terms of these negotiations were made public, there were storms of protest[56] and sections of Sinhalese including the influential Buddhist monks, declared the agreement to be a betrayal of Sinhalese interests.[57] Discussing the aftermath of the compromise, K. M. de Silva points out:

> Confronted with mounting opposition to this compromise, the Prime Minister played for time, but the pressures against it were too strong for him to resist. Led by a group of *Bhikkus* who performed *satyagraha* on the lawn of his private residence in Colombo, the extremists in his own party compelled the Prime Minister to abrogate the pact.[58]

It could be said that, compromises to settle the ethnic conflicts and race riots generated over such tensions became a common feature in Sri Lankan political and social context. K. M. de Silva points out very lucidly, the simple reason for such reactions by the Sinhala majority:

> The Sinhalese viewed the Tamils' demand for a federal Constitution as nothing less than the thin end of the wedge of a separatist movement. The fact is that the Sinhalese, although an overwhelming majority of the population of the island, nevertheless have a minority complex *vis-a-vis* the Tamils. They feel encircled by the more than 50 million Tamil-speaking people who inhabit the present day Tamil Nadu and Sri Lanka. Within Sri Lanka the Sinhalese outnumber the Tamils by more than three to one; but they in turn are outnumbered by nearly six to one by the Tamil-speaking people of South Asia.[59]

It is thus coherent that in a unitary state like in Sri Lanka, the social background would be an important factor that could bring out problems in devolving power to regional centres. However, more important would be the constitutional conflicts in this respect, to which we now turn.

ii. Constitutional Conflicts

As pointed out earlier, in a unitary state, if the government decides to devolve power to the regional centres, the necessary amendments would have to be carried out within the framework of the unitary nature of the constitution. Accordingly, constitutional amendment would be permissible for a readjustment or rearrangement of powers within the framework of a unitary constitution.[60] However, through a constitutional amendment, a government of a unitary state cannot alter the principles which lie at the foundation of its institutional pattern.[61] For instance, according to the Sri Lankan Constitution, sovereignty of the country is in the people and is inalienable.[62] Thus, as pointed out earlier, the legislature of the whole country is the supreme law-making body in the island and this emphasises the fact that the central Parliament is supreme and that there are no subsidiary sovereign bodies.

Accordingly, if the devolution of power to regions in a unitary state is not carried out within the framework of the Constitution there would be constitutional conflicts. For instance, in Sri Lanka, the Parliament has the supreme legislative authority and if the Government decides to create Regional Councils which would have powers to carry out various functions under the supervision of the central authority, this introduction would create no constitutional conflicts. However, on the other hand, if the Government decides to create subsidiary sovereign bodies with supreme legislative authority, constitutional conflicts could arise as this would not fit into the framework of our Constitution, which is unitary in its nature.

In a preceeding paragraph, it was pointed out that certain provisions in the 13th Amendment to the Constitution are in conflict with the provisions under our Constitution. Accordingly, it is appropriate at this juncture to examine such conflicts to assess the extent of erosion, if any, of the unitary character of the country.

The Thirteenth Amendment to the Constitution provides for the establishment of a Provincial Council for each province.[63] The general structure of the Provincial Councils could be summarised as follows: The membership of the Provincial Council is determined under the Provincial Council Act, having regard to the area and population of the province.[64] A Governor will be appointed by the President for each province and shall hold office during the pleasure of the President.[65] Moreover, the Governor is empowered to dissolve the Provincial Council.[65] A Board of Ministers consisting of the Chief Minister and not more than four other Ministers will assist the Governor[67] of a Province in the exercise of his functions.

The Provincial Councils are empowered to enact statutes. According to Article 154G (1) :

> Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter set out in List I of the Ninth Schedule.

A Provincial Council has no power to make statutes on any matter set out in List II, known as the Reserved List.[68] Parliament has the power to enact laws with respect to any matter under List III, known as the Concurrent list after such consultation with all Provincial Councils.[69]

As discussed earlier, in a unitary state although the power could be devolved to the regional centres, there cannot be any subsidiary sovereign bodies with law-making powers. Accordingly, if the power is devolved to the regional centres, under a unitary constitution and the regional councils are empowered to enact primary legislation, the establishment of such councils, has contravened the unitary nature of the constitution. On the other hand a regional council established in a unitary state for the purpose of devolving power with subordinate legislative authority would be within the framework of a unitary constitution.

If it is so, could we regard the statutes made by Provincial Councils, as subordinate legislation which fits into the framework of our Constitution which is unitary in its nature? This question is answered in the negative and a few points would be put forward to support this argument.

Firstly, mention should be made about the two provisions under Article 154G 2 and 3. The first provision[70] states that a Bill for the amendment or repeal of the 13th Amendment or the Ninth Schedule cannot become law unless it is referred by the President before it is placed on the order paper of the Parliament to every Provincial Council and that all the Provincial Councils agree to the amendment or the repeal. Article 154G 3 pronounces that no Bill in respect of any matter under the Provincial Council List will become law, unless it has been referred by the President and that it is placed in the order paper of the Parliament. If any Provincial Council disagrees, it will have to be passed by a two-thirds majority and approved by the people at a referendum. This emphasises quite clearly that, with regard to the enactment of statutes, the Provincial Councils are on par with the Parliment and that the Provincial Councils come within the category of subsidiary Sovereign bodies. This demonstrates the division of legislative power.

Secondly, Article 154G (8) clearly points out that, when there is a conflict between statutes of a Provincial Council and an existing law with regard to a matter on the Provincial Council list, the existing law shall remain suspended and be inoperative within that province, so long only as that statute is in force.

The result of these provisions, as Justice R. S. Wanasundera pointed out in his dissenting judgment is an abdication or an alienation of the country's legislative power.[71] Moreover, as pointed out earlier, this leads to a further argument that the provisions of the 13th Amendment is contravening Article 2 of the 1978 Constitution. Article 2 precisely pronounces that Sri Lanka is a unitary state and in the present circumstances one could argue that the Provincial Councils, which are empowered to make statutes which are on par with laws made by the Parliament and to enact statutes that can suspend and render inoperative laws made by Parliament[72], have made the country federal in its nature. This illustrates the fact that the devolution of power has not been carried out within the framework of the Constitution as the creation of Provincial Councils with above mentioned powers has clearly contravened Article 2 of the Constitution.

VI. Concluding Remarks

This analysis demonstrates the fact that there are possibilities as well as problems and conflicts in devolving authority to regional centres in a unitary state. However, as discussed, amendments could be made within the framework of the Constitution to make provision to empower the regional centres to carry out the central government's functions under its supervision. Smith's analysis on the basis of the relationship between England and Northern Ireland, strengthens this argument:

> Even when special provision is made for one part of the country, as was the case with devolution to Northern Ireland, there is never any doubt as to the unitary nature of the arrangements. Northern Ireland enjoyed more autonomy than England and Wales, but its constitutional status was clearly a case of devolution since political authority had been delegated by the United Kingdom Parliament to a legislative assembly which sat in Belfast.

> The Government of Ireland Act, 1920, was the province's 'Constitution' and it clearly stated that the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Ireland and every part thereof. The United Kingdom Parliament could pass laws on any subject in the province. The two Governments were not co-ordinate. The UK Parliament could change the powers devolved to Stormont and could disallow its laws. The Government at Stormont was a dependent Government.[73]

Moreover, as things stood in England, this province was represented in Westminster. The members were used to sit in the lower house.[74] The devolution was thus carried out by reserving certain powers at the centre. For instance, subjects such as defence, foreign relations, external trade, communication and taxation were handled only by the central government. For social services and agriculture, Northern Ireland received transferred revenue from the central government.[75]

This clarifies the argument that the power could be devolved to regions in a unitary state within its constitutional framework. The constitution could be faced with various changes, without losing its unitary character and these changes cannot be classified as unconstitutional amendments.

However, it should be pointed out that, when there are constitutional conflicts in devolving authority to regions, certain conflicts could be sorted out through a referendum. A referendum would not only 'correct the faults of legislature which may act corruptly or in defiance of their mandate'[76], but also will 'secure that no law which is opposed to popular feeling shall be passed.[77]

However, a constitution of a country is something fundamental and although there are possibilities as well as problems and conflicts when making amendments, it should only be changed after great deliberation. If the constitution becomes a mass of laws inserted by popular drafting and voting there is no doubt that it will become a document with unworkable provisions. Perhaps, it would be better for a unitary state to obtain a fresh mandate to amend the constitution so that the power could be devolved to the regions of the country.

Notes

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10 ENJOYMENT OF FUNDAMENTAL RIGHTS — LIMITATIONS, PROBLEMS AND EXPERIENCES IN SRI LANKA SINCE 1978

Zibly Aziz

The Constitution and Fundamental Rights.

Before an examination of the limitations, problems and experiences relating to the enjoyment of fundamental rights in Sri Lanka is made, it would be necessary to ascertain briefly the content of these rights as found in our Constitution. Chapter III of the Constitution deals with fundamental rights. Shortly stated, these rights are as follows :

01. Freedom of thought, conscience and religion; (Article 10)
02. Freedom from torture, cruel, inhuman and degrading treatment or punishment; (Article)
03. Equality before the law and equal protection of the law, (principle of non-discrimination); (Article 12)
04. Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation; (Article 13)
05. The freedom of speech and expression; (Article 14)(1)(a)
06. The freedom of peaceful assembly; (Article 14)(1)(b)
07. Freedom of association; (Article 14)(1)(c)
08. The freedom to form and join a trade union; (Article 14(1)(d)
09. Freedom to practise one's religion; (Article 14)(1)(e)
10. The freedom to one's culture and language; (Article 14 (1)(f)
11. The freedom of occupation; (Article 14)(1)(g)
12. The freedom of movement; (Article 14)(1)(h)
13. Freedom to return to Sri Lanka; (Article 14)(1)(i)

The Constitution, naturally, does not attempt to describe the full scope and ambit of these fundamental freedoms. This task quite correctly is left to the courts and we shall see below (to some extent) how the courts have set about it. The Constitution nevertheless proceeds to place certain express limitations which in some respects reflect the limitations which have ordinarily being placed by courts in other jurisdictions who have had to rule on matters relating to fundamental rights. Many of these restrictions are contained in Article 15 of the Constitution. Article 15(7) sets out the basic rule that the exercise and operation of the fundamental rights recognized by Article 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedom of others, or of meeting the just requirements of the general welfare of a democratic society.

At this stage it is important to note that two vital freedoms—namely freedom of thought, conscience and religion and freedom from torture or cruel, inhuman and degrading treatment or punishment—is not subjected to any limitation under the Constitution. Furthermore these two fundamental freedoms are "entrenched" in the Constitution and thus any amendment or legislation inconsistent with these freedoms as enshrined in these articles require a referendum (Article 83).

Article 15(1) contains certain other limitations which are made in respect of individual fundamental rights. Thus the freedom of speech is subjected to such restriction as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. Similarly the freedom of assembly is subjected to an offence. Similarly the freedom of assembly is subjected to such restrictions as are in the interests of racial and religious harmony. Freedom of association is subjected to the interests of racial and religious harmony or national economy; and the freedom of occupation is subjected to the interests of national economy and the requirements which may be imposed regarding qualifications or licences to practise certain trades, etc.

Article 15(8) states an obvious limitation in that fundamental rights of the members of the armed forces are subjected to such restrictions as may be prescribed in the interests of the proper discharge of their duties and the maintenance of discipline among them.

The above then are the limitations which are expressly placed by the Constitution on fundamental rights. The Constitution also proceeds to make express provisions relating to the manner of enforcement of fundamental rights, which it has been argued, has the effect of placing certain restrictions of a substantial nature on the enforcement of these rights. Article 17 of the Constitution provides that every person shall be entitled to apply to the Supreme Court as provided by Article 126, in respect of an infringement or imminent infringement by executive or administrative action of a fundamental right to which such person is entitled under the provisions of Chapter III. Straight away one may note the reference to executive or administrative action, a term which has not been interpreted in a Constitution. Article 126 also continues on the same lines when it refers to the "sole and exclusive" jurisdiction which the Supreme Court possesses to hear and determine any question relating to the infringement or imminent infringement of a fundamental right. This Article whilst reaffirming that the infringement should be by executive or administrative action brings into focus another question, namely, whether the "sole and exclusive" jurisdiction of the Supreme Court precludes other courts from dealing with questions affecting fundamental rights. Article 126 proceeds to impose the requirement that the person aggrieved should apply to the Supreme Court within one month of the infringement or imminent infringement of his fundamental rights.

Some of these matters will be discussed below. It should however be especially noted at this stage that Article 126 which places all these limitations proceeds to confer on the Supreme Court the widest possible power to make orders relating to fundamental rights when it states that the Supreme Court "shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances". Though this provision has not been subject to scrutiny by the Court one cannot help but state that the attitude of the Court appears to be that it will not hesitate to use

this power to make any order which it thinks will be adequate to rectify or compensate a breach of a fundamental right. This may even include giving orders affecting administrative changes which may even override orders which are made by such bodies as the Public Service Commission, apart from making awards of compensatory or punitive damages.

I shall now consider (though in a very limited manner):

(a) whether any limitations have been placed on the exercise of such rights by the Court, in the process of interpreting Article 15 or otherwise;

(b) whether the limitations which have been placed by the provisions in the Constitution which relates to the enforcement of fundamental rights (procedural limitations),

(c) certain other problems which have been encountered in the enforcement of fundamental rights.

(A) Courts and Limitations

(a) Freedom from Torture etc. (Article 11)

Our courts have on a few occasions dealt with cases of alleged torture but there has been no finding of torture in any of the decisions of the court relating to torture.

It is appropriate at this stage to refer to the dissenting view of Justice Sharvananda J (as he was then) in Velmurugu v the Attorney-General (S. C. Application No. 74/81—at page 180 FRD (1)) where he refers to the difficulties faced by litigants who allege that public officers had inflicted or instigated acts of torture. In the course of his judgement he cited the European Commission of Human Rights which said:

> There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority.

Thirdly, where allegations of torture or ill-treatment are made, the authorities whether the Police or Armed Services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inqniries to be made into facts which might show that the alle gations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves..... few external marks. (Vide *Journal of Universal Human Rights.* Vol. 1 No. 4 Oct.—Dec. 1979 at page 42).

Justice Sharvananda said that it is useful to bear the above comment in mind in investigating allegations of torture by the Police or Army.

(b) Equality before the Law and Equal Protection of the Law (Article 12(1).

The first case filed in the Supreme Court relating to fundamental rights, Palihawadana vs. Attorney-General ("The Job Bank case") (I.F.R.D.—Page 1) discussed the scope of this fundamental right. Though the Court dismissed the application (on what some regard as technical grounds) there was nevertheless a discussion of this fundamental right. Sharvananda J (as he was then), made the following comment which brings out the rule of "classification" which is implied in this right. At page 6, he states as follows:

> Though Article 12 prescribes equality before the law—and equal protection of the law, it has to be recognised that equality in any literal or abstract sense is not attainable. Its strict enforcement will, in fact, bring about the very situation it seeks to avoid. The fundamental fact is all men are not alike. Some by the mere accident of birth, inherit riches; others are born to poverty. Some acquire skills and qualifications while others are untrained. There are differences in social standing and economic status. It is, therefore, impossible to apply rules of abstract equality to conditions

which predicate inequality from the start. Yet the words have meaning. What is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of the difference, such as age, sex, education and so on and so forth as may be found amongst people in general. Indeed, the object of the Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between citizen A and citizen B who answer the same description. The differences which may be obtained between them are of no relevance for the purpose of applying a particular law or operating an administrative scheme. Yet reasonable classification is permissible and a certain measure of inequality permitted. The State is permitted to make unequal laws or take unequal administrative action if it is dealing with individuals or groups whose circumstances and situations are different.

What is prohibited is class legislation; but reasonable classification is not forbidden. The principle underlying the guarantee in Article 12 is not that the same rules of law should be applicable to all persons within the Democratic Socialist Republic of Sri Lanka, or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if, as regards the subject matter of the legislation or administration, their position is substantially the same. As there is no infringement of the equal protection rule, if the law deals alike with all members of a certain class, the State had the undoubted right of classifying persons and placing those who are substantially similar under the same rule of law, while applying different rules to persons differently situated. The classification must not be arbitrary but should be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained.

It must appear that not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification (Gulf Colorado, etc. Co. vs. Ellis (1987) 165 U.S. 150).

In Roberts vs Ratnayake (1986 2 Sr. L. R. 36) which was an application brought by a foreigner against the Mayor of Kandy relating to a tenancy with the Municipal Council, Kandy, the Court pointed out that for Article 12 to be invoked the petitioner must show that she has been treated differently from other persons similarly circumstanced without any rational basis and that such differential treatment was unjustifiable. In this case the Court adopting the law laid down in a series of Indian cases held that Article 12 cannot be availed of where an act is done by virtue of or under the terms of a contract, in which event the rights and obligations of the parties fell to be determined by the ordinary law of contract. Article 12 could have been invoked, on the other hand if the discrimination had occurred at the "threshold" stage of granting or entering into the contract.

In Dissanayake vs Sri Jayawardenapura University (1986 2 Sri L. R. 254), the Court stated that Article 14 (1)(a) does not give a carte blanc to University students to violate the rights of the Vice-Chancellor by publishing baseless allegations respecting his administration or by defaming him. The University was entitled to take disciplinary action against a student who has done this.

(c) Freedom from Arbitrary Arrest etc. (Article 13)

This Article deals with rights given to accused persons. The Supreme Court has in several cases dealt with the rights of accused persons relating to arrest and detention. One of the more important cases is Kumaranatunge vs Samarasinghe (LL. F. R. D. 347) which was concerned with a detention order regulation made in terms of the Public Security Ordinance which provided for such detention to prevent a person acting in a manner prejudicial to national security or public order. The Court stated that preventive detention cannot be regarded as punishment and can be used

to restrict the fundamental rights guaranteed by Article 13(1) and (2). It should be noted at this stage that the Sri Lanka Constitution does not have a clause similar to the "due process" clause as found in the Constitution of the United States of America. Article 13 of the Sri Lanka Constitution only prevents the executive from taking action in a manner inconsistent with "procedure established by law". Thus if there is a procedure established by law and if the respondent has acted in accordance with such procedure, there could be no violation of any fundamental right. The Constitution appears to protect only action relating to criminal procedure, such as arbitrary arrest etc., and the Court in Sri Lanka does not have the power to strike down a procedure on grounds such as those adopted by Courts in the United States acting under the "due process" clause.

In Mariadas Raj vs The Attorney-General (LL. F.R.D. 397) the Supreme Court discussed the right of an accused person to be informed of the reason for his arrest. The Court stated that the purpose of this rule is to afford the earliest opportunity to an arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresti ng official and disabuse his mind of the suspicion which actuated the arrest. The Court was not willing to treat this human right as a mere irregularity which could be disregarded without any serious consequences. Citing Viscount Simon in Leachinsky (1947) (A.C. 573), where he said that:

> The matter is one of substance and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.

The Court concluded that there was a violation and awarded damages.

(d) Freedom of Speech

The Court in Malalgoda vs Attorney-General (II F.R.D.— page 283) stated that this right, however important it be, was subject to such restrictions as laid down in the Constitution. Upon a comparison of the constitutional provisions in India and Sri Lanka, Soza J. stated that the limitations to the right of freedom of speech in Sri Lanka are prescribed in more absolute terms than in India. He stated that in Sri Lanka the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question, unlike in America or India. This according to Soza J. is not to say of course, that the Court should not be reasonable in applying the law imposing restrictions. The Court in this case was not willing to accept the rule that no "prior restraints" can be imposed upon publications. Unlike the first Amendment to the Constitution of the United States, which enacted an absolute provision leaving it to the Courts to evolve restrictions to this right, in India and Sri Lanka the restrictions were spelt out and the Court had only to apply them. The Court in Malalgoda's case was inclined to accept the view expressed in the dissent by Jackson J. of the United States Supreme Court in Terminiello vs Chicago (1949-337 U.S. 1) where he pointed out that:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinnaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

In Siriwardene vs Liyanage (II F.R.D. 310) the Petitioner who was the editor of a political journal, in his action against the Competent Authority appointed under Regulation 14 of

the Emergency Regulations alleged that the order of the authority in closing his press was unlawful and made mala fide and in abuse of his powers. The Court while accepting the fact that restrictions can be imposed on the freedom on grounds of public order, nevertheless held that it was entitled to decide the question as to whether the Competent Authority was reasonable in the opinion he formed.

Dealing with the freedom of speech, Wimalaratne J. said:

> It is self evident that in a democratic society an essential ingredient in the composition that makes or should make for an equitable system is that of public opinion. Criticism plays a vital and necessary role in safeguarding both the system as well as the Rule of Law from being subverted. Indeed, in a true democracy the right of even the humblest citizen to publicly point out any type of misconduct or misrule or corruption goes to the core of what is accepted as a democratic society. This is the corner stone of freedom. In a word, the principle that the elected representatives in a democracy are not immune from any form of comment or criticism for improper, illegal or questionable conduct that harms the state or society of the individual, is fundamental. No one is above the law; it is the Rule of Law that is supreme.
>
> At the other end of the scale is the need to maintain and uphold the sanctity and force of the same law which, while permitting the right to publish, criticise and commend, also must ensure that such publications or criticisms do not exceed the limits of fairness, and above all, become a vehicle (worse than what it may seek to condemn) that seeks to upset the very Rule of Law under which it has the full freedom to inform the public and seek to mould its opinions.
>
> The checks and balances against official abuse and misconduct that are enshrined in the freedom of publication is a cherished right in any free society. Likewise it is incumbent on the publisher to carry out his responsibilities in such a way that it does not invite censure and criticism in turn. In a word, there are essential limits on the right to publish. The limitations are when a nation is at war or under a state of emergency. The need for a state of emergency is a matter entirely for the Executive.

In Ratnasara Thero vs Udugampola (II E.R.D. 364), the Court was called upon to decide on the legality of the seizure by the police of 2,000 copies of pamphlets which the petitioner intended to be distributed for purposes of canvassing against the proposal to extend the life of Parliament for a further period of six years. The Court held that the petitioner had been prevented from exercising his fundamental right of speech and expression and awarded substantial damages against the first Respondent,

(e) The Freedom to form and join a Trade Union

In Yasapala vs Wickramasinghe (I.F.R.D. 143), the Court considered the question whether the right to form and join a trade union carried with it the right to strike. In other words, was the right to strike (which was an accepted trade union right), elevated to the status of a fundamental right as a result of a right to form and join a trade union being enshrined as a fundamental right. The Court had no hesitation in rejecting this contention and held that:

> the right to strike, though in certain circumstances, it may lend legal justification for the cessation of work by employees, is not a fundamental right of workmen. The right to strike can lawfully be curtailed and the infringement of such a legal right cannot be the subject of complaint under Article 126 of the Constitution.

(4) Procedural Limitations

(a) Executive or Administrative Action

Articles 17 & 126 of the Constitution refer to the infringement or imminent infringement by executive or administrative action. As pointed out earlier, there is no definition of the term "executive or administrative action". This term has been considered in a number of cases of the Supreme Court and the only firm opinion that can be hazarded is that it embraces executive action of the State or its agencies or instrumentalities exercising government functions. Thus, where the Insurance Corporation was made the Respondent in a fundamental right application- Wijetunga vs Insurance Corporation of Sri Lanka—(II F.R.D. 265), it was able to show that the object and purpose of the Insurance Corporation Act No. 2 of

1961 was a creation of an autonomous public body carrying on its business activity free from ministerial control (except as to broad lines of policy) and was created as a separate legal entity carrying on a commercial activity, namely, insurance and this entity cannot be regarded as either a Government Department or a servant or agent of the Government so as to be identified as the Government.

In Wijeratne vs People's Bank (1984 1 SLR 1) Sharvananda J. was not prepared to bring the activities of the People's Bank within "executive or administrative action" for which the State was liable. He said that "the major role of the 1st Respondent (the Bank) is in the commercial sphere and that its main role is that of a commercial bank. Such commercial activities of the Bank cannot qualify as State action."

A more positive development from the words "executive or administrative" action is shown in the attitude of the Court not to lay too much of emphasis on the identity of the person who was actually responsible for the violation if the petitioner is able to establish that the act was done by some one who was acting as an agent, servant or alter ego of the State. (The Court is disinclined to present this new liability as one based on vicarious responsibility but is content to merely refer to it as a liability imposed on the State by the Constitution). A mere misdescription or misjoinder of a Respondent will not be fatal to the success of the application, as the liability is cast not so much on the Respondent who is actually before the Court but on the State. (See Mariadas vs A.G. (Supra) where the State was held liable though the wrong police officer was made the Respondent).

In cases involving fundamental rights in the criminal sphere, these words have led to discussion whether the errant acts of police officers, though not officially condoned, could be attributed to the Government so as to make the latter liable to such acts. In Vivienne Goonewardene vs Hector Perera, Soza J. stated that:

> Public authorities clothed by law with executive and administrative powers are organs of the State. A police officer using the coercive powers vested in him by law acts as an organ of the State. As much as the State is served he enforces the law, the State is liable for the transgressions of fundamental rights he commits when he is enforcing the law.

(b) One Month Rule

A further procedural limitation is placed by the requirement in Article 146 that actions in respect of fundamental rights should be filed within one month of the infringement or imminent infringement of the fundamental right. This certainty leads to certain inequitable situations where persons do not, due to their ignorance of this rule or otherwise, make use of their rights within the stipulated time. The Courts have mitigated this rule, interpreting this requirement as meaning within one month of the petitioner becoming aware that this right has been violated. In other words, the fact that an infringement may have occurred at some point before that would not be an impediment to the filing of the application if the petitioner can show that as far as he was concerned he became aware of the infringement only within that time.

It is apposite at this stage in concluding this part of this paper to bear in mind the words of Wanasundera J. who dealing with the question of the task of the Court to give relief in all cases, stated:

> The Supreme Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and its powers are given in very wide terms; but the authority of the Supreme Court is not absolute, for these powers are subject to certain well defined principles and it is conceded that there are limits which the Supreme Court cannot transgress, however hard and unfortunate a case may be. The Supreme Court has to take cognizance of the distinction between ordinary rights and fundamental rights and it is only a breach of a fundamental right that calls for the intervention of the Court. Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression, negligence or error of judgement, a person cannot be allowed to come under Article 126 and allege that there has been a violation of the constitutional guarantees.

(c) Other Problems in Enforcement of Fundamental Rights.

A report which was submitted to the Government prepared by three senior government officials (including the present writer), and published in Hanzard of 24th July 1986 stated that, while

he content and extent of the rights leave no room for complaint, the present procedure by which the breaches of these rights can be challenged and by which redress can be sought may not be meaningful to the majority of our people. It was also stated in the report that:

> It is commonly felt that whilst litigation has its undoubted benefits, problems relating to fundamental rights may perhaps in many cases be dealt with more effectively outside of the litigation context. Litigation, whilst carrying with it the full might of the law, may have a reduced impact when dealing with fundamental rights where the obvious shortcomings of an adversarial approach combined with what is seen by laymen the world over, sometimes as a "conflict" between the judiciary and the executive, could add to the hazards already faced by litigants in obtaining speedy and effective justice.

Whilst the number of applications filed for enforcement of fundamental rights is increasing, such reasons as a dislike for public ventilation of the grievance, the fear of victimization, the high cost of litigation and the despair caused by the law's delays (though the last reason may not be a proper one to advance as it is observed that filing a fundamental rights application has the best chance of early disposal than any other action filed in any Court), prevent the jurisdiction conferred on the Supreme Court being fully exploited. It was in this context that the recommendation was made to set up a Civil Rights Commission functioning on non-adversarial lines with emphasis on mediation. A result of this effort was the approval given by Parliament for the setting up of a Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights under the aegis of the Sri Lanka Foundation in terms of Law No. 31 of 1973. An Advisory Board which consists of the Chairman, Sri Lanka Foundation, the Attorney-General, the Secretary to the Ministry of Justice and three of their nominees, advise the Foundation as to the manner in which the objectives and purposes of the regulations setting up this Commission shall be carried out.

Another matter which can be adverted to in this part of the paper is the constraints placed on the Supreme Court (largely as a result of its jurisdiction being appellate) from dealing as much as the Court would like to with the facts of any particular case. Though the Supreme Court is not precluded from hearing oral testimony, the practice of the Court has been to determine facts on affidavit evidence. It need hardly be stressed that this practice has its shortcomings. Any proper finding on the credibility of witnesses, an important facet in any determination by a judicial forum, is seriously jeopardized and settlements or compromises which courts are normally inclined to bring about in fit cases are hampered by the absence before the Court of those officials who might have participated in the decision in issue. One can understand and sympathize with the unwillingness of the Court to hear oral evidence. It is very difficult to see how this position can be improved upon. It was with this problem in mind that the suggestion was made in the report adverted to above (and subsequently adopted) for the proposed Commission to offer its services to the Supreme Court as a fact finding/mediatory body in any particular case and report its conclusions/results to the Supreme Court for adoption if it agrees with them.

11 THE ROLE OF THE JUDICIARY IN THE PROTECTION OF FUNDAMENTAL RIGHTS: THE AMERICAN & SRI LANKAN MODELS

M. J. A. Cooray

The Place of the Judiciary in a Democratic System of Government

In the traditional distribution of state power among the three main branches of government, a clear and well established dividing line has been positioned between the legislature and the executive on the one hand, and the judiciary on the other. The proponents of the doctrine of separation of powers frankly admit that a strict demarcation of power between the legislative and executive limbs of government is neither possible nor desirable. Especially in the context of the ever-growing complexities of modern state, strict adherence to a rigidly defined doctrine of separation of powers could only sound the death knell of efficient administration of government.

In the U.S.A. where the separation of powers between the legislature and the executive is distinctly visible "the doctrine of separation of powers was adopted by the Convocation of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments to save the people from autocracy".[1] Justice Holmes, however, said in 1928 in the case of Springer vs Philippines Islands (277 U.S. 189): "It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing it is, or that the Constitution requires".

The British tradition recognizes a separation of powers only to the extent that it upholds the existence of an independent judiciary. There is undoubtedly a great virtue in fencing the judiciary to ward off encroachments by either the legislature or the executive. However, further investigation into the reasons and justifications for such judicial isolation reveals that the traditional delineation of state power conceded only a secondary role to the judiciary in the conduct of state business. The legislature was primarily the law-giver, while it enlisted the services of executive and administrative agencies, or of the judiciary occasionally, to make subordinate laws to breathe life into statute law.

The executive arm of the government has as its main function the execution of laws made by the legislature, although in fact a particular structure of government might leave it in the hands of the executive to initiate laws and oversee their passage through the legislature. As regards the composition of the executive, many democracies provide for the drawing of the higher rungs of the executive from the legislature, with the result that depending on the constitutional rules and the surrounding circumstances either the legislature controls the executive, or the executive holds the reigns. In the ultimate analysis, however, the popularly elected legislature retains control over the executive, particularly where the Head of State is a mere figurehead.

The infinite variety of legislative-executive structures prevalent in the democratic world can conveniently be placed between the English model of parliamentary system and a presidential system of government where the legislature dwells in the shadow of a powerful executive president. The American system of government may be said to be an arrangement whereby the legislature and the executive have been so placed to be prominent each in its legitimate sphere. Traditionally it is the legislature and the executive which share the substance of law-making and the legislature and the administration of government. The role assigned to the judiciary, according to the traditional view, is one of arbitration or dispute settlement. In addition to settling private disputes, civil, criminal or commercial for instance, courts are called upon to settle any disputes regarding the demarcation of power between the legislature and the executive or between different agencies within one such branch.

In the United States of America where the Constitution was intended to be the supreme law of the land judges are called upon to play a special role as the "faithful guardian of the Constitution": namely to ensure that the law of the land is not inconsistent with the Constitution, "Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former".[2] In entrusting this function to the judges enabling them to strike down legislation not in conformity with the Constitution, the founding fathers of the American Constitution did not perhaps envisage the possibility of any conflicts arising between the judiciary and the legislature. Hamilton emphasized that the judiciary was the "weakest of the three departments of power", and that it would "always be the least dangerous to the political rights of the Constitution", because, it "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgement".

History has shown such predictions to be utterly false. Instead of being "the weakest" or "the least dangerous branch" of government judiciary has in the United States of America assumed such magnitude of power that it has aptly been termed an "imperial judiciary".[3] The American Supreme Court has been hailed as the most powerful court known to history".[4] While the essential premise on which judicial review of legislation can be justified is that in interpreting laws courts have to give effect to the law which is superior as between the conflicting laws,[5] in reality courts tend to use the opportunity afforded to it in case of such conflict to either extend or narrow the scope of the Constitution as appear on the face of it,[6] thereby becoming an agency of growth. Recent events in America relating to the filling of a vacancy in the Federal Supreme Court alone are indicative of the enormity of the political power it wields. It is, however, not rarely that a judge after his nomination by a President declares that since appointment he sees things in a different light and the President admits that that appointment was the biggest mistake he made as President. (Chief Justice Earl Warren and President Eisenhower).

American Courts, the Federal Supreme Court in particular, then play a great role in creating law through its primary function of interpretation of laws, so much so that, as has been aptly said, "(The Americans) are under a Constitution, but the Constitution is what the judges say it is". Numerous books and articles that have been written on the Constitution show how through the years courts have adapted constitutional provisions to meet the needs of changing times. Perhaps the brevity of the American Constitution, together with the vagueness it imports, is responsible to a great extent for creative law-making by American Courts. As Woodrow Wilson is reported to have said, "For the Constitution to go beyond elementary provisions would be to lose elasticity and adaptability. ....If it could not stretch itself to the measure of the times, it must be thrown off and left behind, as a by-gone device; and there can, therefore, be no question that our Constitution has proved lasting because of its simplicity".[7] Again it has been said that the American Constitution "does little more than lay a foundation of principle.....It is a corner-stone, not a complete building, or, rather, to return to the old figure, it is a root, not a perfect wine."[8]

An Outline of the Evolution of Fundamental Rights in the U.S.A. through Judicial Decisions

The judicial attitude towards the exercise of its constitutional jurisdiction takes shape within a framework which is by nature limit-setting, for instance, judges do not decide on a constitutional issue if it can be avoided; they do not entertain a constitutional issue unless it arises in an actual controversy; they do not wish to enter "the political thicket", meaning that judges hesitate to determine political questions which in their view fall more appropriately within the legislature's jurisdiction. These limitations, which are demarcated and applied as suited to particular cases before it by the court, are founded on the basic premise we saw at the beginning of this essay that while the legislature makes law the judiciary has, in the performance of its function of dispute settlement, merely to ascertain the will of the legislature and give effect to it, to the extent it is legitimate. The following words of White, C. J., represents an extremely restrictive view of the judicial function: "For protection against abuses by the legislature, the people must

resort to the polls, not to the courts."[9] Those who believe that creative law making by judges is tantamount to a usurpation of the powers of the legislature argue that the judiciary, in the exercise of its judicial review function, becomes virtually a super-legislative chamber, sitting in judgement over the legislature. They question the propriety of the judiciary, an unrepresentative assembly, having the last word on the validity of legislation passed by the legislature, the popularly elected assembly.

The choice seems to lie between two extremities: First, a court wedded permanently to the "strict construction" school, refusing adamantly to expand the original content of the Constitution under any circumstances, and secondly an over-enthusiastic court courageous in the assertion of its power, but less prudent in stretching constitutional prohibitions to a point that legitimate government itself is unduly restrained.[10]

The history of the American Constitution is the history of judicial decisions. There is no better area than that of fundamental rights to gauge the ever-so-rich contribution made by courts in advancing the frontiers of constitutional law. It is not an exaggeration to say that instead of looking at case law as illustrative of constitutional principles, one looks at it to pick up constitutional principles springing therefrom.

There are two ways in which the judiciary expanded the scope of the American federal constitutional provisions relating to fundamental rights. First it interpreted such constitutional provisions as applicable not only to the federal government but also to provincial governments. Secondly, it enlarged the substance of the original rights so as to include a host of new rights.

The First Amendment to the Constitution[11] states that Congress shall not make laws restricting the freedom of religion, of speech, of press or of assembly. The Thirteenth, Fourteenth and Fifteenth Amendments which were passed between 1865 and 1870 make it explicitly clear that the prohibitions contained therein are binding on the central government as well as the state governments. The other amendments are phrased as general directions without indicating to whom they are directed. Amendment IV for instance is

worded as follows: "The right of the.....people.....shall not be violated, and no warrant shall issue, but upon probable cause ....." Amendment V is framed as follows: "No person shall be held to answer....." The Eighth Amendment runs as follows: "Excessive bail shall not be required....." In 1833 the Supreme Court held in Barron vs Baltimore[12] that the Bill of Rights limited only the federal government and this meant that a citizen could enforce his basic rights only as against the federal government. After the enactment of the Fourteenth Amendment, lawsuits were brought claiming that the Amendment had the force of extending all the fundamental rights to state governments. Courts did not wholeheartedly agree with this view but in the early twentieth century held that freedom of speech, press and religion were part of the Fourteenth Amendment and therefore applicable to state governments as well. Later it held the Sixth Amendment too to be within the stretch of the Fourteenth Amendment. This process of "incorporation", "nationalization" or "absorption" has more or less brought in all the first eight amendments to the Fourteenth Amendment. Some of the rights which have thus been incorporated are: The right to just compensation;[13] freedom of speech;[14] free exercise of religion;[15] rights to counsel,[16] and the right to be free of cruel and unusual punishment.[17]

The Court has in essence accepted the position that only some of the rights within the Bill of Rights are made applicable to state governments, through the instrumentality of the Fourteenth Amendment. This is called "selective incorporation"[18] which rejects the "no incorporation" position as well as the "total incorporation" position which are extreme views. While extending a right explicitly stated in an Amendment to state governments, courts often extend rights which are said to be implicit in such amendments. This is referred to as "ultra incorporation".[19] For instance, in Griswold vs Connecticut[20] the court in recognizing a right to marital privacy as being incidental to several rights which are explicitly incorporated in the Bill of Rights, laid down that such implicit right is enforceable against state governments as well.

The recognition of new rights as arising from those rights which are specifically incorporated in the Constitution is the second method by which courts have expanded the scope of the Bill of Rights.

Several approaches have been adopted by the Supreme Court in infusing contemporary values to constitutional provisions, which would otherwise be outdated and perhaps be a break on social progress. By applying the "zone approach" they demarcate a zone in which new subsidiary rights exist radiating from an explicit right. For instance freedom of association radiates from the freedom of assembly, and the rights to receive information extends from the right to free speech. By combining more than one such zone judges succeed in creating further extended rights. This is called the "overlapping zones" approach. For instance the right to marital privacy is said to inhere in the combined zones of the First, Third, Fourth, Fifth and Ninth Amendments. Another approach is to use a specific amendment, for instance, the Fourteenth Amendment, as an enabling clause to admit new rights, such as a woman's right to an abortion within the meaning of liberty in the Fourteenth Amendment.[21]

Constitutional Setting in Sri Lanka for Judicial Role.

Since 1802 when the first Supreme Court was established there has been an ever improving system of judicial administration in Sri Lanka. At every stage when changes were introduced into the courts system two important factors were kept well in sight; namely (1) accessibility of courts and (2) the need to achieve uniformity of judicial decisions. The gradual evolution of the system of courts during the British period also saw the emergence and consolidation of the concept of judicial independence.[22] There are many recorded instances where judges were in conflict with the British administration either to safeguard judicial independence[23] or to protect the rights of the subject.[24] The well-known case of Bracegirdle itself sufficiently illustrates the courage and impartiality with which the Supreme Court of Sri Lanka set about discharging its onerous duties.[25]

The Soulbury Constitution[26] which was in operation from 1948 to 1972, while it incorporated provisions aimed at securing judicial independence, did not deal at all with the subject of jurisdiction of courts and left that to be determined, as before, by ordinary legislation. It was assumed by the Supreme Court in the absence of

any argument to the contrary, that courts possessed the power to review legislation in order to determine its constitutionality. There is a long line of cases, with the Privy Council case of Liyanage[27] leading it, which are commonly referred to as the Judicial Power cases, where several statutes in conflict with the independence of the judiciary were declared unconstitutional.[28] In the absence of a detailed Bill of Fundamental Rights, courts, however, gave implicit judicial recognition to the concept of equality before the law, when they asserted in Liyanage's case that a statute with was *ad hoc*, *ad hominem* and *ex post factor* in the peculiar circumstances of the case amounted to a legislative judgement.[29]

The only provision contained in that constitution which sought to protect rights of racial or religious minority communities was Section 29 (2). That section in effect prohibited either the conferment of a benefit on a particular community which was denied to other communities or the imposition of a disability on a single community with which other communities were not burdened. Protection of community rights, as distinguished from individual rights was the aim of that provision. There is not a single judicial decision which invalidated legislation as being in conflict with Section 29(2) although it was seriously thought that the Official Language Act of 1958 would have come under judicial censure, if not for the fortuitous intervention of the First Republican Constitution of 1972, which declared that the validity of the then existing statutes was beyond attack.

The First Republican Constitution, 1972, introduced a Bill of Fundamental Rights, but at the same breath took away the power of ordinary courts of law to question the legality of statutes passed by the legislature, the National State Assembly. The result was that while legality of government action could be tested in courts of law using constitutional provisions as the determining criteria, such action, however unconstitutional, was immune from judicial censure so long as such action had been authorised by legislation, which itself might happen to be unconstitutional. For instance, in a situation where a statute confers an uncontrolled discretion on an administrative authority and a person's fundamental right is infringed by the exercise of that discretionary power the administra-

tive aithority would be acting within the power conferred on him. In India in such cases the statute will be held unconstitutional thereby rendering the action taken by the administrative authority without any legal basis.[30] Such a course was not open to courts of law since courts could not question the constitutionality of legislation.

In the absence of judicial review of legislation, the First Republican Constitution introduced a system whereby a special tribunal would examine proposed legislation to determine its constitutionality. A Constitutional Court, consisting of five persons about whose qualifications no mention was made in the Constitution, was set up for this purpose based somewhat on the lines of the French Constitutional Council. Since the Constitutional Court was not part of the system of ordinary courts of law, it may rightly be said that the judiciary was denied any jurisdiction in respect of Bills before Parliament. It must, however, be noted that the Constitutional Court behaved much like the Supreme Court in the exercise of its jurisdiction.[31]

The Second Republican Constitution of Sri Lanka, 1978, contains a Bill of Rights, and marking no departure from the 1972 Constitution, denies to courts of law jurisdiction to question validity of legislation passed by Parliament. Thus, the 1972 Constitution as well as the 1978 Constitution did not have a Bill of Rights which is "justiciable", which term essentially connotes the existence of judicial review of legislation. In place of judicial review of legislation the present Constitution of Sri Lanka has conferred a special jurisdiction on the Supreme Court to determine constitutionality of Bills before Parliament, a jurisdiction very much similar to the jurisdiction conferred by the former Constitution on the Constitutional Courts. The present Constitution goes on to provide a special remedy to be obtained directly from the Supreme Court for a breach or imminent breach of a fundamental right or a language right.

The provision of two special judicial inquiry procedures which may be availed of in cases of breach of fundamental rights, (namely (i) an inquiry by the Supreme Court to determine whether a Bill

referred to it is consistent or inconsistent with the Constitution, and (ii) an inquiry by the same court into a petition alleging the breach of a fundamental right or a language right by executive or administrative action), effectively shuts off any other kind of judicial inquiry into legality of legislative, executive or administrative action. This restriction of avenues for judicial intervention disastrously narrows down the area within which traditionally the judiciary is permitted to operate and to constructively interpret and apply both the Constitution and statutory laws. It will be useful to outline the jurisdiction of the Supreme Court in relation to constitutional matters.[32]

The Supreme Court of Sri Lanka which is "the final court of civil and criminal appellate jurisdiction"[33] has been given several special jurisdictions. They are, (i) jurisdiction to inquire into constitutionality of Bills; (ii) jurisdiction to finally determine any question of constitutional interpretation; (iii) Fundamental Rights jurisdiction; (iv) consultative jurisdiction; (v) original jurisdiction to determine petitions relating to Presidential election; (vi) appellate jurisdiction in respect of Parliamentary elections; (vii) original jurisdiction under the Parliamentary Powers and Privileges Act; (viii) original jurisdiction to determine allegations made against the President in impeachment proceedings; and (ix) original jurisdiction to determine whether the expulsion from party or independent group of a member of Parliament is valid.

Several of the above mentioned jurisdictions are exercised by the Supreme Court in the first instance, and there is no appeal to a higher judicial tribunal. The court's jurisdiction to determine constitutionality of Bills and its fundamental rights jurisdiction both belong to this category. Not only has the remedy to be sought from the Supreme Court alone, the relevant provisions also indicate that there can effectively be only one challenge to the validity of a Bill or "executive or administrative action". It is beneficial at this stage to outline the legal position in respect of these two jurisdictions of the Supreme Court in order to understand the limited nature of the remedies available to prevent and remedy breaches of basic rights.

An Urgent Bill meaning a Bill which in the view of the Cabinet of Ministers is urgent in the national interest has to be referred to the Supreme Court by the President before it can be placed before Parliament. The Supreme Court has twenty four hours or a longer period not exceeding three days in all, if an extension of time is given by the President, to determine whether the Bill or any provision thereof is inconsistent with a constitutional provision. While it is mandatory that an Urgent Bill be referred to the Supreme Court, in relation to ordinary Bills there is only an enabling provision under which either the President or any citizen may invoke the Bill jurisdiction of the Supreme Court. Whatever number of petitions there may be, perhaps in addition to a reference by the President, all those would be disposed of in the same hearing. A Bill so referred will have to be examined and a determination made within a period of three weeks. If at the expiration of three weeks in case of an ordinary Bill, or twenty four hours (or three days if an extension of time has been given) in case of an Urgent Bill, the Supreme Court has not communicated its final determination to the Speaker of Parliament, Parliament has authority to proceed with the Bill as if no such reference was made. This means that if the Court fails to conclude its proceedings within the prescribed period of time and Parliament insists on passing such Bill, the Bill becomes law in the absence of any judicial review either before or after enactment. In terms of the separation of powers doctrine, this amounts to an explicit recognition that the judiciary must ultimately yield to the wish of the legislature, and that the judicial function of interpretation of laws must not be permitted to be used as an instrument of limiting Parliament's legislative supremacy.

If the Supreme Court determines that the Bill in whole or in part is inconsistent with any constitutional provision, Parliament has to follow the appropriate amendment procedure, namely the approval of Parliament with a two-thirds majority, or such approval coupled with the direct mandate of the people obtained through a referendum. While to that extent Parliament is bound by a judicial determination, the denial of post-enactment review of legislation to courts of law drastically limits their role as the guardian of the Constitution. If the Constitutional Court under the First Republican Constitution was regarded as an agency of the legisla-

ture, there is no reason to believe that the Supreme Court in the performance of its jurisdiction in relation to Bills of Parliament today is anything else. Of course, the Supreme Court (a) is a more independent institution than the Constitutional Court and the most competent of the courts of law; (b) can be in the exercise of the inherent jurisdiction entertain various types of applications for review which the Constitutional Court would have been incompetent to entertain;[34] and (c) is likely to be more judicial minded than the Constitutional Court, more so because the Bill jurisdiction is exercised by the Supreme Court among its other judicial functions as the highest court of law. However, that the functions of the Supreme Court in relation to Bills is essentially advisory is clearly borne out by the provision in Article 123(2) to the effect that where the Supreme Court determines that a Bill or part thereof is inconsistent with the Constitution, it may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.

Certain significant limitations are placed by Article 120 on the nature of the determination that can be made by the Supreme Court in the exercise of its Bill jurisdiction. Article 120(b) lays down that in the case of a Bill expressly stated to be for the amendment of any constitutional provision or for the repeal and replacement of the Constitution, if the Cabinet of Ministers certifies that it is intended to be passed with the support of a two-thirds majority in Parliament and submitted to the people by referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill. Thus when the Fourth Amendment to the Constitution Bill was referred to the Supreme Court with such an endorsement the Supreme Court made its determination that it "does not have and exercise any further jurisdiction" than to deny jurisdiction to itself.[35] It may convincingly be argued that assuming certain provisions of the present Constitution are absolutely entrenched, Parliament would be able to make use of Article 120(b) to prevent the Supreme Court from determining so, and proceed to enact a law inconsistent with such an entrenched provision, without any fear of judicial censure.[36]

To the extent that judicial review of legislation is absent in Sri Lanka, Sri Lankan Parliament may be said to possess legislative supremacy in the same sense that the British Parliament is supreme. In Britain the duty of courts is traditionally restricted to ensuring that the law is correctly and impartially administered. The propriety of government action is tested by courts using Rule of Law as the governing criterion. Any maladministration is set right by the grant of remedies developed by courts of law over the centuries, known as Common Law remedies. While under the 1972 Constitution of Sri Lanka, any remedy for unconstitutional action taken by any government agency, had to be found in the Common Law which still forms part of the Sri Lankan Law, the present Constitution makes specific provision in this regard. Article 126 provides that a person who alleges that his fundamental rights or language rights have been violated or are about to be violated by executive or administrative action, may apply to the Supreme Court within one month thereof. If the Supreme Court permits him to proceed with such application the matter has to be finally disposed of within two months from the date of filing the application in Court. It may grant any relief which in its opinion is equitable and appropriate.

The scope of this provision is inherently limited. It applies only to such injustice as may fall within the prohibitions prescribed in the two chapters enumerating fundamental rights and language rights. The infringement or the imminent infringement of such right must be attributable to "executive or administrative action": thus judicial and legislative action, or action by private persons are by definition excluded. In case of injustices falling outside the scope of Article 126 or action not covered by "executive or administrative action", remedies will have to be sought outside that Article and unarguably in the Common Law.[37] In contrast to the initial judicial attitude to insist on rigid conformity to time limits,[38] the limitations that the application has to be filed within a month after the alleged breach of the right, and that the application has to be finally disposed of within two months, are liberally construed by the Supreme Court.[39]

An Evaluation of Judicial Role in Sri Lanka in the Light of the American Model.

In evaluating the role of the judiciary in the protection of fundamental rights in Sri Lanka two matters have to be clearly borne in mind. First, while American judges have had nearly two centuries to gradually evolve the fundamental rights that the Americans enjoy today, Sri Lanka's history of a Bill of Rights begins in 1972. Further it is only since the promulgation of the 1978 Constitution that there has been a significant number of cases before courts of law involving fundamental rights issues. Therefore it is rather too early to make a worthwhile evaluation. Secondly, there is absent in Sri Lanka the kind of detailed and indepth studies characteristic of American jurisprudence into judicial behaviour. Therefore what can at best be done is, while recognising the limitations which are placed on judicial function in Sri Lanka, to indicate what lessons can be learned from the U.S. Federal Supreme Court in protecting fundamental rights.

The Sri Lanka Supreme Court in interpreting the Bill of Rights has extensively referred to American and Indian judicial decisions. Certainly not only is such a course immensely useful, but also indispensable, because judges by habit act in accordance with judicial precedent. While American cases or Indian cases are not binding on the Supreme Court of Sri Lanka, they are certainly of great pursuasive authority, since the Sri Lanka Bill of Rights has certain provisions modelled on their American and Indian counterparts. There is no doubt that these cases provide invaluable assistance in determining how constitutional principles are to be applied to various factual situations. For instance, in determining the legality of University admissions criteria in Sri Lanka which take into account several considerations in addition to academic excellence, various similar schemes adopted in India and which have passed the test of constitutionality, as well as affirmative action programmes which are a regular feature of American colleagues and universities become immediately relevant.[40]

Judicial decisions dealing with fundamental rights from America or India are those given in the context of an actual controversy: a controversy between two parties before the courts, in the settle-

ment of which an allegedly unconstitutional statute or other governmental action provides a relevant legal norm. If such legal norm is found to be unconstitutional, courts refuse to apply it to the facts before them. And, courts here can disobey an administration action, subordinate legislation, or even legislation passed by the supreme legislature.

In Sri Lanka, as we have seen, a fundamental rights question arises in the specific situation: (1) in determining the constitutionality of a Bill intended to be passed by Parliament; and (2) in inquiring into an application made under Article 126. In the first situation the decision has to be essentially speculative since the "pith and substance" of a statute can only be seen in its actual operation. A Bill of Parliament may appear to be something, but might prove to be something entirely unforeseen when it is put into effect. If the Supreme Court were to make an incorrect assessment of a legislative measure before its enactment and uphold its legality, it will be too late to realize its error after the Bill has been enacted since judicial review of legislation is merely a historical fact in Sri Lanka. In the second situation while American and Indian courts have the power to invalidate legislation which permit unconstitutional behaviour on the part of government agencies, such wide power has been denied to the Supreme Court. Therefore, it is clear that canons of interpretation followed in America, and the general judicial attitude there towards fundamental rights, will have to be followed in Sri Lanka with caution. The blind adherence to American judicial practice may in certain circumstances in fact result in restricting the scope of fundamental rights in Sri Lanka.

Three rules of statutory interpretation which have a rational place in relation to enacted legislation, but which seem unsuited to the task of determining whether a Bill is consistent with the Constitution, may now be briefly examined.

(1) All laws are presumed to be constitutional until proved contrary. This rule is founded on the premise that the court has a limited role in reviewing enacted legislation, only to be a court of last resort, and not a super legislative body waiting for the slightest opportunity to overrule the popular legislature. Legislation will be declared unconstitutional only if the party which pleads

unconstitutionality proves it, thereby displacing the presumption of constitutionality. The general display of judicial restraint is acceptable in view of the fact that there is no limitation on the number of attempts that may be made by affected parties to display the presumption in an infinite variety of factual situations. In Sri Lanka, when the Supreme Court inquires into the validity of a Bill, it merely looks at statutory provisions in abstract. Moreover, once its determination is made and the Bill becomes law there will be no more chances of impugning it. Therefore the more appropriate mode would be to ignore the presumption and place a relatively lighter burden on the petitioner in proving unconstitutionality.

In America, deviating from the general practice of presuming constitutionality of legislation, courts have adopted positions more favourable to the citizen in areas of civil liberties and equal protection of the laws. For instance in the area of free speech, while the court presumes unconstitutionality in relation to prior restraints (controls on speech before its expression),[41] it relaxes the presumption of constitutionality in respect of punishments after speech.[42] Similar to the protective attitude of the judiciary towards the "preferred freedom",[43] is the attitude of courts towards what are termed "suspect classification" in the area of equality before the law. It was classification based on race that first attracted this rigid test in the 1940's. In Korematsu vs United States,[44] racial classifications were said to be "immediately suspect" which needed to be subjected to the "most rigid scrutiny". Subsequently, national origin[45] and alienage[46] have been added to the expanding list of suspect classifications. In these cases the classification will be upheld if the State is able to prove that it furthers a "compelling", or "paramount" state interest.[47] In respect of classifications, such as illegitimacy in issue in Levy vs Louisiana,[48] which was a less odious classification, courts adopt a moderate scrutiny test, requiring the state to prove that the classification furthers an "important" state purpose and to show a "substantial" relation between the classification and the purpose. In respect of other classifications the court presumes constitutionality and merely insists on a "reasonable" nexus between classification and the purpose of the statute.

It is submitted, in view of the limited nature of the constitutional remedy against legislation in Sri Lanka, that the deviations approved by the U.S. Supreme Court from the presumption of constitutionality must receive serious judicial consideration in Sri Lanka. Further, in respect of equality provisions our Supreme Court would benefit much from the American experience of "strict scrutiny" and "moderate scrutiny". So far it is only the "minimum scrutiny" that has been applied in Sri Lanka.

(2) When two interpretations are possible, the court would lean in favour of that which is consistent with the validity of the statute. Here the court has a choice, either to give an innocuous meaning to the impunged statutory provision or to hold the provision to be unconstitutional. The court adopts the first and rejects the latter, if that could be achieved without doing violence to the language of the statute. This rule of interpretation, which too recognizes the need to respect the sovereignty of Parliament, must find no place, at least as of right, when the Supreme Court exercises its Bill jurisdiction. If it is adequately proved that the Bill has a tendency to violate the Constitution, while an innocent interpretation too is possible, it is not right to accept, as a matter of course the Bill to be valid on the basis of the second possibility.

(3) Mere possibility of future abuse should not constitute a ground for declaring a statute invalid. This is defensible in the American context, where such prospective future abuse might be brought before a court of law in the event it materialises. The argument raised in (1) and (2) have against their incorporation in Sri Lanka are valid here too.

The caution, with which American or Indian judicial decisions have to be followed in Sri Lanka in the resolution of conflicts between the Constitution and a proposed parliamentary Bill, is all the more important because after receiving the determination of the Supreme Court of Sri Lanka on the validity of a Bill, Parliament may introduce amendments to it before it is finally passed. The legality of such amendments is not tested in Supreme Court. It is the Attorney-General who advises the Speaker whether any such amendments would be inconsistent with the Constitution.

However much independent the Attorney-General might be, a determination by him is no substitute for a judicial determination. In these circumstances it is clear that the Supreme Court must not examine in a pragmatic way a Bill referred to it, viewing provisions of a Bill one by one setting them against constitutional provisions. Instead the Bill be viewed in its entirety in the back drop of its antecedents and the purpose it may reasonably be expected to serve in the future. While the legitimate wish of the legislature must be permitted unhindered implementation, judges ought, especially where civil liberties are concerned, to look at Bills of Parliament not with magnanimity but with suspicion.

The remedy for infringement of fundamental rights by executive or administrative action, as specified by Article 126 of the Constitution, which is the only permissible variety of post-enactment judicial review, has its own limitations. As we have already seen the Supreme Court had gradually watered down the harshness of some of the procedural limitations contained in that provision, while a liberal interpretation of the phrase "executive or administrative action" is still eagerly awaited. During the nine years of the present Supreme Court's existence, it has won praise and admiration for courageous decisions and has equally attracted severe criticism for its hesitation to strike down improper governmental action.

A case that has been much criticised is Elmore Perera vs Montague Jayawickrema.[49] In that case where the court agreed with the petitioner's contention that the decision to retire him on the ground of inefficiency was "unreasonable, unjust and lacked bona fides",[50] and had been made "arbitrarily and capriciously"[51], refused nevertheless to uphold the petitioner's contention that his right to equality before the law had been thereby infringed on the narrow ground that he failed to disclose the persons who were similarly placed like him and who had been treated correctly according to the law. The decision of the Supreme Court given by a slim majority of five to four rules in effect that a person who is the first to be ill-treated in a group cannot invoke the protection given by Article 12(1) of the Constitution which in its essence means that "among equals the laws should be equal and should be equally administered, that

like should be treated alike".[52] The absurdity of the majority decision in Elmore Perera's case is that if the Law is applied "capriciously and arbitrarily" in equal measure to everyone belonging to a class the victims of such illegal official conduct will ever be left without the protection of the constitutional right.

The four dissenting judges were highly critical of the majority judgement. Wanasundera, J., ventured to criticise the requirement that instances where proper procedure was followed must be shown as being based on a misconception and unsupported by law, logic or practice.[53] The proper test to be applied is clearly explained in Wimalaratne, J.'s judgement: "In order to establish discrimination it is not necessary for the petitioner to show that correct procedure was applied in the case of others and that he has been singled out for the adoption of a different procedure.....The equal protection that the petitioner enjoyed is that he, along with others similarly situated as himself (e.g. the eighteen other Deputy Surveyors-General) would all be controlled in the matter of discipline by the provisions of the Establishments Code relating to their category and not by some other rule or circular not applicable to them."[54]

It is perhaps too early to pass judgement on the Supreme Court's performance. A general comment may, however, be made that progressively the Supreme Court has come out of the initial inhibitions it showed in the exercise of its newly acquired fundamental rights jurisdiction. The most welcome feature is, perhaps, that dissenting judges put down reasons for their difference of opinion with the majority. In future cases therefore the Supreme Court is always free to draw assistance from any of these divergent views.

The kind of judicial remedy laid down in Article 126 finds its place in several Commonwealth Constitutions. A significant point of difference, however, is that in those jurisdictions such special judicial procedure operates without prejudice to any other remedy available under the law, such as prerogative writs. Furthermore, those constitutions recognise post-enactment review of legislation by courts of law. The Supreme Court therefore should strictly abide by what it has often seen as its duty and authority: "We are

empowered, and indeed it is our duty, to give full operation to the provisions of Articles 17 and 126. These provisions vest (in this Court) sole and exclusive jurisdiction to hear and determine any question relating to an infringement of fundamental rights by executive or administrative action. We are empowered after such inquiries, as we consider necessary, to grant such relief or make such directions in the case as we may deem just and equitable. This is an extensive jurisdiction and it carries with it all implied powers that are necessary to give effect and expression to our jurisdiction."[55]

Conclusion

While American judges as well as Sri Lankan judges have traditionally been nurtured in the English tradition, and therefore share many values in common, the constitutional role assigned to the Sri Lankan judges is extremely limited. Therefore the power that the American courts yield can never be realistically achieved by the Sri Lankan courts. However, within its confines, the Supreme Court can still hold an important position of influence as amply illustrated by its recent decision in respect of the Thirteenth Amendment to the Constitution Bill and the Provincial Councils Bill, where Ranasinghe, J., held the balance between the two opposing views expressed by eight judges evenly divided.

In view of the often divided decisions of the Supreme Court, it is well to study the American model of judicial decision making. Much bargaining and ironing out of differences take place between the conclusion of the hearing and the delivery of the judgement. A careful study of this American judicial practice in order to see how it can benefit our judicial system, in my view, is a constructive and lasting contribution that will enrich our judicial law making.

Notes

1. Myers vs United States, 272 U.S. 52, 293, (1926), per Brandeis, J.
2. Alexander Hamilton in *Federalist* 78, New York: C. Scribner & Co 1867 or Random House, 1937.
3. Nathan Glazer, "Towards an Imperial Judiciary", *The Public Interest*, 41 (Fall 1975), 104-123.
4. Robert McCloskey, *The American Supreme Court*, Chicago: University of Chicago Press, 1960, p. 225.

5. As Chief Justice Marshall explained in the celebrated case of Marbury vs Madison(5 U.S. 137, 141 (1803)) "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty".

6. For instance, as we shall see later, classifications based on racial differences are now subject to strict scrutiny. But, consider what the trial judge had said in Loving vs Virginia (388 U.S. 1 (1967): "Almighy God created races white, black, yellow, malay and red, and he placed them on separate continents.... The fact that he separated the races shows that he did not intend for the races to mix".

7. Quoted in Saul K. Padover, *The Living U.S. Constitution*, New York, Praeger, 1953, at p. 57.

8. Quoted *ibid.*, at p. 52.

9. Munn vs Illinois 94 U.S. 113 (1876).

10. In Harper vs Virginia Board of Elections 383 U.S. 663(1966) where the court by a majority struck down Virginia's poll tax which conditioned the right to vote on the payment of a tax, Douglas J., said: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.....Notions of what constitutes equal treatment for purposes of the equal protection *do* change". On the other hand Black J., dissenting said: "The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil .....It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written Constitution which is to survive through the years as originally written unless changed through the amendment process which Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country, proceeding in the manner provided by Article V." Harlan, J., another dissenting judge conceded that the view points which support a poll tax "are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify

the law to reflect such changes in popular attitude. However, it is all wrong in my view, for the Court to adopt the political doctrine popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process".

11. The Bill of Rights is contained the first ten amendments to the Constitution and some later Amendments, namely Articles XIII, XIV, XV, XIX, XXIV, and XXVI.
12. 32 U.S. (7 Peters) 243 (1833).
13. Chicago vs Chicago, 166 U.S. 226 (1897).
14. Fiske vs Kansa, 274 U.S. 380 (1927).
15. Cantwell vs Connecticut, 310 U.S. 296 (1940).
16. Gideon vs Wainwright, 374 U.S. 335 (1963).
17. Robinson vs California, 370 U.S. 600 (1972).
18. For instance Goldberg, J., said in Griswold vs Connecticut: "Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment incorporated all of the first eight amendments.....I do agree that the concept of liberty protects those personal rights that are fundamental, and it is not confined to the specific terms of the Bill of Rights".
19. See Peter W. Lewis and Kenneth D. Peoples, The *Supreme Court and the Criminal Process*, Philadelphia, W.B. Saunders, 1978. p. 67
20. 381 U.S. 479 (1965).
21. Roe vs Wade, 410 U.S. 113 (1973).
22. See M. J. A. Cooray, *Judicial Role Under the Constitution of Ceylon/ Sri Lanka*, Colombo, Lake House Investments, 1982, pp. 40-59.
23. *ibid.*, pp. 10-13
24. *Ibid.*, pp. 13-16
25. (1937) 39 N. L. R. 193.
26. Ceylon (Constitution) Order in Council, 1946, as amended by the Ceylon Independence Order in Council, 1947.
26. Ceylon (Constitution) Order in Council, 1946, as amended by the Ceylon Independence Order in Council, 1947.
27. Liyanage vs The Queen (1965) 68 N.L.R. 265; (1966) I All E. 650
28. The most exhaustive examination of these cases is found in M.J.A. Cooray, *op. cit.*, chapters 5 to 8, at pp. 74-196.
29. See for a comparison of Kariapper vs Wijesinha, (1966) 68 N.L.R. 529 (S.C.); (1967) 70 N.L.R. 49 (P.C.), a judicial power case under the Independence Constitution, and the decision of the Constitutional Court in the Local Authorities (Imposition of Civic Disabilities) Bill, No. 2 of 1978 (*Decisions of the Constitutional Court*, Vol. 1,54), a case brought under the equality provision, M.J.A. Cooray, *op. cit.*, pp. 261-264.

30. See for instance Saghir Ahmed vs State of U.P., AIR 1954 S.C. 728.
31. See generally M. J. A. Cooray, *op. cit.*, Chapter 11.
32. See M. J. A. Cooray, "The Supreme Court in the Legal System of Sri Lanka," *University of Colombo Review*, Vol. 1 No. 4. pp. 79-93 (1984).
33. The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Article 127 (1).
34. Such as the application made by Felix R. D. Bandaranaike after the decision in respect of the Fourth Constitutional Amendment or more recently the application made to the Court challenging the validity of the Court's determination in a Bill reference (See applications filed by A. Munasinghe et. al. S. C. 6/86 Spl. and S.C. 174/86.) both these applications, however, were disallowed by the Court.
35. See Hansard, November 4, 1982, (Vol. 21., No. 14) Colmn 1459.
36. M. J. A. Cooray, "Referendum and its Place in the Constitutional Set Up of Sri Lanka, *Mooter*, Vol. 1, pp. 39-51 (1984).
37. The Supreme Court on more than one occasion recognized the validity of this proposition. See e.g. Ariyapala Gunaratne vs The People's Bank (S.C. Appeal No. 58/84.)
38. See for instance Hewakuruppu vs The Tea Commissioner, S.C. 118/84 (unreported) and Kathiragesu Visvalingam vs Liyanage, S.C. 47/83 (unreported).
39. See for instance Gunawardena vs E. L. Senanayake, S.C. 12/81, *Fundamental Rights* Vol. 1, p. 178, and Vivienne Goonewardene vs O. I. C. Police Station Kollupitiya, S.C. 20/83 (unreported). Full text of this case has been published in the *Sunday Observer*, Sri Lanka, July 3, 1983.
40. See for instance Perera vs University Grants Commission, S.C. Application No. 57 of 1980; Seneviratne vs University Grants Commission, S.C. Application No. 88 of 1980.
41. New York Times vs United States, 403 U.S. 713 (1971).
42. *Eaton* vs *Tulsa*, 415, U.S. 697 (1974).
43. "Freedom of Press, Freedom of Speech, Freedom of Religion are in a preferred position", Murdock vs. Pennsylvania, 319 U.S. 103 (1943), per Douglas, J.
44. 325 U.S. 214 (1944).
45. Oyama vs California, 332 U.S. 633, (1948).
46. Graham vs Richardson, 403 U.S. 365 (1971).
47. United States vs O'Brien, 391 U.S. 367 (1968).
48. 391 U.S. 68 (1968).
49. (1985) 1 Sri L.R. 285.
50. *Ibid.*, at p. 323, per Sharvananda, C.J.
51. *Ibid.*, at p. 322, per Sharvananda, C.J.
52. Ivor Jennings, *The Law and the Constitution* (3rd ed.,) at p. 49
53. (1985) 1 Sri L.R. 285, at p. 339.
54. *Ibid.*, at p 356
55. Jayanetti vs The Land Reform Commission (1984) 2 Sri L.R. 172 at p.179

12 THE ROLE OF THE SUPREME COURT IN UPHOLDING THE CONSTITUTION IN THE UNITED STATES AND IN SRI LANKA

T. W. Rajaratnam

A. THE subject matter of this paper in fact deals with two different topics but it is useful in dealing with our Supreme Court and our Constitution to keep in mind the record and performance of the Supreme Court of the United States which remains the most important and powerful of Courts perhaps not only in the United States but in the entire world where freedom and democratic rights are cherished by the people. This does not necessarily mean that the government of the United States is exclusively in the hands of the true lovers of freedom and democracy; it is never a universal uniform rule in any democratic country. But the people in the United States most value the freedoms and rights guaranteed to them under the Constitution of the United States. The Supreme Court draws its power from the power of public opinion. The people are conscious of their rights under the Constitution and look up to the Supreme Court as the custodian of their Constitution. "The people have grown to feel that the Supreme Court, whatever its defects is still the most detached dispassionate and trustworthy custodian that our system affords for the translation of abstract into Constitutional commands." These are the words of Justice Robert Jackson in the 1955 Godkin Lectures which he was to deliver at the Harvard University. He did not live to deliver this lecture and his observation therefore remains his epitaph and his swan song.

The civil rights and civil liberties which are guaranteed by the Constitution of the United States render the Constitution not only as a code of law but a code of morality in the

state's relations with its citizens. The citizens have some assurance that their rights under their 200 year old Constitution are guaranteed and the Supreme Court is their arbiter. They have somewhere to look to for protection and relief and somewhere to raise a cry. In such a system there is some reassurance to them that they can be expected to be governed by these laws and the Constitution and not by men. To put it simply they are the laws of men monitored by the Constitution.

The Constitution of the United States is an old Constitution of a new country unlike the Constitution of Sri Lanka which is a new Constitution but it is a Constitution of an old country with old traditions and an old history.

This factor must inevitably make a difference. An old constitution had more years to grow, more lessons to learn, more experience to change its philosophies with the felt necessities of time whereas in a recent constitution the years to mature, the lessons to learn and the experiences are limited to change basic attitudes and philosophies. Moreover, democratic tradition in a new democracy is sometimes mixed with monarchic experiences and feudal experiences, with a socially caste ridden class system which is bound to die hard or die soft but in either case has its impact on a democratic system and its concepts.

There was a time in the United States in 1857 in a case that featured Chief Justice Taney (Justice Curtis and Mclean dissenting) delivering the main opinion observing that no negro could be a citizen; that the negro was a person of "inferior order, that he was a slave and thus his master's permanent property" (19 Howard 393 1857). Thereafter in 1896 we have the "separate but equal" concept in Plessy vs Ferguson with the single dissent of Justice Marshall Harlan. We can never forget his inspiring and noble words: "The Constitution is colour blind and neither knows nor tolerates classes among citizens" (163 U.S. 537). This view had to wait 58 years until 1954 to become a unanimous contrary opinion of the Court in Brown vs Board of Education and Topeka (347 U.S. 483). Society changes, the necessities of society vary.

The Americans have had their changing attitudes and prejudices towards Quakers, Catholics and Jews. These initial prejudices were then turned in full force on the Negros. Subject to the changing attitudes, the Supreme Court maintained the basic freedoms guaranteed under the Constitution, within its avowed limitations. The American Constitution is the shield of every American citizen and when his basic freedoms like the freedom of speech, freedom from interference of one's privacy, free exercise of religion, political and racial equality are assailed it is to the Constitution he looks up to as the shield that will protect him. When necessary these violations are reviewed by the Supreme Court. But it is the highest consensus of the public opinion that gives power. Its honest views today need not be the honest views of the Supreme Court tomorrow. In any case the wisdom of the Judges has sometimes by a "stitch in time saved nine." Many potential controversies have in some measure not been allowed to grow too sharp to explode.

Although we cannot sweepingly say that the judiciary has shown absolutely any concern and has been restrained in the economic sphere, the vast majority of decisions of the Court have been in 5 areas; (1) process of law in criminal cases, (2) political equality in suffrage and re-apportionment re-districting, (3) racial matters, (4) freedom of religion and separation of Church and State, (5) national security.

Ever since the days of the 'New Deal' Court in 1937 the Court's concern and pre-occupation have been with the non-economic basic freedoms and personal liberties. A cynic might observe that the Constitution and the Supreme Court will not allow an individual American citizen to lose his personal dignity guaranteed to him under the Constitution though it may not be able to do anything to put him in employment and give him a living wage.

We cannot expect too much from the Court which is only the interpreter of a free Constitution. The cynic need not be a communist who echoes the words of Lenin".....the slogan of freedom and equality is merely the lies and humbug of a bourgeoisie society.....". If he is, he misses the purpose and the performance of the Supreme Court of the United

States and totally misunderstands the potential dignity and freedom of man, drawing out and inspiring the noblest qualities in him. But as in all matters we cannot deny that there can be other views, but the Supreme Court has been generally averse to subversive expression of opinion in the same way socialist countries have been averse to what in their opinion is subversive to the interests of their establishment and national security test. Justice Black, however, in Dennis and United States 34 US 494 (1951) observed "Public opinion being what it is now in (1951) will not protest against the conviction of these communist petitioners. There is hope however, that in calmer times when present pressures, passions and fears subside this or some later Court will restore, the 1st Amendment liberties to the high preferred place where they belong to a free society."

Judges are fallible, they are learned men, they are intelligent men, they are not angels without their prejudicies and interests but they can rise above themselves for the public and social good, they develop their own character and philosophy—and that is inevitable. They have generally maintained a poise and balance within the spirit of the Constitution carrying with them more often than not the public opinion with considerable consensus. We have referred to one instance where we saw how judges in all sincerity changed their views completely with the change of public opinion, but it took 58 years. It also is an illustration of how a dissenting opinion can anticipate the long paths taken by the changes in public opinion. It has been said "a dissent in Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." (*Supreme Court of the United States*, New Columbia University 1928 p. 68). Dissenting opinions indicate life and movement in a dynamic society and the accusations that judges are permanently fossilised or are like Pharaohs' Mummies cannot be levelled at them. They, it is said, after all are children of their times and they largely reflect the social attitudes and public opinion of their times.

The United States has no better institution to be the steadfast guardian of her people's liberties. Reviewing the performance of the Court in the area outside civil and political rights, protection of economic rights of the citizens lags far behind in contrast, and that area is left for the ordinary laws of the country which do not readily attract constitutional guarantees in their favour. The passing of Roosevelt's New Deal encountered difficulties. On one occasion when Justice Holmes observed "Young man about 75 years ago I learned that I was not God. And so, when the people (through their elected representatives) want to do something (in that vast realm of economic and social legislation) and I can't find anything in the Constitution expressly forbidding them to do so, I say whether I like it or not 'God damn it let 'em do it". (Quoted by Curtis in his *Lions under the Throne*, Boston, Houghton Mifflin Co. 1947 page 281). It never allows the boat to rock too much while maintaining confidence in the Constitution to a large extent. The American Constitution whatever else it does or does not give the American Citizen, does give the citizen a sense of dignity, belonging and hope.

It has truly been said judges are judges but they are also men and not "Disembodied Spirits." In the words of Justice Frankfurter, "as men they respond to human situations." They do not reside in a vacuum and as Chief Justice Warren stated "Judges are not monks or scientists but participants in the living stream of our national life steering the law between the dangers of rigidity on the one hand and the formlessness on the other." ("The Law and the Future", 52 *Fortune* 106 Nov. 1955). They legislate with their respective views and interpretations. They construe and sometimes consciously construct. They see new dimensions in changing situations and old concepts.

If a balance of fair minded men with genuine philosophies and ideals disappear from the Bench and instead Judges committed to the extra material attitudes at the expense of human values and freedom replace them, the Constitution would have lost its meaning and significance to the citizen of the United States of America. This is unlikely to happen however as long as its citizens remain lovers of freedom and their personal dignity is given a due place in American society.

B. We now pass on to the Second Republican Constitution of Sri Lanka which hopefully will celebrate its 10th Birthday in August 1988. A ten year period is too short a term to evaluate and assess the performance of the Supreme Court and protecting the freedoms and fundamental rights of its citizens. It must be stated that unlike in the United States which has an unbroken continuity in the history of its Constitution, Sri Lanka has since its independence in 1948 had three Constitutions. The First Constitution was the Soulbury Constitution which was replaced by the First Republican Constitution in 1972, which in turn was replaced in 1978 by the Second Republican Constitution.

It must be remembered that the Supreme Court under the First and Second Republican Constitutions had a very limited power of review of legislation. Every law before it is enacted, is measured out and fitted on to the constitutional pattern and then made ready for wear. This is done after the requisite certificate is duly stamped by the Speaker or where a bill has been approved by the President under Article 80(3); no Court or Tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever. All laws however before they become sacrosanct receive the attention and care of the Supreme Court which under the First Constitution was a separate Constitutional Court.

Emergency regulations under the Public Security Ordinance will have to be finally approved under Article 155 (10) by Parliament in the Second Republican Constitution. In the First Republican Constitution, the limited judicial review arose as a result of Article 45 (4) which specifically states that the National State Assembly may as an exception ".... delegate to the President the power to make according to the law for the time being relating to public security and for the duration of the State of Emergency, emergency regulations in the interests of public security and for the preservation of public order...." The power to make such emergency regulations shall include the power to make regulations having the legal effect of overriding, amending or suspending the

operation of the provisions of any law except the provisions of the Constitution, which obviously affect national security and the national interests in a time of emergency.

We find a similar article in the Second Republican Constitution in Article 155 (2) but here the Parliament has reserved for itself the right under 155 (10) to examine any proclamation bringing such laws into operation. It would appear that from at least a practical point of view with the rest of the provisions in Article 155, the Supreme Court will rarely have the opportunity to examine a parallel jurisdiction. We shall refer to the limited judicial review in the 1972 Constitution in two Five Bench cases during the period 1972-1977 later on.

Under the Soulbury Constitution, the Courts, not necessarily the Supreme Court, could review all laws and screen them as against Article 29. This article invalidated all laws which exclusively conferred a benefit on one community which like benefit it did not confer on other communities, or on the other hand imposed a disability on one community which like disability it did not impose on other communities. The District Judge of Kegalle held in one Kadakanpulle's case that the Citizenship Act was invalid as it deprived the people of the Indian Community their voting rights. This judgement was set aside by the Supreme Court. The Privy Council also held that the Act did not offend Article 29 on the ground that the evidence was insufficient to establish that members of the Indian Community alone were affected by the Act although it was obvious to everybody that the Act was directed to the Indian Community almost exclusively. (53 NLR 25 and 54 NLR 433). It may be said that the Supreme Court displayed a rather excessive judicial poise and restraint. Another time a District Judge of Colombo in the Kodeeswaran case held that a Government Circular was invalid when it deprived a Tamil Public Servant of his increments because he failed to qualify himself in the Sinhala proficiency examination. He held that the Sinhala Only Act violated Article 29 of the Constitution. But the Supreme Court, however in appeal, set aside the judgement on the ground that

a servant under the Crown had no legally enforceable contract with the Crown and it avoided examining the constitutional issue with regard to Article 29 in reference to the Sinhala Only Act of 1956.

Politics apart, there can be no dispute that the Sinhala Only Act in law was a flagrant violation of Article 29 of the Soulbury Constitution. The Privy Council in the Kodeeswaran case held that in any case though the public servant held his office at pleasure of the Crown, it did not prevent him from claiming the salary due to him, and left the constitutional issue open for decision to the Court in Sri Lanka. (70 NLR 121 & 72 NLR 337 respectively).

Article 29, the Privy Council and the Soulbury Constitution thereafter were replaced by the First Republican Constitution. The performance, the philosophy and attitude of the higher courts can be evaluated by their decisions, which speak for themselves. On the other hand, the Tamil leaders had among their ranks eminent jurists and lawyers who did not challenge the Sinhala Only Act. It is open to ask the question whether they were not sure of getting the law invalidated by the Supreme Court, or whether they treated this discriminatory Act as a passport to leadership and entry into Parliament. It could be answered either way. Perhaps diffidence is the fairer reason. In any case Article 29 was cited by Lord Pearce in Ranasinghe vs Bribery Commissioner (66 NLR), which was not a case on any ethnic question that Article 26 set out (religious and racial matters which shall not be subject of legislation i.e. of a discriminatory kind), and it went on to add "they represent the solemn balance of rights between the Citizens of Ceylon the fundamental conditions on which inter se they accepted the Constitution and these are unalterable under the Constitution". In other words, it was an absolute and entrenched clause. A firm decision by the Supreme Court perhaps would have altered the course of our history. It is not necessary for us to make any further comments on the judicial performance in matters of judicial review.

In Constitutional matters a little robustness, a little foresight, a little philosophy and a little understanding of the spirit and purpose of Article 29 would have perhaps enriched our jurisprudence and even altered our course of history. Perhaps the colonial traditions die hard. The Bracegirdle case was a rare exception. There was hardly any reaction in the academic area with regard to section 29 and the Sinhala Only Act.

Thereafter judicial review of legislation was curtailed except to the limited extent in the First Republican Constitution as stated earlier. All laws went through the preliminary scrutiny of the one time Constitutional Court.

Article 45 (4) of the First Republican Constitution allowed judicial review of Emergency Regulations when it overrode the provisions of the Constitution.

In the Amirthalingam case, when there was a charge under the Emergency Regulation for the distribution of pamphlets carrying heavy penalties, the regulations were challenged on the ground that there was no declaration of an Emergency before the Regulations were framed by the Parliament. These Regulations were reviewed in the light of this objection before five Judges. The five Judges held that the non-declaration of an emergency was not a fatal irregularity and the regulations were good law. As soon as the Attorney General obtained an order in his favour he withdrew the indictment against Amirthalingam and others. The point taken was that the legislature exercised the sovereign power of the people to legislate. This power was inalienable and could be delegated to the executive only after a declaration of a State of Emergency to alert the people that special laws could be framed in view of the Emergency declared.

Within a short time, in another case where there were charges under the Emergency Regulations for causing death, the same objection was taken that the regulations were bad and that there was a manifest error in the decision of five Judges earlier. It was argued that there was no rule of precedence in

constitutional matters especially when there was a manifest error. Four Judges including the Chief Justice disallowed a re-argument on the question of manifest error, while one Judge dissented. He observed:

> There cannot be such a rule to emasculate the Highest Court to bind itself with decisions found to be erroneous after examination. There cannot be a principle in the rule of stare decisis that an erroneous decision should be treated as a classic to be handed down as a perennial legal philosophy to be followed by all Judges for all time.

Another emergency regulation that came up for review was whether there can be a High Court at Bar of three Judges created by the executive to try cases where the charges were under the Emergency Regulations. When the charge was under the Emergency Regulations, confessions made by the accused which were otherwise in-admissible were made admissible. There were several High Courts in the country created by Parliament and unlike now there was no one institution. The same dissenting Judge observed: "It is not only a Court created by the Executive, it is a Court through which the judicial power of the people is not exercised by the National State Assembly. It is a Court of Confession which departs from the well established rules of evidence and a stranger to the traditional principles of justice". Unlike the Supreme Court which is one institution, there were several high courts established in the country by the Administration of Justice Law and the Executive. This same Judge remarked that the Supreme Court should not "join together what the laws have put us under". The number of the case is Application No. 861/76 with Application 868 73/76. Trial at Bar 5/76 decided on 1/2/77 and 13/6/77 respectively. The majority of the judges including the Chief Justice exercised their philosophy of restraint and did not make any decisions on the questions raised, since the Attorney General on the eve of the judgement withdrew the Trial at Bar before three High Court Judges and proceeded under the normal laws. On this matter the dissenting Judge observed: "The Attorney General (at the conclusion of the case) sent a communication to the

Registrar of the Supreme Court that he will not further prosecute the accused under the Emergency Regulations but proceed under the normal laws." The Attorney General had hardly any evidence except the confessions made by the accused during their indefinite period of detention.

The same dissenting Judge made the following observations:

> The act of the Attorney General (in proceeding under the normal laws) has not been on the basis that he receded from the position that he took here that the Emergency Regulations are valid. I am of the view that the act of the Attorney General does not compel us to place judicial reliance on these matters in dispute. If it does, the Attorney General who is a party to these preceedings will be given an authority over the Supreme Court to permit or prevent an adjudication on important matters argued before us as he chooses. The Attorney General rightly or wrongly at a late stage did not want to expose the impugned regulations to any risk of a judicial scrutiny and adjudication. He must be congratulated, however, for having succeeded to take home, so to say, the impugned regulations "intact" without an effective judicial pronouncement leaving us standing to practise the laudable judicial philosophy of judicial restraint.

The Second Republican Constitution has all the relevant fundamental rights and freedoms enshrined in the Constitution—freedom of thought, conscience and religion, freedom from torture, right to equality, freedom from arbitrary arrest, detention, torture, the freedom to join Trade Unions, freedom of association, freedom of peaceful assembly and so on. Of course these freedoms are restricted in the interests of national security or national interests by Emergency Regulations which can be reviewed by the Courts if they do get the opportunity to do so to screen it as against the Constitution 155 (2). Quite apart from the fundamental rights and freedom in the Constitution, Chapter VII devotes a whole chapter on the Directive Principles of State Policy and Fundamental Duties to Guide State Policy. But the provisions of this Chapter do not compel or impose legal rights or

obligations and are not enforceable in any Court or Tribunal. No question of inconsistency with such provision shall be in any Court or Tribunal. In other words this chapter is beyond the pale of the Supreme Court.

Any violation of a fundamental right must be brought to the notice of the Supreme Court within one month of the date of violation which is a totally insufficient period. The Supreme Court has the exclusive jurisdiction to interpret the Constitution. During the period 1978—1986 there have been about 30 or more petitions heard by the Supreme Court. About 12 of the petitions referred to Article 12 are based on the equality rule and the right not be discriminated against. The petitioner did not get any order in his favour in 11 of the applications. In one case he had no standing, in the second case it was held that the Act of the Cabinet was prima facie lawful, in the third case the evidence was insufficient as was in the fourth case, and it was so in the fifth and sixth cases. In the seventh case, there was insufficient evidence for proof as in the eighth case. In the ninth and tenth cases, the petitioner had no standing, and there was insufficient evidence. The results will show that the requirement of the one month to come to Court must be extended to at least 3 months. These statistics are from a rough estimate. It is not necessary to deal with all the cases that have come up for our purpose.

If there were about 14 cases filed in the Supreme Court complaining against violations against the right to equality of treatment in the first five years of the Second Republican Constitution, only one succeeded in regard to the University Grants Commission, in the case of Perera vs University Grants Commission. One cannot go by statistics but most cases failed due to lack of sufficient evidence and the time limit of one month could have also been a relevant factor. In the Grants Commission case the Court held that in the case of admissions to the University if one class is an integration from two sources, the original source should not be taken into account to choose individual candidates. It adhered to the accepted classification in law of the reasonable and rational criteria. On the other hand in the Seneviratne vs

U.G.C. case the Supreme Court referred to the directive policies of the State in Chapter VI such as the promotion of the welfare of the people. This view appears to have prevailed thereafter in the Supreme Court. The State policy was included as a rational criteria, despite Article 29 of Chapter VI referred to earlier. It has become difficult to identify a fixed rationale in University admission cases. Another matter which will be of interest is to hopefully await the Supreme Court availing itself freely of the directive policies of Chapter VI which will give life and purpose to uphold the philosophy and spirit of our Constitution. There was one case on the language issue. Article 22 (2) gives the constitutional right to a person other than an official acting in his official capacity to receive communication from and to communicate and transact business with any official in his official capacity in either of the national languages. When one Kandasamy Adiapatham complained to the Supreme Court that he though a Tamil Citizen received a state cheque in Sinhala in violation of Article 22 (2), the Supreme Court held that a cheque is not a communication. It appears to have left out of the Constitution the rest of the Article "and transact any business". One finds it difficult to understand how the cheque which was the most important part of the communication was not at least a part of the communication. Most of the other applications have not succeeded but we can recall one significant case when the petition almost succeeded on the facts. That is the case of Perera vs Jayawickrema.

In one of the cases taken up, the petitioner was not heard by the Court as he had no standing or locus standi because he did not belong to the class eligible for nomination in the Job Bank Scheme. At this point we may refer to the fact that in India a social action group could have a locus standi as any other individual to complain about a denial of a Fundamental Right. Let us hope that the Supreme Court of Sri Lanka will seriously consider the epistolary jurisdiction and the locus standi concept in Fundamental Rights cases, but one of the arguments that may be against such an innovation will be the prospect of opening the flood gates for frivolous litigation. But on the other hand one or two very

deserving cases may obtain relief. A very limited epistolary jurisdiction may be allowed in a case of a very flagrant violation of a fundamental right which is a public outrage.

There was one case G.A. Ehelyagoda and other vs Janatha Estates Development Board in which the Supreme Court held with the petitioners that there was an abuse of executive discretion in demoting the petitioners. There were two other successful cases where the Supreme Court awarded a compensation of Rs. 10,000/- in the case of Ratnasara Thera vs Udugampola which involved the illegal seizure of pamphlets. The Court held that handing out of pamphlets to vote against the Referendum was a fundamental right. Unfortunately the State did not appear to have been on the same wave length with the Supreme Court. The State paid the compensation awarded and promoted Udugampola.

Another case that was decided in favour of the petitioner was the Vivienne Goonewardene case where the petitioner complained that her right to peaceful assembly and speech on Women's Day was interfered with by the Police and she was illegally arrested. The Police Officer was ordered to pay Rs. 10,000/- Here too the State did not appear to have been on the same wave length nor were a group of persons who demonstrated in front of the houses of the Judges who gave the decision.

The Supreme Court recently confirmed the right of an employee to join a Trade Union and his Right of Association which cannot be denied to him by his employer (Gunaratne vs Peoples' Bank).

There was a divided judgement against the petitioner in the case of Perera vs Jayawickrema who complained that he was the victim of the arbitrary and dictatorial action on the part of the State (Justice Wanasundera dissenting). It was held by the majority that the petitioner was a victim of gross injustice but had failed to show the class which benefitted when he had been singled out for such unjust treatment. The majority judgement presents difficulties to a jurist or academic and needs deeper study to set his mind at rest.

There are more cases that have failed than have succeeded, Perhaps they had to fail but where there have been dissenting judgements, our jurisprudence to that extent has been enriched.

The Supreme Court was called upon to decide the constitutional validity of the Referendum in 1982. Under Article 120 (b) "Where the Cabinet of Ministers certifies that a Bill which is described in its long title as being the amendment of any provisions of the Constitution is intended to be passed with the people by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such bill". This was precisely what was done but the amendment was in conflict with Article 161 (e) which reads "Unless *sooner* dissolved the first Parliament shall continue for six years from August 4 1977 and *no longer* and the expiry of the aforesaid period of six years operate as a dissolution of Parliament".

The trunk and operative part of Article 161 states "notwithstanding anything to the contrary in any such other provisions of the Constitution" which includes Article 120 (b) and the Articles referring to extension of life of Parliament by Referendum etc. In other words a view is justifiable that Article 161 and 161 (e) in the Transitional provisions stand and remain in the Transit lounge so to speak notwithstanding the articles referring to extension by refrendum, 120 (b) etc. As we know, 1977 Parliament was elected under the 1972 Constitution and the next General Election was to be on Proportionate Representation. The new Parliament was to consist of 196 members unlike the 1972 Parliament which had only 168 members. In the new Parliament it would have been difficult under proportionate representation to obtain a 2/3 majority which was a constitutional requirement for a Bill proceeding to a referendum to extend Parliament. In the context of these Articles we see the spirit, message and philosophy of our Constitution. An extension would have required votes from other parties which would have normally been forthcoming only in time of grave and real national crisis.

In any case there was a 4 : 3 decision that under Article 120(b) the Supreme Court had no jurisdiction to deal with the matter. It is unfortunate, however, that the minority of 3 who held the view that they had jurisdiction remained silent. In effect the decision suspended the operation of at least part of the Constitution contrary to Article 75, and we did not leave the transit lounge for the second lap of our democratic journey.

This is an instance where the people have not had the advantage of an appreciation of the meaning of Article 161 and 161 (e), when there was a definite date of expiry fixed for the 1977 Parliament. We are the poorer for it and our constitutional jurisprudence has not been enriched. These questions have not engaged much attention from our jurists or academics.

Let us hope fervently that our jurisprudence in the Constitutional field will be enriched in the future and our Constitution becomes a vigorous document full of judicial vitality as time goes on in the interests of our nation.

Public opinion is necessary with an appreciation of the Constitution, the academics and jurists have a role to play, the Bar has its duty and then and then alone will the Judges of the Court have the full assistance and encouragement to emulate their American counterparts.

We conclude this paper with the inspiring words of Justice Learned Hand: "Liberty lies in the hearts of men and women. When it dies there's no Constitution, no law and no Court can save it."

APPENDIX

WELCOME ADDRESS

Jacqueline Lee Mok

Distinguished Participants, Ladies and Gentlemen, on behalf of the American Studies Association of Sri Lanka, the United States Educational Foundation, and the United States Information Service, I would like to welcome you to this Seminar on the U.S. and Sri Lanka Constitutions. We have a wealth of eminent scholars and law professionals with us today to talk about various aspects about the American and Sri Lankan Constitutions, and I expect the ensuing discussion will be lively and energetic.

This program is a collaborative effort by the American Studies Association, U.S.E.F. and U.S.I.S. to commemorate the 200th Anniversary of the signing of the U.S. Constitution. We wanted a seminar that would be relevant to Sri Lanka, and as fate would have it, 1987 has been a banner year for a discussion of constitutional issues in the light of the political developments which have taken place in both our countries.

I am not a constitutional scholar and I defer to my senior colleagues to discuss the particular political, historical and legal dimensions of our two Constitutions. I would, however, like to make a few comments as an interested observer of the American and Sri Lankan cultures.

Perhaps the true value of any piece of legislation is its longevity and its viability. In that respect, the U.S. Constitution is a living document, responsive to social needs and cognizant of its social responsibilities. Created as a compromise under controversial circumstances, our constitution was ratified in order to preserve what was fast becoming a failed experiment in democracy. By 1787, the Articles of Confederation were no longer strong enough to keep the United States of America intact. When the Constitutional Convention took place in May 1787, statesmen loyal to the philosophy upon which this young nation was founded were hard pressed to draft a new document which would make a more cohesive nation.

As President Reagan described it, "The Constitution and our Government were born in crisis. The years leading up to our constitutional convention were some of the most difficult our nation ever endured. This young nation, threatened in every side by hostile powers, was on the verge of economic collapse. In some States, inflation raged out of control. Debt was crushing. In Massachusetts, ruinously high taxes provoked an uprising of poor farmers led by a former revolutionary war captain, Daniel Shays.

Trade disputes between the States were bitter and sometimes violent, threatening not only the economy but even the peace. No one thought him guilty of exaggeration when Edmund Randolph described the perilous State of the Confederacy: "Look at the public countenance," he said, "From New Hampshire to Georgia. Are we not on the eve of war, which is only prevented by the hopes from the convention?"

Throughout the stifling summer heat and humidity, the delegates to the Constitutional Convention of 1787 hammered out compromise after compromise to construct a document which would, from that point onward, define the United States. There were enormous pitfalls. In fact, the Convention almost disbanded because of no agreement could be reached about state representation in the legislature until Roger Sherman of Connecticut offered the concept of two legislative houses, with the Upper House having equal representation from all States and the Lower House having representation in proportion to the States' population, and all appropriation bills originating in the Lower House.

By September 1787, when the delegates to the Convention signed the Constitution in attestation of the unanimous decision to approve the document, we had the roots of what makes the United States the nation it is today. As Fred Barbash of the *Washington Post* wrote: "By any before-and-after test, the United States owes its very identity—even its continued existence as one nation—to the Constitution and the country's remarkable adherence to it. Before, the United States was a loose confederation of thirteen feuding states, each sovereign in its own right, each with its own militia, its own foreign policy, its own currency. . After the Constitution was written, only the United States Government could conduct foreign

policy; only it could issue money, wage war, regulate trade. The country was not transformed overnight, but the Convention and the Constitution sealed the pact of nationhood".

As a condition to the overall ratification of the Constitution, the acceptance of the Bill of Rights, guaranteeing the personal freedom of individual citizens and the Rights of the States, was to be the first order of business for the new U. S. Congress.

Even though I am not a student of the 1978 Sri Lanka Constitution, I have noticed several parallels, among them the use of the phrase "Supreme Law" of the land in reference to the ultimate legitimacy of the Constitution, its Articles, and its Amendments; and in Chapter III, the articulation of fundamental rights, similar in wording and intent to our Bill of Rights.

Both your Constitution and ours were drafted in socio-political environments which have changed since their adoption. What makes them admirable documents is their ability to be both "flexible and immutable." Naturally, amendments are made to Constitutions to reflect the changes in our social thinking and to relate to political realities. Yet, inherent in any amending process is the idea that our Constitutions represent a covenant between the national government and its people. We as individual citizens believe in the sanctity of that covenant because it insures the thriving democracies under which we live.

In closing, I want to welcome you once again to our two-day Seminar on the U.S. and Sri Lankan Constitutions. I look forward to the forthcoming discussion and am delighted to declare the Sessions open.

Thank you.