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ELECTIONS IN SRI LANKA

IDENTIFIED PRIORITIES IN USHERING IN A NEW ORDER

LAW & SOCIETY TRUST

CONTENTS

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Editor's Note ... ...

> *"The reformer has enemies in all those who profit by the old order and only lukewarm defenders in all those who would profit by the new"*
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> **Machiavelli in *The Prince***

This issue of the Review will be published for the benefit of its readers at a retrospective point of time, following the April 2nd 2004 parliamentary elections. It is published in the expectation that the articles contained therein would compel greater reflection and critical analysis with regard to the numerous woes that plague Sri Lanka as a functioning democratic order.

The serious erosion of public confidence in the integrity of the electoral process is now a matter of common acceptance. As a result, we have the law as well as the institutions that administer it, now taken sweepingly at nought in many respects. Sri Lanka is fundamentally in crisis as far as the reality of democratic governance, (as opposed to its theory), is concerned. Recovery of a basic element of faith in the systems that govern us, requires a cumulative effort at many levels. It is uncertain as to whether civil society can muster the courage to meet this challenge.

The Review publishes three analytical discussions in relation to the elections and the electoral processes in Sri Lanka that identify particular priorities in ushering in a new electoral order.

Firstly, ***Dushyantha Mendis*** of the *International Centre for Ethnic Studies, Kandy,* engages in a refreshingly practical as well as theoretical study on the statutory framework and institutional arrangements in regard to elections. Succinct questions posed at the end of his analysis, when dealing with the prevalent political culture making necessary, legislation such as the Seventeenth Amendment to the Constitution, are very pertinent in this regard. Thus, he states;

"The independence of the judiciary, and of such important institutions such as the elections, public services and Police Commissions would be something which should be taken for granted in any advanced democracy, and that independence would have evolved in the form of traditions and conventions governing appointments to them and the exercise of their powers and functions.

The very fact that the political executive has to be hedged in by a Commission appointed through a complex procedure in making appointments to these institutions, in order to ensure some degree of independence for them, directly implies that ultimately Sri Lankan society cannot trust its own leaders to act in the best democratic traditions. To say that Sri Lankan society cannot trust its own leaders is of course to say that Sri Lankan society cannot trust itself.

If Sri Lankan society cannot trust itself but is aware of the fact, that in itself should count as progress to the extent that self knowledge is the beginning of wisdom. However, the mere creation of institutional structures without a deep political commitment to make them work in the manner which could be best expected of them would be futile and possibly even mischievous; in such a background, it is very likely that the new institutional forms would simply become subjects of political horse trading and arm twisting."

Secondly, the Review publishes an exploration of Sri Lanka's electoral system and the alternatives that are being offered in place of the Proportional Representation (PR) system by ***Ramesh D. De Silva***, formerly a researcher at the *Law and Society Trust*. This paper examines the positive as well as the negative features of the German electoral system currently being looked at as an electoral model from which Sri Lanka can draw illustrations from with regard to reformation of the PR system. Here again, the point is that, other systems currently in place in democracies more accountable than ours, should be adopted in this country with great care and caution.

Finally, we have eminently sensible suggestions made with regard to minimising election violence and transforming the electoral processes, by the **Committee to Investigate into Election-Related Violence, (CIEREV),** which sat during the period June 8, 2002 - December 26, 2002 and examined complaints by citizens relating to the Parliamentary General Election of December 2001 and the Local Authorities' Elections of 2002.

One notable, (though scarcely surprising), conclusion reached by the **CIEREV** is that that the government in power, whatever political hue it may take on, is the major culprit in election-related violence in Sri Lanka. Its recommendations, in this regard, are manifold. Thus, it is of the view that the (proposed) establishment of the Elections Commission (EC) is a step in the direction. However, in keeping with international covenants and established international best practice, further legislation is required to strengthen the hand of the EC, such as the inclusion of

provision to take legal or disciplinary action against those who defy the EC's directions and guidelines.

As far as Parliamentary Elections are concerned, the **CIEREV** has proposed that an independent caretaker government comprising seven members be appointed by the Constitutional Council within one week of the announcement of elections. It has also recommended that appropriate legislation be passed to ensure reservations among the lists of nominations for women and those with post-secondary/professional qualifications.

The questions posed by the contributors as well as the conclusions of the **CIEREV** published in this Issue of the Review are pivotal to serious attempts towards reform of our electoral systems. The most recently concluded elections have manifested afresh, the need for such reform as a matter of priority.

Kishali Pinto-Jayawardena

Elections in Sri Lanka: Statutory Framework and Institutional Arrangements

Dushyantha Mendis[*]

"What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and upon courts. These are false hopes: believe me, these are false hopes. Liberty lies in the hearts of men and women: when it dies there, no Constitutions, no law, no court can save it. No Constitution, no law, no court can even do much to help it."

Judge Learned Hand, US Court of Appeals

Introduction

Analysis of the prevalent statutory framework and institutional arrangements for elections in Sri Lanka reveal that, while the statutory framework is marred by significant infirmities in the legal provisions available for challenging the outcome of unfree and unfair elections, applicable institutional arrangements are marred by the ability of the political executive to interfere with the scheduling of elections and the conduct of elections by the Department of Elections, as well as the police which obviously plays a key role in enforcing election laws.

The article comprises six sections. First, there is a brief overview of the operation of the franchise in Sri Lanka. Second, the constitutional history of Sri Lanka is briefly outlined in order to place the discussion of electoral laws in their constitutional context. Third, some of the more important and controversial legislative provisions relating to elections are examined. Fourth, the position of the Commissioner of Elections in both constitutional and practical terms is examined, as it was prior to the enactment of the Seventeenth Amendment to the Constitution, and fifth, the Seventeenth Amendment is discussed. Sixth, there are some concluding observations.

Universal Suffrage in Sri Lanka

The present Constitution of Sri Lanka has, (through article 88), accorded every person the right to be an elector at the election of the President and of Members of Parliament, and to vote at any referendum, provided that such person's name is entered in the register of electors

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[*] Dushyantha Mendis is Associate Director, International Centre for Ethnic Studies, Kandy, Sri Lanka. This study is based on a paper presented at the International Conference on Electoral Processes and Governance in South Asia, held in Colombo, Sri Lanka, 21st to 23rd June, 2002, by the International Centre for Ethnic Studies, Kandy, Sri Lanka

(unless disqualified under various criteria set out in the Constitution itself). It is provided (by article 93) that the voting for the election of the President and of Members of Parliament and at any referendum shall be free, equal and by secret ballot. In a leading fundamental rights case, the Supreme Court has also recognised the right to vote as an integral part of the fundamental rights guaranteed under the Constitution of freedom of speech and expression. Rejecting a view urged before court that there is a clear distinction between the franchise and fundamental rights, court held that when the freedom of speech and expression is entrenched, it guarantees all forms of speech and expression, including the franchise.[1] As Justice Mark Fernando observed, writing the unanimous judgment of the three-member bench,

> *"...the most effective manner in which a voter may give expression to his views, with minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth. The silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundations of the Constitution."*[2]

Sri Lanka is a frontrunner among third world nations in establishing and maintaining a functioning democracy. Universal suffrage was introduced in Sri Lanka in 1931, only three years after it was finally granted in the United Kingdom itself, and 20 years before it was introduced in India. Women in Sri Lanka had the right to vote long before their counterparts for instance in France, Belgium and Switzerland. In 1935, registration of voters was made compulsory. By the State thus taking over the responsibility for registration of voters, Sri Lanka again placed itself ahead even of some advanced countries where registration is as yet voluntary.

The grant of Universal Franchise in Sri Lanka took place when Sri Lanka was yet a British colony, and through the implementation of the recommendations of a Constitutional Reform Commission sent out by the British Government, namely the Donoughmore Commission, named after its head, Lord Donoughmore. It is worth noting that the introduction of universal suffrage took place in spite, rather than because, of any pressure from Sri Lanka's own political elite. The Donoughmore Commission saw universal suffrage as an essential pre-requisite of social advancement;

> *"In view of the backward character of social and industrial legislation in Ceylon, ... a good case could be made out for regarding*

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1. ***Karunatilake and Another*** v. ***Dayananda Dissanayake, Commissioner of Elections et.a,*** (1999) 1 SLR 157, p 173.
2. *Ibid* p 174.

the extension of the franchise as more urgent than any increase of responsible government."[3]

The Commissioners also drew a direct link between responsible and representative government; "...we could not recommend a further grant of responsible government unless that government were to be made fully representative of the great body of the people."[4]

Elective representation to the national legislature had been introduced only in 1910 and then the franchise was severely restricted in terms of income and property qualifications, as it indeed was until the time of the introduction of universal adult franchise. Nevertheless, Sri Lanka's experience of the franchise antedates Sri Lanka's experience of representative government by a wide margin, for there was some experience of it, albeit subject to stringent income and property qualification, in the area of local government. In the municipal councils set up under Ordinance No. 17 of 1865 the elected element of the membership exceeded the (government) nominated element. The District Road Committees established under the Thoroughfares Ordinance No. 10 of 1861 also included an elected membership, as did the Local Boards of Health and Improvement constituted under Ordinance No. 13 of 1898, where the number of elected members equalled the number of nominated members.

It has been commented about these local government bodies that –

"It would ...be more correct to call them extensions of the bureaucracy rather than genuine local government bodies."[5]

The case of the *Gamsabhas*, the village councils established under the Irrigation Ordinance of 1856 however, was different.

This was an attempt to re-vitalise an age-old institution which regulated the affairs of the village, and in 1856 the *Gamsabhas* were given the power to make rules for irrigation and cultivation, subject to the approval of the Governor and the Executive Council. The proceedings of the *Gamsabhas* were summary and informal, and fines could be levied for breach of its rules. So successful was this experiment that in 1871 the *Gamsabhas* were vested with some limited powers to settle many disputes within its local area, for instance, those involving agriculture, fisheries, footpaths, village schools, petty crime etc.[6] It has been said that the franchise for the election of the members of the committee "...was one of the simplest in the history of electoral law;"[7] every male inhabitant who had not been convicted

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3. *Report of the Special Commission on the Constitution*, Cmd. 3131, HMSO, 1928, p 83.
4. *Ibid.*
5. G R Tressie Leitan, *Local Government and Decentralized Administration in Sri Lanka*, Colombo, Lake House Investments Ltd., 1979, p 49.
6. V Kanesalingam, *A Hundred Years of Local Government in Ceylon 1865-1965*, Colombo, 1971, p 8.
7. *Ibid* p 11.

of a serious crime within the preceding five years was entitled to vote. Whereas in the early period of the setting up of the *Gamsabhas*, it was the Government Agent of the province who presided over its meetings, from 1871 it was the Chief Headman of the area, and from 1924 onwards the Chairman of the Committee was himself elected.[8]

Thus universal franchise when it came in 1931 would not have had the effect of imposing an alien system on a befuddled populace. There has been only one change in the franchise, in 1959-60, when the voting age was lowered from 21 to 18.

Since the first General Election of 1931, there have been 13 General Elections, and four presidential elections. Nationwide elections for other tiers of government local and provincial have also been held with some regularity.

It is noteworthy that from 1956 until 1977, six successive Sri Lankan General Elections saw the government in office defeated at the polls.[9] The 1956 transfer of power was particularly significant in that, thereby Sri Lanka became the first State where a peaceful transfer of power from the original legatee of colonial power occurred in post-colonial South and South East Asia.

Constitutional Developments 1948 – 2002: A Brief Outline

The Constitutional structure in Sri Lanka at the time of attaining independence was very much based on the Westminster model. The head of State was the British Queen, represented in Sri Lanka by the Governor General. The Governor General exercised mainly ceremonial functions, but there were some discretionary powers vested in him. These arose because under the Soulbury Constitution, certain powers and functions of the Governor General were to be exercised in accordance with the Constitutional conventions governing their exercise in the United Kingdom.

The political executive was the Cabinet and the legislature a bicameral one consisting of the House of Representatives and an upper house, the Senate.

The legislature was elected on the first-past-the-post system. A few electorates were multi member constituencies, and six members were also appointed to represent interests which would otherwise not be represented in Parliament.

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8. Edgar Fernando, *Local Government Elections in Ceylon*, Colombo, 1967, pp 8-16.
9. K M de Silva, "The Problems of Governance in Sri Lanka: The Subversion of a Democratic Electoral Process," *South Asian Survey* 7:(2), 2000.

The Senate was set up in the belief, (held by the Commission which formulated Sri Lanka's independence Constitution, the Soulbury Commission, so named after its head, Lord Soulbury), that it could make

> *"... a valuable contribution to the political education of the general public ... there are in Ceylon, as in other countries, a number of eminent individuals of high intellectual attainment and wide experience of affairs, who are averse to entering political life through the hurly-burly of a parliamentary election. But it would be an advantage to the country to enjoy the services of men upon whom party or communal ties may be expected to rest more lightly, and who can express their views freely and frankly without feeling themselves constrained to consider the possible repercussions upon their electoral prospects."*[10]

There was also another important reason for the setting up of the Senate put forward by the Soulbury Constitution;

> *"...those who, rightly or wrongly, feel themselves menaced by majority action, may regard a Second Chamber not merely as an instrument for impeding precipitate legislation, but as a means of handling inflammatory issues in a cooler atmosphere."*[11]

However the Senate could only delay legislation; it could not prevent it. Finance bills could be delayed for a month, and other bills for one parliamentary session.

Protection for minorities was sought to be provided by S 29 (2) under which no law passed by Parliament:

> *"shall (a) prohibit or restrict the free exercise of any religion; or (b) make any persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or (d) alter the Constitution of any religious body except with the consent of the governing authority of that body...."*

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10. *Report of the Special Commission on the Constitution*, Cmd. 6677, HMSO, 1945, pp 78-79.
11. *Ibid* p 79.

This provision was held by the Privy Council, then Sri Lanka's highest appellate court, to set out "entrenched religious and racial matters, which shall not be the subject of legislation. 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 therefore unalterable under the Constitution.[12]"

The Privy Council had stated this proposition only by way of *obiter dicta,* and it was debatable; for instance in another case, the Privy Council had observed that the Parliament of Ceylon had "the full legislative powers of a sovereign independent State."[13] Nevertheless the observations of the Privy Council on S 29 (2) in ***The Bribery Commissioner*** v. ***Ranasinghe*** were, as we shall see, to cast a very long shadow over the Constitution itself.

Judicial review of legislation was not expressly provided for by the Constitution, but was a power assumed by the courts.[14] That this power was implied by the Constitutional history of Sri Lanka was recognised by the Privy Council in its observation about the power of judicial review "...having remained, where it lain for more than a century, in the hands of the judicature."[15]

Members of the higher judiciary were appointed by the Governor General. The powers of appointment, transfer, dismissal and disciplinary control of other judicial officers were vested in the Judicial Services Commission. This Commission consisted of the Chief Justice, a Judge of the Supreme Court and another person who was, or had been, a Judge of the Supreme Court. That the provisions relating to the Judicial Services Commission manifested an intention to secure to the judiciary a freedom from political, legislative and executive control was recognised by the Privy Council.[16]

While the highest appointments in the administrative hierarchy were made by the Governor General, the powers of appointment, transfer, dismissal and disciplinary control of public officers were vested in an Independent Public Services Commission.

Finally, as regards the Soulbury Constitution, we may note that the doctrine of the separation of powers was read into it by the Privy Council. In ***Liyanage*** v. ***The Queen***, the Privy Council observed that –

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12. ***The Bribery Commissioner*** v. ***Ranasinghe***, (1964), 66 NLR 73 at p 78.
13. ***Ibralebbe*** v. ***The Queen*** (1963) 65 NLR 433 at p 443.
14. Joseph A L Cooray, *Constitutional and Administrative Law of Sri Lanka*, Colombo, Sumathi Publishers, 1995, p 116.
15. ***Liyanage*** v. ***The Queen*** (1965) 68 NLR 265 at p 282.
16. *Ibid.*

"the importance of securing the independence of judges and maintaining the dividing line between the judiciary and the executive was appreciated by those who framed the Constitution."

The Privy Council went on to point out that significantly, the Constitution was divided into parts (indicating the doctrine of separation of powers), with separate parts dealing with the Governor General, the legislature, the executive, and the judicature."[17]

In its functioning however, the Soulbury Constitution did not perhaps realise its full potential. As regards the Senate for instance, Joseph A L Cooray points out that –

"From the inception ...many of its members were selected not so much on the basis of merit as on service rendered to the party in power. Criticism had been made on the ground that there had been far too little of the careful and efficient scrutiny or the mature discussion of legislative measures that one was inclined to expect of a revising Chamber. The occasions on which its debates had reached a high standard, free from party politics, had been relatively few and far between."[18]

The Public Service Commission was subject to pressures of a different kind;

"The difficulty that had arisen was mainly the result of having hitched an Independent Public Service Commission on to a Constitution that had to be worked on the principle of ministerial responsibility. In fact, the tragedy of the Public Service Commission was that under the Constitution it was expected, like Janus, to face both ways at the same time in the direction of public service independence from ministerial control over appointments, transfers, dismissals and disciplinary control, as well as in the opposite direction, giving effect to the principle of ministerial responsibility to Parliament for the acts of the public service."[19]

The Constitutional conventions of the United Kingdom on which the Governor General was supposed to act have not been authoritatively codified, and debate is possible about what should be done in particular circumstances. Thus, controversies arose in Sri Lanka about the appointment by the Governor General of the Prime Minister both in 1952 and in 1960, and regarding the dissolution of Parliament in the latter year.

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17. *Ibid* pp 265, 281.
18. Joseph A L Cooray, *op.cit.*, 1995, p 53.
19. *Ibid* p 53.

S 29 (2) would also appear to have been a disappointment. For instance in 1948, the Ceylon Citizenship Act of 1948 and the Parliamentary Elections Act of 1949 were effective in disenfranchising the vast bulk of Indian Tamil plantation workers, relatively recent immigrants, by a relatively restrictive definition of Citizenship. The Privy Council held that the relevant legislation was on Citizenship and could not be said to be making persons of the Indian Tamil community liable to a disability to which persons of other communities were not made liable.[20]

K M de Silva has pointed out two other instances where minority groups were discomfited under the Soulbury Constitution;

> *"When S W R D Bandaranaike's Official Language Act[21] was introduced in the House of Representatives in 1956, the Speaker ruled that it was not a Constitutional amendment and therefore required only a simple majority. In 1960, the Roman Catholics found to their dismay that the Constitution provided no protection for them in their campaign to preserve the status quo in education."*[22]

It appears that the government could have driven a coach and six through S 29 (2) almost at will.

Of the Soulbury Constitutional structure, the first element to go was the Senate, abolished in 1972.

An effort to amend the Constitution was commenced in 1959 with the appointment of a joint parliamentary select committee in 1957, and although that effort came to nought, both major parties represented in Parliament, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP) held the view, throughout the 1960s, that the Constitution should be amended. However, what took place ultimately in 1972 was not the amendment of an existing Constitution but the adoption and enactment of a new Constitution, and this was done by a United Front Government consisting of the SLFP and small left wing parties.

Where the Soulbury Constitution came a cropper was in an intersection of S 29 (2) with the power of judicial review. S 29 (2) was in any case anathema to the SLFP, the party which was instrumental in bringing the assertion of the rights of the majority Sinhalese and Buddhists to the fore in the agenda of the 'national' political parties in Sri Lanka. What made it of immediate and acute concern was a 1969 case, ***Kodeeswaran*** v. ***The Attorney General***,

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20. ***Kodakan Pillai*** v. ***Mudanayake*** (1953) 54 NLR 433.
21. This served to make Sinhala, the language of the majority community in Sri Lanka, the only official language of Sri Lanka.
22. K M de Silva, "The Constitution and Constitutional Reform since 1948," K M de Silva (ed.), *Sri Lanka: A Survey*, London, C Hurst, 1977, p 316.

an action brought by a public officer against the government (represented by the Attorney General) for an increment of salary not granted to him on the basis that he had not passed a mandatory proficiency test in the use of the Sinhala language. Among the contentions of the plaintiff was that the Official Language Act of 1956 was unconstitutional and void, and accordingly the government had no basis on which to insist that he pass a proficiency test in Sinhala. The District Court[23] held with him. The Supreme Court[24] held that it was not necessary to rule on the matters raised by the Plaintiff because in any event a public servant could not sue for an increment in salary. The Privy Council[25] overruled the Supreme Court on the latter point and sent the case back for decision on the original issues.

Kodeeswaran's case was to give point and impetus to the efforts to draft a new Constitution. As the then Minister of Constitutional Affairs, Colvin R de Silva observed in the Constituent Assembly,[26]

> *"...15 years after the event the position is that the Official Language Act is under challenge in the courts, the only judgment by any competent Court on this matter being the judgment of the District Court that the Official Language Act is invalid, and in the meantime, quite rightly, the government of Ceylon continues to apply the Official Language Act, for the matter is in appeal and therefore the decision is not binding on the Crown.... If we have this power (of judicial review of the Constitutionality of legislation), if the courts do declare this law invalid ...the chief work from 1956 onwards will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked."*

The irresistible force of Sinhala language policy would appear then to have swept away the seemingly immovable object, S 29 (2) and in fact the entire Soulbury Constitution. The new republican Constitution of 1972 was brought into being using the device of the Constituent Assembly, this particular device being chosen to overcome any hurdles that may be presented by the entrenched nature of S 29 (2). The United Front government could select this option because it was blessed with a parliamentary two-thirds majority in a first-past-the-post electoral system. The fact that the share of total votes it received was considerably smaller than the number of seats it won, did not communicate itself to the UF government as indicating the absence of a national political consensus for a new Constitution.

The Constitutional structure devised in 1972 has been described as a "centralised democracy in which the dominant element is the political executive, which has few institutional checks

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23. DC, Colombo 1026/Z.
24. 70 NLR 121.
25. 72 NLR 337.
26. *Constituent Assembly Debates*, Vol. 1, 2833-4.

on its use of political power."[27] The 1972 Constitution, like the Soulbury Constitution used the system of the Parliamentary Executive, i.e., the cabinet form of government. However, any significant similarities between the two Constitutions ended there.

The head of State was now the President, but the President was the nominee of the Prime Minister. The President's office was diminished in other ways as well, by reducing his discretionary power. For instance the rules for dissolution of Parliament were now spelt out in the Constitution.

The new Constitution did away absolutely with the doctrine of the separation of powers. The unicameral National State Assembly was declared the supreme instrument of State power of the republic. The Assembly exercised (a) the legislative power of the people; (b) the executive power of the people, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and (c) the judicial power of the people through the courts and other institutions created by law except in the case of matters relating to the powers and privileges of the National State Assembly. Provision for members appointed to represent special interests otherwise un-represented in Parliament was done away within the new Constitution. Elections were still however on the first-past-the-post system and the multi member constituencies were continued.

Appointments to the higher judiciary continued to be made by the head of State, but now the President was required to act on the advice of the Prime Minister or a minister authorised by the Prime Minister to advice the President on those matters. The Judicial Services Commission was abolished, and two new bodies set up, the Judicial Services Advisory Board and the Judicial Services Disciplinary Board. The former body made recommendations to the Cabinet on judicial appointments, but the Cabinet was not bound by such advice, though the Cabinet had to take responsibility for its decision before the National State Assembly. The Judicial Services Disciplinary Board acted subject to rules made in consultation with the Cabinet, but its decisions could not be debated by the National State Assembly.

The Public Service Commission was abolished, and the Cabinet vested with the authority for the appointment, transfer, dismissal and disciplinary control of all public servants. It has been pointed out that in fact "this change cannot be looked upon as drastic; it merely gave Constitutional force to what was by then normal practice."[28]

Judicial review of the constitutionality of legislation was expressly prohibited by the Constitution, but an innovation, not entirely original, was introduced; a Constitutional Court was set up to rule on the constitutionality of legislation enacted by the National State

27. K M de Silva, *op. cit.*, 1977, p 319.
28. Vijaya Samaraweera, "The Administration and the Judicial System," K M de Silva (ed.), *op. cit.*, 1997, p 366.

Assembly. The Constitutional Court could be moved by a wide variety of parties, but within a week of the bill being impugned being placed on the agenda of the assembly. The court was also required to give its determination within two weeks of the question being referred to it.

S 29 of the Soulbury Constitution disappeared, but a chapter on fundamental rights and freedoms was incorporated in the Constitution. The fundamental rights sought to be protected included the equality of all persons before the law, non-discrimination in public employment on the grounds of religion, race, caste or sex, freedom of thought, conscience and religion, protection of life and personal liberty, freedom of speech, of peaceful assembly and association and freedom of movement and residence. However this statement of fundamental rights turned out to have very little effect in practice; a select committee of the National State Assembly appointed to consider proposals for the revision of the Constitution in 1977 pointed out the three major criticisms of the chapter in the 1972 Constitution on fundamental rights; "that the rights recognised were limited in scope, that they were subject to restrictions which were so wide as almost to nullify the grant of fundamental rights and their enforcement was not guaranteed in the Constitution."[29]

An area of increasing concern was the use of the Public Security Ordinance of 1947. Sections 3 and 8 of the ordinance have the effect that the decision to declare a State of emergency, and all regulations, orders, rules and directions made under the ordinance, cannot be questioned in a court of law. Section 7 of the ordinance provides that regulations made under the ordinance prevail over all other laws except the Constitution. It was the head of State who under the Soulbury Constitution could declare a State of emergency. Under the 1972 Constitution, almost all the powers which were vested in the head of State under the ordinance were firmly vested in the head of the political executive. What was troubling was that the government did not scruple to make tendentious use of the emergency powers.

One of the most notable things that were done with the introduction of the 1972 Constitution was that the United Front Government took the opportunity to extend the life of the sitting Parliament by a further two years, an action "probably unprecedented in the annals of Constitution making in democratic States."[30]

In 1977, the United National Party was elected in its turn with a two-third majority, but this time with a clear majority of total votes cast at the elections 50.9%. The constitutional changes they made through the second republican Constitution introduced by them in 1978 were much more significant and positive than those made through the 1972 Constitution.

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29. Quoted in Joseph A L Cooray, *op. cit.*, 1995, p 79.
30. K M de Silva, *op. cit.*, 1977, p 323.

Under the 1978 Constitution, a) the legislative power of the people is exercised by their elected representatives and by the people directly at a referendum, b) the judicial power of the people is exercised by Parliament through the courts and other institutions set up by law, and c) the executive power of the people is exercised by an elected President.

While sovereignty is vested in the people as in the 1972 Constitution, this sovereignty is protected by requiring that some basic provisions of the Constitution such as those relating to the term of office of the President, the duration of Parliament and certain fundamental rights could only be changed with the consent of the people at a referendum.

One major innovation of the 1978 Constitution is a strong executive presidency. The powers entrusted to the President are indeed wide.

The President is head of State, head of the executive and of the government, and commander in chief of the armed forces. The President appoints the Prime Minister (though here his discretion is fettered to the extent that he is constitutionally required to appoint the person most likely to secure a majority in Parliament) and other ministers, and assigns their subjects and functions which he may again change. Up until the Seventeenth amendment to the Constitution in 2002, the President appointed the Chief Justice and other judges of the superior courts and the head of the Police. He also appoints other senior officials including the heads of the Army, Navy and Air Force and ambassadors. The President is vested with the absolute power of recognising foreign States and governments and the executive power to enter into treaties is not conditional on the passing of legislation. The President is also immune from suit for any act or omission done in his official or private capacity. Removal of the President from office requires an impeachment process and a two-thirds majority in Parliament, a condition at first glance unlikely to be fulfilled if the President's own party is in power in Parliament.

Concern focused almost immediately the new Constitution was announced on the vast powers of the President, and these powers have remained a source of concern ever since. Often overlooked in much discourse which attempts to cast the executive presidency as an unfettered Leviathan is that in fact some important checks and balances do operate on the presidency, subtle no doubt, but no less real for that.

For instance, two of the three executive Presidents Sri Lanka has had have been stymied at one point or another by the workings of the political process in Sri Lanka. President Premadasa was faced with the threat of an impeachment process in 1991 from an apparently substantial block of his own parliamentary group. In July 2001 President Kumaratunga, faced with a vote of no confidence on her government which had every chance of success in Parliament, prorogued Parliament and scheduled a referendum asking the people whether they want a new Constitution. The resulting popular outcry made it impossible for her to

proceed with that desperate ploy. In December 2001, with the United National Front previously the main party in opposition to the President's parliamentary power base, the People's Alliance obtaining a majority in Parliament, the President apparently found it politically impossible to exercise her discretionary powers of appointment of ministers and assignment of their subjects and functions.

Limitations on the President's immunity from suit, and its ramifications in the field of executive action, have also been clearly delineated by the Supreme Court;

> *"...Article 35 (the article of the Constitution dealing with the immunity from suit of the President) only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time ...it does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or respondent who relies on an act done by the President, in order to justify his own conduct."*[31]

The executive presidency has also vastly strengthened the hand of the minorities in Sri Lanka. Each of the two major political parties in Sri Lanka generally receives around 30-35% of the total vote at parliamentary elections. However the presidency is won on the basis of an absolute majority, and in order to secure this the President must have appeal to both the minorities and those whose allegiance is generally to other political parties. Indeed it has been noted that –

> *"...previous elections were won or lost in the Sinhalese areas, and the major parties could ignore the north of the island. This situation has changed since the 1980s, and the experience of the presidential elections held so far shows that no party or individual aiming at the presidency could afford to alienate the minorities, or fail to campaign in the Tamil areas of the north and east, as well as among the Indian plantation workers."*[32]

The 1978 Constitution has also reined in what has been described as "almost an executive dictatorship which could silence Parliament and the opposition during a state of emergency."[33] The imposition of a state of emergency is now debated in and voted on by

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31. Karunathilaka and Another, *op. cit.*, 1999, p 177.
32. K M de Silva, "Electoral Systems: The Sri Lankan Case" in Devendra Raj Panday and Anand Aditya (eds), *Democracy and Empowerment in South Asia*, Kathmandu, Nepal South Asia Centre, 1995, p 94.
33. A Jeyaratnam Wilson, *The Gaullist System in Sri Lanka*, London, The Macmillan Press Ltd., 1980, p 18.

Parliament on the first available occasion after such imposition, and if a state of emergency is in operation for a period of 90 days in a period of six calendar months, it cannot be prolonged for more than ten days in the following six months without the approval of a two thirds majority in Parliament.

A major departure of the 1978 Constitution was in the introduction of proportional representation in legislative elections in place of the first-past-the-post system which had prevailed up to that time. This will be further discussed at an appropriate stage further on.

The independence of the judiciary was originally (i.e., prior to the 17th Amendment) safeguarded in two ways. The judges of the superior courts were appointed by the President, but could only be removed for proved misbehaviour or incapacity, and the President could make an order only on address of the majority of Members of Parliament. No resolution for the presentation of such an address can be proceeded with unless it is signed by at least one third of the total number of Members of Parliament. (These requirements for the removal of members of the higher judiciary still remain.) The judges of the lower courts are subject to the control of a body titled, once again, the Judicial Services Commission, consisting of the Chief Justice and two other judges of the Supreme Court.

The President's discretionary power to appoint judges of the superior courts was also restricted to some extent by a 1996 ruling of the Supreme Court.[34] There the Supreme Court held that the President's discretion to appoint judges to the Supreme Court was not unfettered, and the President was required to consult the Chief Justice before an appointment was made.

Exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution is vested in the Supreme Court, which must determine any such question within a period of two months.

The appointment of the most senior officials is as we have seen in the hands of the President. The 1978 Constitution continued the practice adopted by the 1972 Constitution of vesting appointment of heads of departments in the Cabinet. Appointment and control of other officials could be delegated by the ministers to the Public Service Commission.

The 17th Amendment to the Constitution passed by Parliament in 2001 makes some important changes in the method of making appointments to the higher judiciary and also the appointment and control of specified public servants. These changes will be discussed at a more appropriate stage further on.

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34. ***Silva*** v. ***Bandaranayake*** (1997) 1SLR, p 92.

It may also be noted that the 1978 Constitution has gone very far in asserting the rights of minorities. It has been said to have gone "... furthest in the effort to meet Tamil demands. Various provisions for the official use of the Tamil language and fundamental rights for the protection, among other things, of minority religious and ethnic groups were incorporated in the various chapters of the Constitution.[35]"

A measure of devolution of powers and functions from the central government to the provinces through the setting up of provincial councils was attempted by the 13th Amendment to the Constitution passed by Parliament in 1987.

Perhaps the greatest contribution of the 1978 Constitution in terms of contributing to individual rights and freedoms is in the area of fundamental rights; every person is entitled to apply to the Supreme Court in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which he is entitled under the Constitution. As we shall see, this provision has been of incalculable importance in preventing infringement by the executive of fundamental rights of voters in Sri Lanka.

The Constitutions of Sri Lanka would appear to have, over time, increasingly recognised the rights and freedoms of individuals. Nevertheless, the right to vote and the right to a free, equal and secret ballot have sometimes been seriously impinged upon in Sri Lanka, and the next section will discuss how this has been done. Elections will be discussed under the categories;

1) Presidential,
2) Parliamentary,
3) Provincial and
4) Local elections
5) The referendum.

The Right to Vote Abridged? Elections in Sri Lanka

1. Presidential Elections

Presidential elections are conducted under the Presidential Elections Act (No. 15 of 1981, as amended from time to time).

1.1 Method of Election

These elections are decided on the basis of an absolute majority. Several candidates may compete, but at the end of the first count, if no candidate obtains 50% of the vote, all

35. A Jeyaratnam Wilson, *op. cit.*, 1980, p 18.

candidates other than the first and second in terms of the votes secured are eliminated from the count, and the votes cast for the first and second candidates as second and third preferences in the ballots cast for the candidates eliminated from the count, are counted in a second count, and added to the total of votes cast for the first two candidates. In no presidential election in Sri Lanka has it been necessary to go in for a second count.

1.2 A Standing Invitation to Mayhem? Challenging a Presidential Election

The method by which the election of a candidate as President is avoided is set out in the Presidential Elections Act; S 90; "...by his conviction for any corrupt or illegal practice."

These practices are spelt out in great detail in the act, but it is difficult to think how such a conviction could be obtained given the immunity from suit of the President.

The method by which the election of a candidate to the office of President shall be declared to be void, is on an election petition heard by a five member bench of the Supreme Court. The grounds on proof of which the election shall be declared void are set out in S 91 (a) to (e) of the Presidential Elections Act.

The only petition ever heard by the Supreme Court against the election of a President was ***Sirimavo Bandaranaike*** v. ***Ranasinghe Premadasa and Chandananda de Silva.***[36] In this case Sirima Bandaranaike, the candidate who finished in second place in the presidential election of 1988, challenged the election of Ranasinghe Premadasa as President, basing herself on S 91 (a) and (b), which read as follows;

a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate they preferred;

b) non compliance with the provisions of this act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.

Sirima Bandaranaike preferred three charges, based on S 91 (a) and (b); the first was that of general intimidation (S 91a), the second that of non compliance with the provisions of the Act relating to elections (S 91b), and thirdly, 'other circumstances' (S 91a), i.e., the failure of the Commissioner of Elections (the 2nd respondent) and/or certain members of his staff to conduct a fair and free election, in accordance with the provisions of the act. It was alleged that due to each of these reasons, the majority of electors were or may have been prevented

36. (1992) 2 SLR 1.

from electing the candidate of their choice. The second charge was abandoned by the counsel for the petitioner in his closing address. This left only the first and second charges, based on S 91 (a).

Now, it is straightaway apparent that S 91 (a) is, in the terms of the layman, tautologous, for it follows that if there has in fact been general bribery, general treating or general intimidation, then the majority of electors would have been prevented from electing the candidate they preferred. However, in legal terms, it is necessary to give a definition of what 'general intimidation' means, and that is what the latter part of S 91 (a) does. The alternative course is to allow the judiciary to determine for itself exactly what a situation of 'general intimidation' may mean. However, this implies that the judiciary would have to legislate on matters of acute political concern, and that option is therefore hardly practical, ignoring the question as to how desirable it may be (which in the opinion of the present writer is, not at all). For the benefit of the uninitiated, it must also be pointed out that it is not open to court to hold that a piece of legislation appears to be tautologous and that therefore they will concentrate merely on that part of the particular piece of legislation which they think is relevant; Court cannot do this because it is here bound by the rule of statutory interpretation which requires that meaning and purpose be assigned to every word in a piece of legislation. Taking the section as it stands therefore, whether the majority of electors were prevented from electing the candidate of their choice must be proved in order for the election to be declared void on the grounds of 'general intimidation' etc.

This was in fact exactly what the Supreme Court held in ***Sirimavo Bandaranaike*** v. ***Ranasinghe Premadasa and Chandananda de Silva***; in its judgment, the Supreme Court held as a "clear, categorical and unequivocal ruling on the key words in S 91 (a) of the act," the following paragraph from a preliminary order which court had issued; "... it seems to us that on the basis of instances or acts of general intimidation established by evidence, the court may draw a reasonable inference there from that the majority of electors may have been prevented from electing the candidate of their choice. In a case of general intimidation, the question that arises is from the proved acts of intimidation of electors, is it reasonable to suppose that the result of the election may have been affected? This, it seems to us, to be the true meaning of the words "the majority of the electors may have been prevented from electing the candidate they preferred." But it will be open to the returned candidate to show that the gross intimidation could not possibly have affected the result of the election."[37]

The court's reasoning as regards the charge of 'other circumstances' was similar; "We have already held, in accordance with the ruling of this court in the preliminary order, that the burden is on the petitioner to prove that by reason of the 'other circumstances,' the result of the election may have been affected."[38]

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37. *Ibid* p 12.
38. *Ibid* p 64.

In making these rulings, the Supreme Court was only doing exactly as it had to do under the law. In the event, the evidence presented in the Supreme Court falling short of the required proof, the petition was dismissed.

However, it may be questioned as to when, if ever, it can be proved in a court of law, that for instance general intimidation had the effect of preventing the majority of electors from electing the candidate they preferred. It could be asked whether the wording of the act has not in fact placed an impossible burden on the petitioner.

The origin of S 91 (a and b) is extremely interesting; it is, as the Supreme Court noted in ***Bandaranaike*** v. ***Premadasa***,[39] exactly the same wording as was used in S 77 (a and b) of the Ceylon (Parliamentary Elections) Order in Council, 1946. In fact the Supreme Court, in ***Bandaranaike*** v. ***Premadasa***, studiously applied precedents from parliamentary election petition cases to the reasoning in the particular case at hand. It may be pointed out that again, they had no choice in the matter, the wording in the two pieces of legislation being the same.

However it is important to note that criteria for declaring void the election to a parliamentary seat is now applied to the election of the President which is held islandwide, and it may be questioned as to how realistic it is to expect laws which were designed to deal with problems arising in the geographically limited area of a parliamentary seat to succeed in dealing with the totally different challenges that are posed by an islandwide presidential election. The complete uselessness of S 91 was well recognised when the United National Party, having filed a petition against the election of the President in 1999, withdrew it shortly afterwards.

Thus the more ruthless type of candidate could move into the presidency serenely unperturbed by the general intimidation, non compliance with election laws etc. that may have got him or her there, secure in the knowledge that no effective legal challenge can be posed against his or her election. This legal position is in fact a standing invitation to mayhem at the time of a presidential election. It is not an invitation which has been accepted by all political parties and candidates however.

It is interesting to speculate as to why the legal provisions determining election petitions in presidential elections are so weak; stupidity and inertia would not do as explanations in a country widely regarded as being of some political sophistication. Neither would the prospect of making cynical misuse of the absence of effective legal provisions in future presidential elections alone account for the continued existence of these provisions.

These provisions become all the more curious and apparently inexplicable considering the fact that an apparently more appropriate wording is available in S 92 (a) of the Parliamentary Elections Act (No. 1 of 1981); "that by reason of general bribery, general treating or general

39. (1989) 1 SLR 240, p 247.

intimidation or other misconduct or other circumstances whether similar to those enumerated before or not a section of electors was prevented from voting for the recognised political party or independent group which it preferred and thereby materially affected the result of the election."

This section would appear to be an advance on the corresponding section in the Presidential Elections Act, and it could be asked why that wording could not be applied in the latter act. The only logical reason that comes to mind is that such a wording in the Presidential Elections Act would make any election petition necessarily successful in a situation where a large part of the north of the country is controlled by a terrorist group. That is of course only speculation, but it is an interesting question as to whether one could ever bring in provisions with 'teeth' if not 'bite' to the Presidential Elections Act in that type of situation. If the answer is in the negative, that would provide yet another instance of the not only corrosive, but outright destructive effects on Sri Lanka of its long war against the northern terrorist group.

2. Parliamentary Elections

These are conducted under the Parliamentary Elections Act (No. 1 of 1981, as amended from time to time).

The parliaments of Sri Lanka under the Soulbury Constitution (i.e. up to 1972) comprised two types of representatives, elected and appointed. The elected representatives themselves comprised two categories, those elected from single member constituencies these comprised the vast bulk of the representatives and those elected from multimember constituencies. These latter were devised to provide for set up to provide for significant concentrations of minorities religious, ethnic, and from 1947 to 1959, caste as well in areas which would otherwise be dominated by the majority community. In a multi member constituency each elector would be entitled to as many votes as there were seats for that particular electorate; for instance, in a three seat constituency each voter would be entitled to cast three votes each, and these could be cast in whatever manner the voter thought fit, all in favour of one candidate or each in favour of three different candidates. Under the Soulbury Constitution, six members were also appointed in each Parliament, to represent interests which would otherwise be underrepresented or not represented.

Under the 1972 Constitution, there were no appointed members. All members were elected, still on the first past the post system, and multi-member constituencies yet continued.

2.1 Delimitation of Electorates under the First Past the Post System

Under both the Soulbury Constitution and the 1972 Constitution, the demarcation of the nine administrative provinces of Sri Lanka into electoral constituencies on the basis of two principles was entrusted to delimitation Commissions which were periodically appointed following the usual decennial census. The two principles involved in the delimitation of constituencies (apart from the fact that the administrative provinces were to form the basis of delimitation) were;

1) There was to be one electoral constituency for every 75,000 persons.
2) Additionally there was to be a constituency for every 1,000 miles of square area.

As K M de Silva has pointed out, this formula was a compromise a 'squaring of the circle' between territorial representation as demanded by the majority Sinhalese and a more ethnically balanced representation as demanded by the Tamil minority.[40] These dichotomous demands were met by the formula already noted in several ways.

On the one hand,[41] determination of seats on the basis of population attempted to satisfy Sinhalese demands; the disenfranchisement of a large part of the Indian Tamil estate labour force, coupled with the carving out of electorates on the basis of population gave an advantage to the rural Sri Lankan voter in the central hill country. On the other hand, demarcating an additional constituency for each 1,000 sq. miles resulted in for instance the densely populated Western Province getting only one additional constituency whereas the Northern Province, with a large Tamil population, the Eastern Province, with a mixed population of Tamils, Sinhalese and Muslims, and the largely Sinhalese but relatively less populated North-Central Province would get four additional constituencies each.

This basis of delimitation was used in all parliamentary elections up to 1977. By 1978, Parliament consisted of 168 members elected from 160 constituencies. The 1978 Constitution however introduced an entirely new system for electing Members to Parliament, the proportional representation system, and under this system an entirely new basis was adopted of demarcating not electorates, but electoral districts.

2.2 Demarcation of Electoral Districts under the Proportional Representation System

Under the proportional representation system the administrative province yet remains the basis for the demarcation of electorates. Under the terms of the Constitution, there shall be not less than 20 and not more than 24 electoral districts. Each province of Sri Lanka may itself Constitute an electoral district or it may be divided into two or more electoral districts.

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40. K M de Silva, *op. cit.*, 1995, p 90.
41. *Ibid* p 92.

Where a province is divided into a number of electoral districts, regard shall be had to the existing administrative districts so as to ensure as far as is practicable that each electoral district shall be an administrative district or a combination of two or more administrative districts or that two or more electoral districts shall together Constitute an administrative district. Accordingly, the nine provinces of Sri Lanka have been divided into 22 electoral districts.

The number of representatives now sent to Parliament is determined as follows;

a) A total of 160 representatives from the different electoral districts. In order to ascertain how many representatives should be sent from each electoral district, the first step is to obtain what is known as the 'qualifying number;' the total number of registered voters divided by 160. The total number of voters in each electoral district is then divided by the 'qualifying number' and the result indicates the number of representatives that particular electoral district is to return. If all 160 seats have not been allocated among the different electoral districts following this exercise being carried out for all electoral districts, the remaining seats are allocated on the basis of the greatest remainder. Thus 160 seats are allocated annually among the different electoral districts on the basis of the number of registered voters in each district.

b) Thirty six seats are allocated in the proportion of four per province, and these seats are allocated equitably among the electoral districts of the province. In this provision we see a vestige of the old system of giving weightage on the area basis. However, whereas under the old area basis the Northern and Eastern provinces got eight out of a total of 25 area seats, under the proportional representation system they still get eight, but it is now eight out of 36.[42]

c) Twenty nine members are elected in proportion to the total number of votes polled at the national level the so called 'national list' MPs.

Thus Parliament now comprises 225 representatives.

2.3 Proportional Representation

This system was introduced to do away with the wild distortions created by the first-past-the-post system in translating the popular will into the number of seats each political party receives at elections. As the 1978 Parliamentary Select Committee on the revision of the Constitution[43] pointed out, at the general election of 1970 the SLFP with 36.9% of the vote secured 91 or 60.3% of parliamentary seats, whereas the UNP with 37.9% of the total vote

42. *Ibid* p 93.
43. *Parliamentary Series*, No. 14, 1978, p 143.

secured only 17 or 11.3% of parliamentary seats. In 1977, the boot was on the other foot; the UNP, with 50.9% of the total vote secured 140 or 83.3% of parliamentary seats, whereas the SLFP, with 29.7% of the total vote secured eight or 4.8% of parliamentary seats.

As we have seen, Sri Lanka is now demarcated into 22 electoral districts. The nomination list for an electoral district of any political party or group of independents contesting an election should contain a number of candidates equal to the number of seats in that particular district plus one third of that number. These candidates are each identified by a number, allocated by listing the candidates in (the English) alphabetical order.

At the election, the ballot paper requires voters to vote for the party or group they support, and then they may mark not more than three preferences separately for three different candidates identified by number. Every political party and group contesting the electoral district is required to obtain at least five per cent of the total votes cast in order to have any of their representatives elected.

At the count, the votes polled by the political parties and groups who have polled less than the statutory minimum are deducted from the total votes cast in that particular electoral district. This deduction yields the 'relevant number of votes.' This latter number is then divided by the number of seats in that electoral district minus one. The result is the 'resulting number' or 'quota.' (If the result is or includes a fraction, then the figure is rounded off to the integer immediately higher than the relevant fraction.) The number of votes received in that electoral district by each political party and group (which has obtained the statutory minimum percentage of votes) is then divided by the 'quota,' and this yields the number of seats each party and group is entitled to. Seats yet to be allocated to a political party or group after the completion of the preceding exercise are allocated on the basis of the greatest remainder. The party or group which polls the highest number of votes in that electorate is awarded a 'bonus' seat (which is why the 'resulting number' is obtained by dividing the 'relevant number of votes' by the number of seats in the electorate minus one.) Who in each party or group will occupy the seats allocated to such party or group is decided on the basis of the preferences each candidate has received.

When proportional representation was first introduced to Sri Lanka, there was no provision for voters to mark their preferences for individual candidates, and the seats were filled on the basis of the list put forward by the party. Apart from being criticised for taking away from the voter the right to choose his individual representative, filling of seats by the party hierarchy alone also led to frictions within the parties themselves. The system of marking preferences was therefore introduced in 1983.

The cut-off point for elimination of the votes of parties polling less than the statutory minimum was originally fixed at 12.5%. Criticism that this discriminates against small political parties led to a change in 1988 when the cut-off point was reduced to five percent.

The advantages and disadvantages of proportional representation may now be briefly examined.

The greatest advantage of proportional representation has been in that it has brought to an end the wild electoral swings experienced under the first past the post system. While doing this, the Sri Lankan system has not produced the type of hung or paralysed Parliament which is the usual bane of proportional representation systems manifested in nearly all other countries which have adopted that system. Here the system of awarding 'bonus seats,' something the critics of proportional representation love to hate, would appear to have played an important role in providing some of the benefits of stable government offered by the first past the post system.

Proportional representation has also been of tremendous benefit to religious and ethnic minorities. A change of central importance is in the method of determining the voting strength of electoral districts from 'population' to 'registered electors.'[44] Thus the advantage given to the rural Sinhalese voter which we have noted in our discussion of the delimitation of constituencies has now been removed, and the minorities in the north and east are somewhat better off in the number of representatives they could elect. Of even greater significance is that concentrations of minorities in majority dominated areas are now much better placed to have elected representatives of their choice.

Another important advantage of proportional representation is that the danger of victimisation of electorates for electing a representative from the party in opposition, very real under the first past the post system, is now appreciably reduced, because it is hardly likely that under proportional representation, an entire electoral district could be carried by one political party only.

One of the greatest advantages of the proportional representation system may be what is commonly held up as its greatest weakness; the breaking up of the link between a particular electorate and the member specifically representing it. Though much bemoaned, it may yet be one of the healthiest contributions of the proportional representation system to Sri Lanka, in liberating an MP from purely local concerns and demands.

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44. K M de Silva, *op. cit.*, 1995, p 93.

Much criticism has been levelled at the absence of scope for the exercise of conscience by those elected under the proportional representation system;[45] Sri Lankan courts have consistently upheld the sacking from the party, and therefore from Parliament, of representatives who have not toed the party line, except in instances where the principles of natural justice have not been observed. This criticism ignores some important points. Firstly, the representative is clearly elected as a representative of a party; it is by virtue of his party nominating him or her that he or she has been elected. Thus it should come as no surprise that such a representative should be subject to party discipline. Secondly, there are many situations where collective interests take precedence over individual interests; the notion that a member must adhere to the discipline of his party is no more exceptionable than for instance that of the collective responsibility of cabinet. Thirdly, those afflicted with a bad attack of conscience in fact have a safe, simple and sure remedy ready at hand resignation from party and Parliament. Where it is commonly alleged in Sri Lanka that many bouts of bad conscience in MPs are activated by monetary blandishments, resignation would prove the purity of the holder of the conscience. Those who criticise the absence of a provision for conscience in the proportional representation system are in fact effectively saying that an MP should not only have his conscience, but also his parliamentary salary, perks and privileges intact as well. In a situation where the conscience has been activated by monetary blandishments, what is required to be intact then is not only the conscience of the MP, but also his parliamentary salary, perks and privileges *plus* the monetary or other benefit! Thus, if the critics have their way, conscience, even if it doth not make cowards of us all, would at least make a few of us rich, and that beyond the dreams of avarice.

The proportional representation system has indeed had a couple of notable ill effects, but in the nature of things, little can be done about them. Campaigning has now to be done on the level not of the electorate, but of the electoral district which would comprise several electorates. Thus those candidates hailing from larger electorates (i.e. in terms of the number of registered electors) are at an advantage over those from smaller electorates, assuming in both cases that they are able to carry their electorates. Secondly, the highly competitive quest for the voter's preferences leads to intra-party rivalries which sometimes take violent turns. Thirdly, those who have larger campaign resources are at a distinct advantage over their less well-endowed brethren. The need for large resources also leads to many political IOUs being given for campaign funding, and this leads directly to corruption.

While it is known that these disadvantages are present, what is not known is to what extent they have exclusively blighted the political landscape. Intra-party squabbling for nominations could in any case take violent turns even under a first past the post system, in an era where violence is readily resorted to, to resolve many problems. Campaigns will

45. For instance see the discussion of this point in Sundari de Alwis, P Saravanamuttu and Rohan Edrisinha, "The Electoral Process in Sri Lanka Recent Developments" in Devendra Raj Panday, Anand Aditya and Dev Raj Dahal (eds), *Comparative Electoral Processes in South Asia*, Nepal South Asia Centre (NESAC), July 1999, p 107.

consume vast resources, and political IOUs will be given whatever system of representation is adopted; the net effect of proportional representation may have been merely to 'democratise' violence and corruption among several candidates rather than concentrate them in one person as in the first past the post system.

2.4 By, of, and for the People? Government Interventions in the Scheduling of General Elections beyond the Due Date

There have been two instances of this in Sri Lanka, (after the attainment of independence). We have already noted the first, the extension of the life of Parliament from five to seven years under the United Front Government of 1970–77. General Elections which should have been held in 1975 under the normal scheme of things were held only in 1977. We have also noted that this extension of the life of Parliament was probably unprecedented in the annals of Constitution making, for it was brought in under cover of the new Constitution of 1972.
The second instance was the referendum of 1982. The question put to the people here was whether the existing Parliament should continue for another term, a question squarely within article 83 (b) of the Constitution which provides for the extension of the duration of Parliament by resort to a bill passed by a two thirds majority in Parliament and approval of the people at a referendum. It was surely not entirely fortuitous that the ruling party, the UNP, possessed in the Parliament which would in the normal course of things have been dissolved in 1983, a five sixth majority. In the event, 54% of those voting at the referendum approved the extension of life of Parliament, but questions have also been raised as to the manner in which the referendum was conducted.

The first intervention took place when the political executive was solidly based in Parliament, and the second when the political executive was headed by a directly elected President. Thus it would appear that where such interventions are concerned, it is very much six of one as against half a dozen of the other as to whether a parliamentary system or presidential system was involved, though it may also be noted that the referendum, however imperfectly carried out, did involve a consultation with the people, and was squarely within the constitutional provisions for the holding of a referendum, whereas the extension of the life of Parliament in 1972 took place without any consultation at all.

2.5 Highway or Blind Alley? Election Petitions

The Parliamentary Elections Act carefully distinguishes between making a whole election void and voiding and avoiding the election of a particular member.

Taking first the election of a particular member, S 91 provides that "The election of a candidate as a member is avoided by his conviction for any corrupt or illegal practice." The corrupt and illegal practices are spelt out in detail in the act.

S 92 (2) provides that –

> *"The election of a candidate as a member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge...,"* and specifies from (a) to (d) the relevant grounds which however need not detain us here.

Under S 95, election petitions have to be brought by individuals, either a person claiming to have had a right to be returned or elected at the disputed election, or a person who was a candidate at the election.

Now clearly these sections are brought over from, and relevant to, a time when individual candidates contested elections under the first past the post system, under the banner of various parties. However under the proportional representation system it is the party which contests an election, and as an incident of so doing, nominates its members for election. Thus the concentration on the individual candidate in S 92 (2) would appear to be misplaced. It also leads to absurd consequences. The individual candidate whose election is declared void for instance on the basis of corrupt or illegal practices (S 92 (2a)) at the election would have brought votes in for his party through those very corrupt or illegal practices, but nevertheless the party is not penalised for the candidates misdoings, but instead benefits from them, for even if the particular candidate's election is declared void, the party merely appoints another of its representatives to take the place of the departing candidate.

Under S 91 (1) "the election in respect of any electoral district shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge, namely:

(a) that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those enumerated before or not a section of electors was prevented from voting for the recognised political party or independent group which it preferred and thereby materially affected the result of the election.

(b) non-compliance with the provisions of this act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance materially affected the result of the election."

On the surface, this would appear to be an eminently satisfactory proceeding, but closer reflection indicates that this section too harks back to a time when a single candidate won an electorate. Voiding an entire election was well and good then, but under the proportional

representation system an electoral district is inevitably shared by representatives of several competing political parties, and voiding the entire election means that the electoral gains of those petitioning are also lost together with the electoral gains of those petitioned against. The victims are thereby victimised a second time over, and the perplexed student of electoral law may be forgiven for wondering whether this state of affairs is one ordained by the Queen of Hearts in Alice in Wonderland.

What the act provides both for voiding an entire election and the election of a candidate is therefore not a highway to justice, but a blind alley. It is not surprising that no one ventures in that direction; elections petitions, a favourite and often successful pastime of defeated candidates under the first past the post system, are now unheard of.

3. Provincial Council Elections

These are conducted under the Provincial Council Elections Act (No. 2 of 1988).

Provincial Councils are set up under the 13th Amendment to the Constitution, which came into effect on 19 November 1987. Some measure of devolution has taken place from the centre to the provinces through these councils, though not enough by far for the devotees of devolution; the supreme power and authority of the central government is as yet intact. As the majority of a full bench of the Supreme Court observed in the 13th Amendment to the Constitution,[46] "No division of sovereignty or of legislative, executive or judicial power has been effected. The national government continues to be legally supreme over all other levels or bodies. The Provincial Councils are merely subordinate bodies. Parliament has not parted with its supremacy or its power to the provincial councils."

The Provincial Councils are elected for terms of five years, and on the proportional representation system. The membership of each council is determined on the criteria formerly used for carving out electorates, population and area, though in the case of these councils the population basis is one member for every 40,000 persons and the area basis is one member for every 100 sq. km of territory. Executive power in a provincial council is vested in the Governor (appointed by the President for a five year term) and a Board of Ministers consisting of a chief minister and four others.

3.1 Of Mere Provincial Concern? The Provincial Council Elections of 1998 that never were

The period of office of five Provincial Councils, i.e., those of the Central, Uva, North-Central, Western and Sabaragamuva councils came to an end in June 1998, and in terms of the law, they then stood dissolved. Accordingly, the Commissioner of Elections took the first

46. (1987) 2 SLR 312 at p 323.

steps towards holding elections, by fixing a period in which nominations for the prospective election were to be handed in. Thereafter a date for the election had been fixed (for 28 August 1998), to be preceded, as is usual in Sri Lanka, by a date for the casting of postal ballots (fixed for 4 August 1998). However, one day before the postal ballots could be cast, on 3 August, postal voting was suspended by the Elections Commissioner without any reason being adduced for that move. On 4 August however the mystery was solved when the President issued a proclamation bringing the entire country under a state of emergency, and issued an emergency regulation which effectively cancelled the date of the poll. The Commissioner of Elections subsequently took no steps towards holding elections in the provinces now bereft of duly elected councils.

Two intrepid journalists, also civil society activists, filed an application in the Supreme Court alleging that their fundamental rights had been violated by the failure of the first respondent, the Commissioner of Elections to hold elections to the five Provincial Councils. That case is the now celebrated '***Karunathilaka and Another*** v. ***Dayananda Dissanayake Commissioner of Elections et.al.,***' which we have caught up with in the course of this article.

The facts raised in the Supreme Court at the hearing of the fundamental rights application clearly showed that in fact nothing had happened immediately before the proclamation of the state of emergency to justify such a proclamation. As the Supreme Court observed –

> *"The petitioners have established, prima facie, that from 25.6.98 up to the end of July, 1998, there was no known threat to national security, public order, etc., which warranted the postponement of the elections. The respondents have failed to adduce any material whatever which suggests that, in August, 1998, there was any such threat. Accordingly, the suspension of the notices by means of the impugned Regulation was arbitrary and unreasonable."*[47]

The real purpose behind the proclamation of a state of emergency was not however hard to seek. In November 1998, the Provincial Council Elections (Special Provisions) Bill was tabled in Parliament. It sought, as the Supreme Court noted,[48] to achieve two objectives. First, it purported to vest in the Commissioner the duty, within a specified period, to appoint a new date for the postponed elections. This the Supreme Court found, in a separate case, to be quite redundant, because the Provincial Councils Election Act already made provision for fixing another date of poll, as well as, for reasons which need not detain us here, inconsistent with some provisions of the Constitution. Secondly, a clause of the bill purported to empower the secretary of a recognised political party or the group leader of an independent group to substitute, in place of the name of any candidate, the name of another person with

47. (1999) 1 SLR 157 at 181.
48. *Ibid* pp 165-66.

his consent, but without the consent of, or notice to, the original candidate. The Supreme Court succinctly inferred the real purpose of the emergency regulation and the bill;

> *"If the issue of postal ballot papers had taken place on 4.8.98, voters would have received ballot papers and could have proceeded to cast their vote. If the postal voting process had commenced in that way, substitution of candidates in the nomination papers would have required the drastic step of cancelling ballot papers already issued, and postal votes already cast. That would have been a serious interference with a pending election. The suspension of the issue of postal ballots would have facilitated the subsequent substitution of candidates without the need to cancel any part of the voting process, and it seems probable that was the purpose of that suspension."*[49]

The net result of the Supreme Court's reasoning in the matter of Karunathilaka's application was that the Commissioner of Elections was ordered to, schedule a fresh date for the elections to the provincial councils within a specified period. The judgment in that case is however notable for a number of points its stress on the duty of the Commissioner of Elections to discharge his duties and functions independently, to be discussed in Section 4 of this article (on the Commissioner of Elections), its inclusion of the franchise in the fundamental right to freedoms of speech and expression and its ruling that the immunity from suit of the President is not extended to those seeking cover under the President's actions, thus bringing to bear an important qualification on the scope for arbitrary executive action. The latter two aspects have already been discussed earlier in this article.

At this stage, what is relevant to note is that the President's actions as regards the provincial council elections in 1998 clearly demonstrate the very real danger of the misuse of the power to declare a state of emergency, vested in the political executive, with a view to interfering with the normal process of elections. Again, it would not make an iota of difference whether that Executive is the Cabinet based in Parliament or the President.

It is equally important to note that the application by Karunathilaka and Another could only be made in the first instance because of the fundamental rights provisions of the 1978 Constitution.

Whether however those provisions will always prove as efficacious as they proved to be in Karunathilaka's application, in applications made under similar but not identical circumstances is an interesting if speculative question. The Supreme Court cannot be considered a monolithic entity, and different benches may approach similar questions

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49. *Ibid* p 171.

differently. If that is so, it may be wondered as to what constitutes adequate protection against abuse of executive powers.

It would also appear practically impossible to hedge the power of the political executive to declare a state of emergency with restrictions such that it would have been impossible for the President to declare such a state under the circumstances of August 1998. The untrammelled power to declare a state of emergency is one that the political executive must necessarily have, and one could only hope that it would be used with good sense, in good faith and within a firm commitment to democratic ideals.

3.2 Blind Alley Revisited: Election Petitions in Provincial Council Elections

The provisions for election petitions in the Provincial Councils Elections Act are identical to those in the Parliamentary Elections Act, and as such are subject to all the debilitating infirmities and irrelevance of the provisions in the latter act.

4. Local Government Elections

These are held under the Local Authorities Elections Ordinance, (No. 53 of 1946 as amended from time to time). There are presently 18 Municipal Councils, 36 Urban Councils and 257 Pradeshiya Sabhas (the local authority for less urbanised and rural areas) islandwide. As we have already noted, Sri Lanka has a long experience of local government, the formal structures that are familiar to us today having their origins in the nineteenth century. At the time of independence, there were four types of local government institution in Sri Lanka; municipal councils covering the larger urban areas, urban and town councils covering the progressively smaller urban areas, and the Village Councils covering the rural areas. Commenting on the system of local government in Sri Lanka in 1957, Lady Ursula Hicks was to observe that –

> *"It was very clear to the outside observer that local government in Sri Lanka is in the doldrums."*[50]

However that may be, local elections continued to be held regularly, and the system chugged on peacefully enough, until the early 1970s. The problem was to be the misuse and abuse of the extraordinary powers vested in the minister of local government over all types of local government institution; under the various ordinances setting up the different types of local government institutions, the minister is vested with the power;

1) to remove the Mayor/Chairman from office, or
2) to remove all or any members from office, or
3) dissolve the relevant council on any of the grounds specified in the respective ordinances.

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50. Planning Secretariat, papers by visiting Economists, Colombo, 1957, p 107.

4.1 Controlling the Country Bumpkins? Experiments in Local Government

The United Front Government elected in 1970 was not shy about making use of the minister's extraordinary powers over local government institutions. On the contrary, making full use of these provisions,

> *"the government often used its powers to dissolve many local bodies, and to run them either through pliant officials, or by other individuals chosen by the government for their political loyalties."*[51]

Postponement of elections, which had up to that time not been very common, became the "order of the day" in the period 1972-77. A revival both of local government bodies and elections took place with the change of government in 1977.

In 1980 however there was a major departure in the area of local government with the setting up of District Development Councils (DDC) under the Development Councils Act (No. 35 of 1980). The electorate for the purpose of these councils was the administrative district, and the council itself consisted of the Members of Parliament elected from the corresponding electoral districts, and a number of elected members specified by the President, that number being specified in order to ensure that the number of elected members should exceed the number of MPs in the council, (except in those districts where the number of MPs was less than three). The Executive Committee was headed by the district minister, the other members being the Chairman and two other members of the District Council.

With the setting up of these councils, all village and town councils within the areas of the District Council's operation stood dissolved. This had the unfortunate and startling effect of reducing the number of councillors elected at the local level from 7,781 to just 156.[52] Possibly it was dissatisfaction with that outcome which resulted in the Development Councils (Amendment) Act (No. 45 of 1981), but the measures introduced by this amendment did not in any way increase the number of locally elected councillors. Two new bodies were set up; the Gramodaya Mandalaya (GM) at the lowest level of the administrative system, the Grama Sevaka Niladhari Division, and the Pradeshiya Mandalaya (PM) at the sub- provincial level of administration, the Assistant Government Agent Division. However none of the members of these bodies were elected; the Gramodaya Mandalayas consisted of public officials and officers of public corporations serving in the relevant Grama Sevaka Niladhari Division nominated by the minister by name or office, and the Chairman, President or head of every such organisation, association or body which is not of a political nature, as may be specified by the minister, which in the minister's opinion should be represented in any Gramodaya

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51. K M de Silva (ed), *Sri Lanka: The Problems of Governance*, Kandy, ICES, 1993, p 6.
52. G R Tressie Leitan, *Political Integration through Decentralisation and Devolution of Power: The Sri Lankan Experience*, Colombo, 1990, pp 26-27.

Mandalaya having regard to the interests that such organisation, association etc. represents or serves. The Pradeshiya Mandalayas consisted of the chairmen of the Gramodaya Mandalayas within the relevant AGA's division.

The expectation behind setting up these mandalayas could plausibly have been to ensure representation for genuine grass roots level bodies. As Tressie Leitan observes,

> *"The realities of the situation were however different. Studies carried out in the districts of Kalutara and Gampaha revealed that in many village areas, voluntary organisations which were 'anti-government' generally did not present themselves for inclusion of their chairmen in the GM, through a conviction that 'it would serve no purpose.' On the other hand, mushroom voluntary organisations (which presumably felt that they had government 'support') sprang up overnight, for the exclusive purpose of membership in the GM—which carried with it prestige and political recognition, not to mention the possibility of personal enrichment through government contract work."*

Not only were these bodies unrepresentative, they were not even useful in channelling proposals which may emanate at village level, to the District Development Council; although the chairmen of the Gramodaya Mandalayas sat on the Pradeshiya Mandalaya, there was no structural mechanism through which the proposals from the PM could be channelled to the DDC. As Tressie Leitan observes,

> *"They could do so only through devious routes, i.e., either through the administrative elite, or, as happened most often, through the political elite: the MPs and the district minister."*[53]

Leitan also points out another central weakness of the whole scheme of DDCs, PMs and GMs;

> *"Funds for local development projects had to be obtained from the decentralized budget, which unfortunately did not come to the DC, to be utilised by it. Instead, these funds were allocated to each Member of Parliament, who considered its disbursement as his right for patronage purposes. It was thus not uncommon for members of PM (or even elected members of the DC) to supplicate the MP for a share of his 'spoils."*[54]

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53. *Ibid* p 29.
54. *Ibid.*

The reason for the setting up of this seemingly futile structure of local government has to be sought not in the theory and practice of local government itself, but in the theory and practice of presidential hopefuls. R Premadasa, the then minister of Local Government, Housing and Construction, was a man with presidential ambitions, ambitions which were in fact ultimately realised. The setting up of GMs and PMs, so useless from the point of view of local representation, would have been extremely useful for R Premadasa from the point of view of building up a cadre of loyalists spread throughout the country, owing allegiance not to any electorate but to himself alone.

With the setting up of provincial councils in 1987, the structure of local government changed again; from that time there are Municipal and Urban councils for the urban areas, and Pradeshiya Sabhas for all the rest. All are elected on the basis of proportional representation, as indeed the District Development Councils had been.

Proportional representation, as we have noted earlier, is fine from the point of view of divorcing Members of Parliament from immediate and local concerns and demands. To divorce representatives in local government institutions from local concerns and demands would appear to be however a negation of the very fundamentals of local government, but that is what proportional representation nevertheless does when applied in that field. We may again refer to Tressie Leitan;

> *"Local elections in Sri Lanka took place before 1979 on the basis of 'wards'—i.e., each local authority area was demarcated into a number of areas which were termed 'wards' within each of which the voters elected the 'ward member' on the 'first past the post' principle... The rural voter, especially, maintained a close relationship with his 'ward member', to whom he went regarding the need for repairing a village road, or a culvert, or construction of a drinking water well....*
>
> Under the system of proportional representation (PR) however, relationships within a party become more important considerations in obtaining placement on a party list. It is also possible for voters in a particular locality to find that they are unfamiliar with any of the candidates on the party list. Personal contact and close interaction between voter and councillor, is thus very often lost under PR....
>
> Voters could also find that under the list system of proportional representation (PR), no representatives have been elected to the local council from their specific locality...."[55]

55. *Ibid* p 24.

4.2 New Wine and Old Bottles? Election Offences in Local Government

Until the coming of the Local Authorities Elections (Amendment) Act, No. 1 of 2002 (certified on 13 March 2002), the Local Authorities Elections Ordinance did not contain any provisions for the filing of election petitions. However S 83 effectively voided the election of a member of a local authority convicted of any offence relating to elections to a local authority.

In the absence of any provisions for the purposes of an election petition in the Local Authorities Election Ordinance, the writ of quo warranto was used in Sri Lanka to test the validity of the qualification for holding office as a member of a local authority, and the writ of mandamus to compel the holding of a fresh election where the election already held has been merely colourable and therefore void. The writs were against individual members.

While the writs worked satisfactorily under the first past the post system, even if they could still operate under the proportional representation system, this would have been of little help, because as we have already seen in our discussion of election petitions under the Parliamentary Elections Act, the benefits of the misdeeds of an individual candidate would still ensure to the benefit of his or her political party, which has simply to nominate another representative to take the place of its departing member.

Clearly, it would have been preferable to devise some new provisions for the filing of election petitions under the new system of proportional representation rather than leave the new wine of the PR system to be contained within the old bottles of the writ system. This was done only with the amendment of 2002, and this amendment brought in provisions for petitions in elections to local authorities identical in substance to those relating to parliamentary elections. These provisions therefore are subject to all the limitations to which petitions in parliamentary elections are themselves subject.

5. Referendum

Referenda have unfortunate associations with fascist dictatorships, but they have been used in more respectable circumstances as well. As Joseph A L Cooray points out, "In 1975 a referendum was held on Britain's continued membership of the European community, while another was held in 1979 in Scotland and Wales on the question of devolution under the Scotland and Wales Acts of 1978. Other countries such as Switzerland, Denmark, Australia and Ireland have explicitly provided in their Constitutions for referenda in respect of certain important matters."[56]

56. Joseph A L Cooray, *op. cit.*, 1995, p 306.

Article 4 of the Constitution provides *inter alia* that the legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the people and by the people at a referendum.

Chapter XIII of the Constitution which deals with the referendum carefully distinguishes between submission of bills (article 85) and submission of any matter which in the opinion of the President is of national importance (article 86), to the people at a referendum. In either case the submission must necessarily be by the President. Three types of bills are contemplated by article 85; (1) those certified by the cabinet as being intended for submission at a referendum and those which the Supreme Court has determined as requiring the approval of the people at a referendum and (2) any bill (not being a bill for the repeal or amendment of any provision of the Constitution, or for the addition of any provision to the Constitution, or for the repeal and replacement of the Constitution, or which is inconsistent with any provision of the Constitution), which has been rejected by Parliament.

We have already mentioned the referendum of 1982 as an instance of government intervention in the scheduling of elections beyond the due date, but have also noted that provision existed, in article 83 (b) of the Constitution, for the holding of a referendum for that purpose.

The abortive referendum of 2001 also has its points of interest. On 8 July 2001 a no confidence motion against the government of President Chandrika Bandaranaike Kumaratunga was presented in Parliament. Debate on the motion was expected to be taken up on 18 July, and it was also expected to be successful, the government having lost its majority in Parliament on 20 June 2001 with the defection of one of its constituent parties. On 10 July however the President prorogued Parliament, and at the same time announced a referendum under article 86. The question to be posed at the referendum was, "Is a new Constitution, a matter of national importance and necessity, needed for the country."

Three central issues arise from this entire proceeding. First there was the flagrant flouting by the President of parliamentary convention in proroguing Parliament while a motion of no confidence was pending. Second the attempt to change the Constitution was a barely concealed ploy to get over the problem of the imminent defeat of the government in other words, an attempt to change the fundamental law of the land in order to get over an immediate political problem. Thirdly, the method chosen to change the Constitution was clearly extra-constitutional in the sense that it is not a method contemplated by the Constitution itself, quite the contrary, because article 85 expressly disallows the use of the referendum for any type of constitutional change. Clearly, a political and constitutional crisis of the first magnitude was at hand, and there is no saying how the crisis would have resolved itself had it been allowed to run its own course without external i.e., public pressure.

Fortunately, for Sri Lanka, the resulting political outcry made it impossible for the particular course chosen to be pursued any further, and the referendum was cancelled.

This episode provides an abject example of how constitutional provisions could be perverted when applied without any considerations of political and constitutional morality in a ruthless quest for power. It is also clear that it would be impossible to provide constitutional safeguards against such perversion, for the political executive must necessarily be granted the power to call for referendums on matters of national importance. It would be completely farcical for the provisions which grant the political executive such powers to be hedged about with various detailed provisos; it is after all a fundamental assumption made of those who seek high political office that their allegiance is not only to the letter but also to the spirit of the Constitution they swear to uphold. Such constitutional hedges would perhaps be completely ineffective as well, for if the political will and ability to abuse the Constitution is present, whatever constitutional limitations are in force could be ignored or reinterpreted to provide for the chosen course of action. The episode of the abortive referendum provides the only solution to that type of national crisis; popular outcry and resistance.

The Commissioner of Elections

Prior to the 17th Amendment to the Constitution made in 2001, article 103 of the Constitution dealt with the Commissioner of Elections and article 104 dealt with his powers, duties and functions. Under article 103, 1) the Commissioner was appointed by the President, 2) his salary was chargeable on the consolidated fund and could not be diminished during his term of office, and 3) he could be removed or remove himself from office, through the usual instrumentalities of death, resignation, attainment of the specified retirement age 60 years, or on the grounds of ill health or mental or physical infirmity by the President, or by the President upon an address of Parliament. The President could appoint an acting Commissioner whenever the Commissioner was unable to discharge the functions of his office, and in exceptional circumstances permit a one- year extension of his period of office after reaching the age of 60 years. Under article 104, the Commissioner was required to exercise, perform or discharge all such powers, duties and functions as may be conferred, imposed on or vested in him by law.

The immense responsibilities of the Commissioner were appreciated by the Supreme Court in Karunathilaka's case,

> *"The Commissioner has been entrusted by article 104 with powers, duties and functions pertaining to elections, and has been given guarantees of independence by article 103, in order that he may ensure that elections are conducted according to law; not to allow elections to be wrongfully or*

improperly cancelled or suspended, or disrupted, by violence or otherwise."[57]

The elevated status of the Commissioner of Elections in the constitutional scheme of things in Sri Lanka even prior to the 17th Amendment to the Constitution is clearly indicated by the fact that substantial similarities then existed between the position of the judges of the superior courts and that of the Elections Commissioner. The salaries of the Commissioner and the judges of the superior courts were chargeable on the consolidated fund and could not be reduced after their appointment, though in the case of judges of the superior courts, the Constitution stated also that their pension entitlement could not be reduced after appointment, a provision (significantly?) lacking where the Commissioner was concerned. Both the Commissioner and the judges could be removed by the President upon an address of Parliament, but in case of the judges the grounds for such removal were proved misbehaviour or incapacity whereas as we have seen in the case of the Commissioner the President could act without an address of Parliament in case of the incapacity of the Commissioner. Further, in the case of the judges of the superior courts, the address of Parliament should have been supported by the majority of the total number of Members of Parliament including those not present, and no resolution for the presentation of such an address could be entertained by the Speaker or placed on the order paper of Parliament unless notice of such resolution was signed by not less than one-third of the total number of Members of Parliament, and set out in full the particulars of the alleged misbehaviour or incapacity.

The Elections Commissioner has also been vested with some wide ranging powers by the Elections (Special Provisions) Act, No. 35 of 1988, which introduced amendments to the presidential, parliamentary and provincial councils election acts. Under the terms of the Special Provisions Act, the Elections Commissioner is vested with the following powers with regard to all three types of election;

1) He may declare the polling at any polling station void for any of the following reasons;

   a) it was not possible to commence the poll at the appointed hour
   b) having commenced at the appointed hour, it was not possible to continue polling until the hour fixed for closure of the poll and
   c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer.

2) Where the Commissioner is of the opinion that the result for the particular electoral district will not be affected by the failure to count the votes actually polled, or those which would have been polled, at the polling station in respect of which the polling

57. (1999) 1 SLR at p 170.

has been declared void, the Commissioner may direct the relevant returning officer to declare the election results for that electoral district. Where the Commissioner is of the opinion that the election result will be affected by the failure to count the votes pertaining to the polling station in respect of which the polling has been declared void, the Commissioner is vested with the power to appoint a date for taking a fresh poll at the relevant polling station.

3) The Commissioner is required to consult the secretary or authorised representative of every political party and the group leader of every independent group contesting the election prior to taking any decision as to whether to or not order a fresh poll.

This last provision detracts considerably from the independence the Commissioner should be able to exercise in reaching decisions as to whether to or not a fresh poll should be held. In the first place, it is incongruous that the Commissioner is required to consult, given his elevated position in the constitutional scheme of things. Secondly, the pressures that could be brought to bear on the Commissioner in the process of consultation with the secretaries of the contesting political parties are obvious.

The only argument for the preceding condition whereby the Commissioner is required to consult, is expediency. This was the case at the General Election of 5 December 2001, where the Commissioner had voided the polling at a number of polling stations. However even the secretary of the United National Front (UNF), the political party which had most to gain from a free and fair polling at the polling stations where the polling had been voided, agreed that no fresh poll was required, given the urgent need to have the overall election result a win by a narrow margin declared as early as possible for the UNF to consolidate the status of its party leader as the person who should be called upon by the President to form a new government. Thus, though unsatisfactory, arguments for expediency would also appear to have their validity in certain restricted contexts.

The Elections Commissioner is also vested with the discretion to extend recognition to political parties for the purpose of contesting at elections under its own name and with its distinct symbol. Until 1964 there was no system of registering the political parties contesting the elections; all that a candidate had to do to contest an election under the banner of a political party was to produce, to the Elections Commissioner, a letter of candidature from the political party of the candidate's choice. In 1964 however an amendment to the Ceylon (parliamentary elections) order in council provided objective criteria by which the Commissioner of Elections may take a decision as to whether or not a political party should be extended recognition.

The criteria were; a) a continuous period of five years of political activity or b) two of its candidates should have been elected to the previous Parliament. A political party would lose

recognition if a) not even one candidate was nominated for election or b) all candidates nominated forfeit their deposits: i.e. fail to obtain separately 1/8 of the total polled in each electoral district. In 1981 the system of registration of political parties was completely revamped with the Parliamentary Elections Act of that year. Under the procedures spelt out by that act, the Commissioner would publish a notice inviting applications to be submitted for recognition, along with specified documents and information, and the Commissioner would be vested with the absolute discretion as to whether or not to extend recognition to the party. It is indeed of immense satisfaction that as at 1997 "the confidence reposed in the Commissioner of Elections appears to have worked satisfactorily as evident from the fact only one (1) out of 101 cases that the Commissioner refused to recognise, was successfully challenged in the Supreme Court under fundamental right of unequal treatment."[58]

Finally, it may be noted that the Commissioner of Elections is assisted by the staff of his own department, and, at election time, by a vast mass of public servants of every category drawn in for election duty. These public servants would fill the positions of returning officer for each electoral district, presiding officer of each polling station and the counting officers of each counting centre, who would themselves be assisted by every category of staff in the public service. It is a fact that the public service has become politicised, and some election malpractices and abuses are known to take place because of this, but in the absence of any serious study of the subject, it is futile to speculate just what, and how much, interference in a free and fair election takes place because of such politicisation.

To concentrate on such politicisation and possible abuse is however to ignore the tremendous contribution, involving hard work in often very difficult circumstances, which the election staff of Sri Lanka consistently make in every election in this country. Episodes of utmost dedication to duty, self sacrifice and even heroism are not unknown as the account set out below regarding an incident which took place in the course of the General Election of 1989, held in a period of terror unleashed by the Janatha Vimukthi Peramuna (JVP) would illustrate. Elections staff sent to operate a polling station had been attacked on the way to the station, and two persons had been shot dead. The remaining staff had however got a message through to the relevant authorities and a relief party had been sent out. These "were despatched at 12.00 noon in three vehicles. They reached Ballekatuwa junction at 1.00 pm. After they had walked one mile from the Ballekatuwa junction they met the staff returning from Illukpellessa polling station after the tragic event, carrying the corpses of the two dead persons. However, they proceeded to the polling station finally reaching there at 2.45 pm. On their way they heard burst of gun fire at close range, yet they continued and reached the polling station. They sent messages to the villagers that the booth was opened and that they

58. R K Chandrananda de Silva, *Comparative Electoral Systems in South Asia, Monograph No. 5 – Sri Lanka*, International Centre for Ethnic Studies, Colombo, Sri Lanka, 1997, p 29.

could come and vote. Apparently no one arrived through fear. The polling station was closed at 4.00 pm."[59]

Less than Elevated? The Commissioner of Elections (Prior to the Seventeenth Amendment)

Constitutionally, the Commissioner of Elections is placed on a high pedestal. In terms of practical politics, ways have been found on occasion of cutting the pedestal from under the Commissioner's feet. An abject demonstration of this is provided by President Chandrika Bandaranaike Kumaratunga's conduct just prior to the presidential election of 1999, where she was a contestant, and also ultimately the victor,

> *"...when the Commissioner of Elections fell ill just before the election campaign got underway, she (i.e., the President) handpicked an acting Commissioner of Elections. Ignoring the claims of the Deputy Commissioner, she reached out to the public service to pick a man who had no experience of election work. While the President is empowered by the Constitution to make such an appointment, the propriety of a President seeking re-election exercising this power in the way it was done was, to say the least, questionable. The President was uniquely privileged in being able to pick an acting Elections Commissioner of her choice for a presidential election at which she was seeking re-election."*[60]

So much for the Commissioner. But also for good measure "...she (i.e., again the President) hosted an official dinner at her official residence to a group of senior government officers, most or all of whom would be called upon to serve in the sensitive posts, in conducting the elections, and the supervision of the counting of the votes, in the districts at the forthcoming presidential elections."[61]

Another illustration of the pressures that could be brought to bear on the Commissioner is given by the episode of the polling card stickers, just prior to the General Election of 2000. In this instance, the Commissioner of Elections decided to place small stickers on the polling cards issued to each voter for production at the polling station. The objective behind placing these stickers on polling cards was, when the general public got to know about it, widely believed to be the prevention of the large scale rigging of elections by the use of forged polling cards. The proposed use of the stickers was however kept a secret by the Commissioner, until of course there was a leakage to the government. The response of the

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59. Report of the Commissioner of Elections on the Ninth Parliamentary General Election of Sri Lanka held on 15.02.1989, *Sessional Paper No. I*, 1993, pp 118-19.
60. K M de Silva, *op. cit.*, 1993, p 6.
61. *Ibid.*

government was hysterical beyond measure. It is reported that at a hastily summoned meeting of some leading cabinet ministers at Temple Trees, then the official residence of the President, the proposal was even floated of arresting the Commissioner of Elections, a proposal abandoned, it is reported, only when the Attorney General shot it down.[62] Nevertheless calumny and opprobrium were heaped in liberal measure on the Commissioner, and the government controlled media three national TV channels, several national radio channels and a large newspaper group screamed treble to their political master's bass. A national list nominee to Parliament, a lawyer, filed a complaint with the Human Rights Commission (HRC) that his fundamental rights as a candidate and voter were violated by the Commissioner secretly attempting to paste stickers on polling cards. "In record quick time, despite hundreds of petitions for human rights violations alleged to have been committed in the country's war torn North and East collecting dust at the HRC, its Chairman, eminent lawyer, Faiz Mustapha who is also a President's Counsel, sent a letter to the Elections Commissioner requesting him to attend a discussion at the HRC...." [63]

Many a man would have broken under the strain. The Elections Commissioner did not, but one wonders as to whether any person who occupies that position would under such circumstances, ever feel impelled again to be innovative in combating electoral abuse.

Apart from incidents which directly undermined the independent and elevated position of the Elections Commissioner, his ability to execute the functions of his office in a manner which would ensure a free and fair election was even otherwise circumscribed. For instance, one of the most serious problems in conducting a free and fair election has been, in recent times, the rampant misuse and abuse of state resources including the resources of State corporations, the resources chiefly being men, money, and vehicles. While action could be taken against this under other laws, such misuse and abuse did not Constitute an election offence, and consequently the Commissioner had no handle with which to try to control the situation.

Again, some circulars and directives issued by the Commissioner of Elections and the Inspector General of Police in the run up to the General Election 2000 have come to light following petitions made to the Human Rights Commission by activists and election monitors on the basis of the right to know of voters. It is reported that "They are interesting for the manner in which they reveal the helplessness of the department (i.e., of elections), the total inadequacy of circulars and directions and the uselessness in setting up special elections units within a hopelessly politicised police force and extreme political intimidation."[64] Indeed the police readily become the lap dogs and sometimes the attack dogs of whatever political party is in power. The political impartiality of the police is only apparent in that they readily

62. Frederica Jansz, "His Head on a Platter," *The Sunday Leader*, 24 September 2000, p 9.
63. *Ibid.*
64. Kishali Pinto-Jayawardana, "Returning to Some Electoral Sanity" (an instalment of the author's regular weekly column, Focus on Rights), *The Sunday Times*, 21 October 2001, p 10.

assume these roles irrespective of the ideological orientation of the party in power, political power being the only criterion they use.

The Seventeenth Amendment to the Constitution

A hoary old story relates how a hapless student of constitutional law, searching for the Sri Lankan Constitution in a library, was directed to the periodicals section. The latest instalment to the growing number of constitutional amendments is the 17th Amendment, widely hailed if not as a panacea for all ills in the body politic, as at least a good prophylactic against abuse of government power. This amendment sets up a body called the constitutional council consisting of a) the Prime Minister b) the Speaker c) the Leader of the opposition in Parliament d) one person appointed by the President e) five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition f) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President. The council is chaired by the Speaker.

The Constitutional Council recommends to the President persons for appointment as chairmen and members of the following Commissions and no appointment may be made to them except on a recommendation of the council. Removal of members from the Commissions may take place only as provided in the Constitution or the relevant law and where no such provision is made, only with the prior approval of the council. The Commissions are –

a) the Election Commission,
b) the Public Services Commission,
c) the National Police Commission,
d) the Human Rights Commission,
e) the Permanent Commission to Investigate Allegations of Bribery or Corruption,
f) the Finance Commission
g) The Delimitation Commission.

No person may be appointed by the President to any of the following offices unless such appointment has been approved by the council upon a recommendation made to the council by the President, and no person shall be removed from such office except as provided for in the Constitution or in any law. The offices are;

(Part I)

a) The Chief Justice and the Judges of the Supreme Court
b) The President and the Judges of the Court of Appeal,
c) The Members of the Judicial Service Commission other than the Chairman,

(Part II)

a) The Attorney General,
b) The Auditor General,
c) The Inspector-General of Police,
d) The Parliamentary Commissioner for Administration (Ombudsman),
e) The Secretary-General of Parliament.

As would be evident the composition of the Constitutional Council itself and the process of appointments to the highly sensitive Commissions and offices specified in the 17th Amendment make it highly unlikely that either the Commissions or the offices could become the playthings of any government. To that extent, the 17th Amendment is progress indeed. However there are two dangers which could arise; first, political horse trading may take place in making appointments and this could lead to the second danger which could also occur independently, that of gridlock in the system. Sri Lanka has already had an experience of this when the President, for reasons best known to herself, delayed by several weeks the setting up of the Constitutional Council by delaying the appointment of her own nominee.

For the first time ever in Sri Lanka's constitutional history, the 17th Amendment states (at Article 103 (2)) categorically, clearly and unequivocally that –

> *"The object of the (Election) Commission shall be to conduct free and fair elections and Referenda."*

The 17th Amendment also vests the newly set up Elections Commission with a panoply of interesting powers. The Commission, once an election or referendum has been scheduled, has the power to a) prohibit the use of State property or the property of any public corporation for election purposes of any political party, group, or candidate b) guidelines to any media unit as may be considered necessary for conducting a free and fair election and on failure of the State owned radio and TV stations to follow such guidelines, to appoint a competent authority to take over the management of any broadcast which may impinge on the election, c) to instruct the Inspector-General of Police of the number and deployment of Police officers and other Police facilities for the election d) make recommendations to the President as to the deployment of the armed forces for the purpose of conducting a free and fair election.

Interestingly as regards the misuse and abuse of State resources for election purposes however, Kishali Pinto Jayawardana points out that –

> *"...one of the last drafts of the Seventeenth Amendment specifically included a clause which related not only to the Commissioner's*

authority with regard to State resources but made any person who contravened or failed or neglected to comply with any direction or order issued by the Commissioner or indeed, any provision of the law relating to elections, guilty of an offence. The Commissioner was thus entitled to institute criminal proceedings in the appropriate court under his own hand. Where any particular offence was not punishable by any particular law, the Commission or the Attorney General could, in fact, move the high court in the matter. Rigorous penalties could be imposed on a person found guilty of such offence...."

For reasons which are fairly obvious, this clause had been removed from the final draft of the Seventeenth Amendment "...placed on the order paper of Parliament."[65]

Conclusion

Perusal of this article would have revealed four basic facts; if one aims to mould the statutory framework and institutional arrangements in Sri Lanka with a view to having free and fair elections, there are;

1) steps which have already been taken with this end in view, such as the Seventeenth Amendment to the Constitution.
2) steps which could be taken, such as introducing amendments to the legislation relating to election petitions to make them more appropriate to the presidential and proportional representation systems,
3) matters about which steps may be taken, but where the outcome is still uncertain for instance the filing of a fundamental rights application where the executive has misused or abused its powers with regard to elections and
4) instances where no steps, legislative nor institutional could be taken, such as in the case of abuse of power by the political executive, in interfering with the due scheduling of elections.

The Seventeenth Amendment is generally seen as a heartening step forward in ensuring free and fair elections; if so much of the election laws as are actually observed and enforced are regarded as the ground rules implicitly agreed on between political parties as those according to which they will compete, the Seventeenth Amendment would indicate an advance in the quality of those ground rules. Perhaps the very disappearance of the criminal liabilities attaching to misuse and abuse of State property from the amendment when it was being enacted by Parliament is a positive sign, for it may indicate that the political consensus which

65. Kishali Pinto Jayawardana, "Extent and Limitations of the 17th Amendment" (an instalment of the author's regular weekly column, Focus on Rights), *The Sunday Times*, 28 October 2001.

gave life to the amendment threw out what was politically impossible and kept in what was perceived as being politically possible.

However, it is also necessary to raise questions about the political culture which makes legislation such as the Seventeenth Amendment necessary. The independence of the judiciary, and of such important institutions such as the elections, public services and Police Commissions would be something which should be taken for granted in any advanced democracy, and that independence would have evolved in the form of traditions and conventions governing appointments to them and the exercise of their powers and functions. The very fact that the political executive has to be hedged in by a Commission appointed through a complex procedure in making appointments to these institutions, in order to ensure some degree of independence for them, directly implies that ultimately Sri Lankan society cannot trust its own leaders to act in the best democratic traditions. To say that Sri Lankan society cannot trust its own leaders is of course to say that Sri Lankan society cannot trust itself.

If Sri Lankan society cannot trust itself but is aware of the fact, that in itself should count as progress to the extent that self knowledge is the beginning of wisdom. However, the mere creation of institutional structures without a deep political commitment to make them work in the manner which could be best expected of them would be futile and possibly even mischievous; in such a background, it is very likely that the new institutional forms would simply become subjects of political horse trading and arm twisting.

Introduction of amendments to legislation dealing with election petitions, in order to make them more relevant to present day challenges and electoral systems would also depend on the political will to ensure free and fair elections. Of vastly greater import is particularly how the political executive is going to conduct itself in future where elections are concerned. Thus with regard to every important measure which may be taken to ensure more free and fair elections we find that what is crucial is the political will to attain that outcome. This brings us to the wisdom of Judge Learned Hand's dictum quoted at the beginning of this article; it is only when liberty lives in the hearts and minds of people will Constitutions, laws and courts be able to effectively work as elements of a functioning democracy.

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An Electoral Model for Sri Lanka

Should we introduce the German Electoral System?

Ramesh D. de Silva*

"The health of democracies, of whatever type and range, depends on a wretched technical detail: electoral procedure. All the rest is secondary."

From "Revolt of the Masses"

by

José Ortega y Gasset, Spanish Philosopher

I. Introduction

The current electoral system for national parliamentary elections of Sri Lanka is in crisis. It would only be fair to conclude that the prevalent electoral system of proportional representation, introduced through the Second Republican Constitution of 1978, has not been able to guarantee free and fair elections. The presidential elections of 1999, the general elections of 2001 and the local government elections of 2002 have led to unspeakable violence leaving behind a sense of insecurity and bitterness. It does not appear that the parliamentary elections scheduled for April 2004 will be an exception to this general rule.

There are many aspects that need to play together to ensure a working democracy, such as the general political climate, an educated public and a stable economy. In so far as these are concerned, the above quotation by Ortega y Gasset may be misleading. However Democracy, like any other political system, has to deal with the question of how to find a viable commonsensical basis upon which some measure of consensus may be reached between varying opinions and interests. Fundamentally, such a measure of consensus is vital as far as electoral procedure is concerned, for obvious reasons.

In the following analysis, the German electoral system will be explored. This system has lately been discussed as a workable alternative to the current system in Sri Lanka. The aim of the analysis is to discuss the advantages and shortcomings of this system based on the experiences in Germany. As this topic is too wide a field to be examined in an analysis of this nature, the following shall be limited to a presentation of the system in operation and the main criticisms brought forward by its opponents. The main differences between the German and Sri Lankan systems will be examined as well as the possibilities of implementing this electoral system in Sri Lanka.

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II. Basic Electoral System Theory and the Sri Lankan Electoral System Today

The following chapter is a brief summary of basic electoral system theory and a short outline of the systems that have been and continue to be in force in Sri Lanka today. The analysis will also discuss the primary problems that have resulted as a consequence of the prevalent electoral system.

1. Distinguishing Two Electoral Systems

In principle two types of parliamentary electoral systems are distinguished. One is the simple majority (SM) system. The focus of this system is on the candidate himself. The eligible population is divided into electorates. The candidate receiving the largest amount or "simple majority" of the votes from his or her constituency is elected to represent it in parliament. Primarily the voter chooses the candidate and not the party which he or she represents.

The other is the system of proportional representation (PR) according to which, seats in parliament are distributed according to the percentage of the votes obtained by political parties throughout the country. This system predicates that Parliament shall be a mirror of the parties representing society. The difference between the two, from one perspective, can be described as follows: the PR system cannot do without parties but does not need constituencies while the SM system may do without political parties but is not possible without constituencies.

Although all democracies envisage the conducting of elections and guarantee the right to vote, no system is alike. Each of the systems contemplated above has negative side effects. The simple majority system has two strong points. It is *simple* to explain, to implement and exercise and usually generates a comfortable *majority* for the government. On the other hand, all votes for candidates that fall short of the majority do not find any representation at all, thus creating parliaments that may only represent a majority. The system of proportional representation allows a far wider spectrum of votes that are cast, to find representation in parliament. But at the same time, no party is generally able to form a government of its own where multiparty coalitions result in a fracturing of government and parliamentarians are decided upon more through their party than directly through the voters. Most countries have combined the systems or modified one of them with elements of the other to varying degrees to correct these shortcomings.

Sri Lanka's Electoral System

Until 1978, Sri Lanka had a modified SM system partly with multimember constituencies. However, there was a dysfunction between representation of minority votes and the actual majorities in Parliament. Therefore, with the introduction of the Second Republican Constitution, a modified system of PR, was established, which has been amended several

times since. This modified system was expected to result in the representation of a wider spectrum of opinions in parliament and consequently a more democratic legislative assembly.

Today the system is as follows:

- The country is divided into 24 electoral districts.
- The number of seats, allocated to the electoral districts according to their share of the population, is distributed among the competing parties according to the percentage of votes received within each district.
- Parliamentary seats are distributed only among parties which obtained more than 5 % of the votes cast within that electoral district (Cut-Off Point).
- Every voter can determine his first three preferences of candidates in his electorate within the party he votes for.
- A bonus seat is given to the party with the highest number of votes obtained per electoral district.

3. Problems of the Current System

However, recent elections under the current system have proven the existence of certain deficits, either within the system itself or through a corruption of the system from outside, which has led to an alarming degree of election violence and corruption. Elections in Sri Lanka are today far from being free and fair, leading to a general loss of confidence in democracy as a whole. The major weaknesses can be identified as follows:

- The large electoral districts and several parliamentarians responsible for these vast districts have resulted in alienation between the representatives and their voters;

- Varying sizes of the polling divisions create unequal chances for the candidates and thus unequal representation;

- The preferential vote system has resulted in a cut-throat competition not only between the parties but also within them. Large sums of money have to be collected and spent to ensure success;

- Candidates with less preferential votes from a more successful party are at an advantage over candidates with more preferential votes from a less successful party;

III. The Current Electoral System in Germany

Germany is a Federal Republic with elections taking place on federal, state and local levels. There are a number of different electoral laws each slightly modifying the federal electoral system. The following discussion of the "German System" therefore only covers the Electoral System for the elections to the federal parliament, the Bundestag.

1. The Basis of the Law

The Basic Law, as the German Constitution is called, contains only a few, though fundamental, principles:

- "All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies."[1], "These principles[2] are irrevocable."[3]
- "The members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people; they shall not be bound by any instructions, only by their conscience. Anybody who has attained the age of 18 is entitled to vote; anyone of majority age is eligible for election. Details shall be the subject of a federal law."[4]

The electoral system in the constitution of the Weimar Republic, the predecessor to the Basic Law was a very liberal PR system, which had lead to a fracturing of parliament. The unstable governments created thereby were repeatedly overthrown, calling the Germans to the ballot every few months, which finally lead to the collapse of the system a mere fourteen years after its creation. Consequently, when the drafters of the new Constitution came together in 1949 to correct the weaknesses of its predecessor, it was preferred to leave the actual details of the electoral procedure to the legislative giving it the opportunity to experiment within the strict boundaries of the Constitution.

2. The System of Personified Proportional Representation

The actual Electoral System was laid down in the Federal Electoral Law of May 7, 1956 which is not part of the Constitution but bound by the limits set by it. Since then, it has only been slightly modified, the last time being in 2002. It was designed to combine the strengths of both the SM and the PR systems while at the same time avoiding their most fundamental weaknesses. Most easily it is described as a PR system which contains a cut-off point and elements of the SM system. It is known as a system of "personalised proportional representation" (PPR).

3. The Two-Vote System

The German parliament has 598 seats. Half of the members of parliament are elected by direct vote in 299 constituencies that cover the entire country according to the simple majority system. In this so called *first vote,* the voters have a direct choice between all the

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[1] *Article 20*, Paragraph (2)
[2] In *Article 20*
[3] *Article 79*, Paragraph (3)
[4] *Article 38*

candidates that contest in their electorate. In practice, only candidates supported by parties are elected.

Through a "second vote", candidates are elected from lists that the parties have set up within each federal state. All seats in parliament are distributed according to the proportion of second votes that each party receives nationwide. For this, only parties which have polled more than 5% of the votes, are considered. Parties that have obtained at least three direct mandates are exempted from the cut-off point

The number of successful direct candidates a party has obtained is subtracted from the total number of seats. The remaining seats are filled up via the party lists. These lists are fixed by the parties beforehand through secret ballot or delegates and cannot be altered subsequently. Candidates move into Parliament in descending order, thus making the candidate at the top of the list, the surest. Candidates that run in one of the electorates as direct candidates may be placed on the state list as well.

Small parties without successful direct candidates, fill up their share of the seats only over their state lists.

4. Fourfold Procedure Relating to the Distribution of Parliamentary Seats

First, the seats to be given to the contesting political parties need to be determined (598 seats, minus those direct candidates that have been successful without belonging to a party that is represented in the federal parliament). On the other hand, the total of the votes of those parties that have passed the 5% cut-off point is established.

Secondly, the remaining seats are distributed according to the Hare-Niemeyer method. Where "x" is the number of seats, the party "X" is entitled to:

$$\frac{x}{\text{Total of the remaining seats}} = \frac{\text{Second votes for party X}}{\text{Total of the remaining second votes}}$$

A certain value is calculated for every party in this manner. Each party obtains one seat for each full number of this value. The remaining seats are distributed by the highest decimal fractions. If party Y is entitled to 199.9 seats and party Z to 200.1, party Y receives the remaining seat. Only if Z would hereby lose its overall majority, would it get one more extra seat.

Thirdly, the share of party seats that each of the state lists is entitled to, is determined. This process takes place in a manner parallel to the above-mentioned method; "y" is the number of seats for the state list of party "Y" in the state "A":

$$\frac{Y}{\text{Total of the seats for party Y}} = \frac{\text{Second votes for the Y state list in state A}}{\text{Total of the second votes for party Y}}$$

Finally, the number of direct mandates each party obtained within one of the states is deducted from the seats that the state list is entitled to. The remaining seats will be filled up with candidates from the list. If there are more direct candidates than seats according to the list, these candidates get extra seats called "Overhang Mandates."

IV. Criticism of the PPR System within Germany

The guidelines provided by the Basic Law set a high standard for any electoral law. In the following analysis, perspectives from debates in Germany as to how far the PPR system corresponds with these guidelines, will be discussed. The system, as outlined above, has received a wide measure of acceptance from the German people. However, criticisms of the system have also been evidenced.

So far, the electoral law has been deemed constitutional by the Federal Constitutional Court (FCC). However, the many occasions in which judges of the FCC had to preside over electoral complaints, indicate how controversial the process has become. The FCC has developed a set of rules regulating the manner in which fundamental principles of the Basic Law are to be applied to each of the systems. The PPR system is basically only a modified PR system. Therefore, in principle, the rules for the PR system apply. The aim of the PR system, as mentioned above, is to give each party its representative share of the seats in parliament. Therefore each vote needs to have an *equal possibility of success*. On the other hand a vote in the SM system has to be only *equal in value*, as all votes short of the majority don't lead to any representation at all and therefore can't have the same possibility of success.

1. The 5 % Cut-Off Point

The 5 % cut-off point is an exception within the PR system. All votes that go to a party with less than 5 % of the total do not have an equal possibility of success. This rule has been justified objectively. Already, in one of its first decisions,[5] the FCC sees the justification in the following: the 5 % clause ensures the ability of the legislative assembly to act and decide. Thus, it is pointed out that large parties facilitate parliamentary co-operation as they already have to deal with a large spectrum of the population within them. Small parties may be more prone to limiting themselves to a one-sided policy towards their voters only. This might prevent the formation of a functional parliament.[6]

This element is one of the main differences that the drafters of the Constitution introduced to the old electoral system of the Weimar Republic, (which had up to 25 parties represented in

[5] BVerfGE 1, 208 (247).

Parliament). It is argued that today, unlike then, the people of Germany has had a stable democracy and a stabilised party system. However, just as much as it may be argued that a stable system exists due to the cut-off point. It could also be contended that the 5% cut-off point has resulted in the violation of the right of the people to vote for less populist parties whilst curtailing the freedom of founding of new parties.

It should, on the other hand, be noted that small parties that address important issues can establish themselves despite the cut-off point as did the "Greens" heralding their aim of protection of the environment, in the early 1980s. Due to objections voiced to the cut off point, the FCC has retreated somewhat on its support of the 5% cut-off point, making the point that it should only be in force as long as it is absolutely necessary.[7] For the first elections in the re-united Germany of 1990, the cut-off point was even partly suspended due to the special circumstances of introducing a new electoral and political system into the new states of former East Germany.[8]

2. The Three-Mandate Exemption

The three mandate exemption has also been heavily criticised by many academic writers. It has only been of practical relevance once so far. The FCC has deemed the clause as constitutional, even though it favours parties with three direct mandates (but with few second votes), that have narrowly missed their entrance into parliament but which have a voter clientele that is widespread. The FCC justifies this decision on the basis of the special regional link that such a party has to its electorates .[9] However, as much as the aim of the 5 % cut-off point is to keep parliament functional and small parties with little backing in the population, at bay. The three mandate exemption could be critiqued from the same perspective. . There is no reason why a party with such a purported regional link should not be as destabilising as a party with 4.99 % of the votes. The FCC has yet to meet this argument.

3. The Overhang Mandates

An even more heated debate continues regarding the constitutionality of the Overhang Mandates in connection with the fundamental equality of the election. The FCC believes these to be constitutional as long as these seats are not replaced, which they are not.[10] Earlier, the problem was largely theoretical as during the first elections, only up to five such seats, (and more than often, none of these extra seats), came into being.

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[6] BVerfGE 6, 84 (92).
[7] BVerfGE 6, 84 (93), more recently BverfGE 95, 408 (417).
[8] BVerfGE 82, 322.
[9] BVerfGE 95, 408 (419).
[10] BVerfGE 97, 317 (328)

However, this has become a problem of imminent practical relevance when during the last decade, up to sixteen overhang mandates came into being in Parliament. The vote of the FCC, declaring these results to be constitutional was maintained on a 4/4 balance, (the closest possible balance), showing how controversial this problem really is.[11] The mathematical possibility for overhang mandates has been dealt with earlier. There are three causes for overhang mandates. One is the unequal delimitation of constituencies. The problem results when one of the federal states has, according to its share of the population, many constituencies that are too small. Thus, the relation between direct seats and list seats would not be 50/50 but could amount to 60/40. However this problem is easily solved through a re-delimitation exercise.

Another factor is voter behaviour. A lower than average participation in one of the federal states decreases the number of list seats in comparison to the other federal states. As the number of direct seats remains stable, there are again more direct seats than seats according to the second votes. The splitting of votes, (giving the first vote to a party more likely to win a direct seat and the second vote to the actually favoured), is another cause for Overhang Mandates.

Further a party with a narrow win of direct seats due to a majority of less than 50% in an electorate may win more seats than it should according to the second votes. As for the behaviour of voters, only an obligation to vote, (as practiced in Belgium), could minimise this problem. The splitting of votes could be avoided by combining both votes to one vote. However in that case, the personalized aspect of the PPR system would be completely nullified.

A third cause is the distribution of seats according to the decimal fractions. A party with a low decimal fraction that has won direct seats may not get the equivalent amount of second vote seats. The overall criticism is consequently that the PPR system, which allows overhang mandates, rewards parties that get less second votes with extra seats. The paradox: voting for a party may actually harm the overall result of that party! Moreover parties with overhang mandates need much less votes per parliamentary seat than parties without.

The followers of the system justify this irregularity with an indication to the alternatives. Thus, it is argued that the existing overhang solution could be discarded only if workable alternatives existed. The direct seats could be distributed not according to the state lists but according to the federal total of second votes that a party gets. Overhang mandates would only come into existence when a party obtains more direct seats nationwide than second votes. However, this would mean that direct seats from one region would have to be deduced from state lists in another region. Hereby the federal structure, the weight of local branches

[11] BVerfGE 95, 335

within the parties and the representation of the population within the regions would be undermined.

Another solution could be a modus to give extra seats to equalize the overhang mandates. One disadvantage in this suggestion is a further growth of parliament. Moreover, the unequal bonus of seats in the regions with overhang mandates would be doubled. The alternatives thus appear to have no advantage over the outlined system.

V. The Introduction of PPR in Sri Lanka

The above problems give only a quick overview of some of the most prominent aspects of the controversial debate concerning the German PPR system within Germany. Nevertheless it is representative of the problems faced by such a system. These may seem negligible when compared to the current systemic problems in Sri Lanka. However, it is moot point that many of these faults of the system could cause much greater damage in a political and economical climate that is less stable than Germany. It is important in this regard that the strong and independent FCC is an institution that prevents unlawful and unjust political interference while guaranteeing and guarding the fundamental electoral rights of German voters. Given the fact that a much lesser degree of judicial strength is evidenced in Sri Lanka, this manner of judicial supervision of political parties in times of elections and with regard to vital aspects of the right of universal franchise may not be possible.

Another issue concerns delimitation of constituencies. Any system based on constituencies leaves those in power with the opportunity of "gerrymandering", the re-delimitation of constituencies maximising the effect of supporters of one party and neutralizing the potential of opponent party supporters. In how far would a commission overlooking this process, be independent in a political climate where the two major democratic parties are deeply divided as is the case in Sri Lanka?

Equally, how would the PPR system accommodate all the different races and religions and their varying concentration in different areas of the country? Minorities with a concentration in a certain area would be much more influential than those spread equally throughout the country. How would minorities that fall short of a cut-off point be represented?

Most importantly, the German PPR system is a highly complicated system by any definition. Most Germans do not quite understand the difference between their first and their second vote, thinking it would be a kind of preference or an option for the undecided. Many do not realize that voting for their party might actually cause less seats for that party. Considering that, as pointed out in the introduction to this analysis, a country's electoral system is the basis of a democracy, an electoral system that is highly complicated, posits itself on a very uncertain democratic basis. How should this kind of highly technical electoral system be explained to the average Sri Lankan?

VI. Conclusion

Free and fair elections posit fundamental requirements for a stable democracy. Neither of the two basic systems examined above is capable of solving all election related problems. The options that a legislator has within these systems are vast and often tend to be as unsatisfying as the unmodified options. In order to find a suitable system for a country, one therefore needs to look at the society, the functioning of the state and all other relevant aspects.

Germany may be a more stable democracy than Sri Lanka. But, as earlier pointed out, this is not the result of the electoral system in itself. On the contrary, this system is highly complicated and has been argued to result in an infringing of the right to equality of the voters. Although, the system has been in force for nearly fifty years, its appropriateness and constitutionality has been debated by its critics for almost that same period of time. Its viability rests on other institutional aspects of the German constitutional system that are lacking in Sri Lanka.

Nevertheless, the general idea of introducing a personalised element into a system of proportional representation in Sri Lanka would surely help to bring politics closer to the people. Some of its aspects, such as the party lists elected through the members internally, might decriminalise the election process. However, we should also look at Germany as a good example of the difficulties that such a system may cause. In this regard, idealizing the German model as a perfect electoral system for Sri Lanka would be unwise.

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Committee to Investigate into Election-Related Violence (CIEREV)*

Final Report

Executive Summary

**The Committee to Investigate into Election-Related Violence (CIEREV) pertaining to the Parliamentary General Election of December 2001 and the Local Authorities' Elections of 2002, comprised five members, namely Justice Ranjit N.M. Dheeraratne, formerly Supreme Court Judge, (Chairman), and members Kingsley Rodrigo, Arjuna Parakrama, Joel Fernando and Janvid Yusuf. The Committee sat during the period June 8, 2002 - December 26, 2002.*

Conscious of the fact that it was not a Commission and therefore had no powers to summon witnesses, the CIEREV sought voluntary assistance from the general public, through newspaper advertisements and a press conference, both by way of affidavits on election violence and general suggestions for making the electoral process more transparent, fair and equitable.

A total of 216 complaints of election-related violence and 05 general written submissions were received by the CIEREV. Of these 137 were within CIEREV's terms of reference and supported by affidavits, providing *prima facie* evidence of the commission of these acts. Complaints were received from 19 districts, with the highest number coming from Kandy (43), Kurunegala (34), Gampaha (28) and Ratnapura (23), while only one complaint each was received from Ampara, Jaffna, Moneragala and Trincomalee.

129 of the complaints received related to the 2001 Parliamentary General Election and 08 to the Local Authorities' Elections, while the majority of complaints (101) concerned post-election violence. The majority of incident reported were acts of mischief (97), though there were 07 murders, 14 acts of robbery, 10 assaults and 03 incidents of arson recorded.

The CIEREV notes that only in 12 instances (9%), had cases been formally filed in Court, though 87 had been reported to court by the police, and 15 examples of unacceptable police delay have been identified in this report. Based on the identification of the alleged perpetrators by the complainants, the CIEREV has concluded that supporters of the government in power were responsible for nearly one-and-a-half times the number of incidents of non-governments of violence in which he perpetrator's political affiliation had been identified.

The CIEREV is of the view that the (proposed) establishment of the Elections Commission (EC) is a step in the direction, but that, in keeping with international covenants and established international best practice, further legislation is required to strengthen the hand of the EC, such as the inclusion of provision to take legal or disciplinary action against those who defy the EC's directions and guidelines.

Regarding Parliamentary Elections, the CIEREV proposes that an independent caretaker government comprising seven members be appointed by the Constitutional Council within one week of the

announcement of elections, and that the preferential voting system be abolished in favour of a reversion to the election of representatives on the single electorate system by a combination of the first-past-the-post (FPP) in each electorate and election of representatives on the basis of proportional representation of the registered political parties district-wise on a list system (LS). It is also recommended that appropriate legislation be passed to ensure reservations among the lists of nominations for women and those with post-secondary/professional qualifications.

The CIEREV recommends that legal provision for identification of voters at polling booths be provided to minimize the incidence of personation at elections. In addition, the use of Electronic Voting Machines (EVMs) would minimize delays and discrepancies in counting of votes, thereby enhancing the transparency of the electoral process. The CIEREV recommends that, in keeping with Sri Lanka's obligations as a signatory to the relevant international covenants, migrant workers be afforded the opportunity of voting from abroad. Since, postal voting has led to complaints and general dissatisfaction, the CIEREV recommends that a system of voting in advance be adopted for all elections.

The CIEREV recommends that over-crowding and disorder at polling centres be carefully controlled, that the prohibition of all forms of canvassing on polling day be extended to cover all locations, as opposed to being confined to a radius of 500 metres from the entrance to polling centres, and that only one party/candidate's office be permitted on election day per polling division, all of which are measures to ensure that elections are conducted without undue influence and intimidation. In this connection, the CIEREV recommends that the current provision for candidates to enter polling stations be rescinded.

The CIEREV also recommends that the size and location of posters during an election campaign are strictly regulated, that political parties provide audited accounts of all election-related expenditure which should be submitted to the Elections Commission within six months of the completion of the election, and that legal provisions should be introduced to limit election expenses of candidates. The CIEREV recommends that all political parties and candidates subscribe to a code of conduct, as is the case in many other countries, and that all candidates be required to submit a declaration of assets at the time of nomination, which should be accessible to the public. The CIEREV urges that higher penalties be legislated for election offences, and that a single composite enactment covering all elections be promulgated in place of the multiple enactments, which are in place at present. This would ensure uniformity and equitability across the entire election process.

The CIEREV recommends that local monitoring organisations be provided the same facilities to enter polling centres and counting centres as afforded to international monitoring organizations, after careful scrutiny and monitoring, to ensure transparency and accountability. On the long-term the CIEREV urges that both school students and public servants are provided with education on the electoral principles and representative democracy as well as electoral law. All these reforms, however, would be of little avail if the broadest public participation is not canvassed so that civil society at large will become a stakeholder and active partner in the electoral reform process.

Committee to Investigate into Election-Related Violence
(CIEREV)

Final Report

Introduction

The Committee to investigate into election related violence committed before, during and after the Parliamentary Election of December 5th 2001, and the Local Government Elections of March and May 2002, (CIEREV) was appointed on 8th June 2002 as a sequel to the expression of serious concern from all quarters, over anti-social and criminal elements entering the electoral arena. There is no controversy that democracy cannot survive in this country without free and fair elections. Pending the appointment of a secretary and the provision of wherewithal necessary to perform its functions, the CIEREV had its first meeting on 13th June at the OPA headquarters. After the Secretary was appointed, the CIEREV commenced to meet at the BMICH after 25th July.

The CIEREV is conscious of the fact that it is not a Commission appointed either under the Special Presidential Commission of Inquiry Act No. 7 of 1978 (as amended) or the Commission of Inquiry Act No. 17 of 1948 (as amended), and therefore has no powers to summon witnesses.

Under those circumstances, the CIEREV decided to call for information from the public on a voluntary basis, by way of affidavits, in order to investigate into the acts of election-related violence with a view to finding out whether there was *prima facie* evidence of commission of such acts. Since the obvious ultimate objective in appointing the CIEREV was to find ways and means of making the electoral process more transparent, fair and equitable, the CIEREV also decided to invite from concerned persons and organizations, written submissions on the question of achieving that objective. The CIEREV informed the appointing authority of these decisions by letter dated 13th June, 2002. The CIEREV was assisted in its task by a State Counsel and a Superintendent of Police.

The notice was published in English, Sinhala and Tamil, in 16 newspapers, and Secretaries of all 30 registered political parties of Sri Lanka were written to, requesting them make arrangements to publish the notice in their respective party papers. The CIEREV is, however, unaware whether any political party organ did carry that notice. Of those, three letters were returned undelivered and attempts made to reach the addressees proved futile.

Subsequently, a press conference was also held on 28.08.2002, in order to give wider publicity to the role and functions of the CIEREV and to extend the time given by the paper notices, to the general public to send in affidavits and written submissions, by a further period

of one month. At that press conference, twenty-two media personnel were present, representing eighteen organizations.

The CIEREV has thus, done its utmost to secure public participation in accomplishing its task. The CIEREV received 216 complaints, of which 181 were affidavits, and, in addition, five written submissions of a more general nature were received. The CIEREV also had the benefit of a discussion with Mr. Dayananda Dissanayake, Commissioner of Elections regarding the recommendations, it proposes to make.

Incidents of violence

A total of 216 written complaints were received by the CIEREV in response to the newspaper advertisements published between 31.07.2002 and 04.08.2002, as well as the media coverage given to the Committee. Of these 216, a total of 68 complaints were either concerning incidents outside the terms of reference of the CIEREV or not supported by an affidavit. On 44 of these complaints, the CIEREV was unable to act as they dealt with other elections such as the 1999 Presidential election or were not related to the election at all, involving, for instance, personal grievances. The balance 24 were not supported by affidavits and hence remained outside the CIEREV's mandate. A further 11 complaints were duplicated, leaving a total of 137 complaints to be inquired into by the Committee.

The following pages will present a summary and analysis of the complaints received by the CIEREV. The principles and methodology adopted by the CIEREV have been described above and will not be re-stated in this section. Suffice to note that, in keeping with the public notice, only affidavits were considered for further investigation. In the case where a complainant had not initially submitted an affidavit, that person was requested to do so. Of the 216 complaints received, 181 were accompanied by affidavits. 137 affidavits within the terms of reference of the Committee were received, 23 (17%) from women and 114 (83%) from men.

Though the CIEREV received only 216 individual complaints in all, the geographical spread of the petitioners indicates that there is a wide coverage. Complaints were received from 19 districts, only the districts of Vavuniya, Polonnaruwa and Batticaloa in which the elections were held were there no complaints. The highest number of complaints were received from the districts of Kandy (43), Kurunegala (34), Gampaha (28) and Ratnapura (23), while only one complaint each was received from Amparai, Jaffna, Moneragala and Trincomalee.

As regards the actual extent and depth of violence as evidenced in these complaints, the CIREV received 129 complaints relating to the 2001 Parliamentary General Election, and 08 complaints relating to the 2002 Local Authorities' Election. The overwhelming majority of

these complaints, totalling 101 (or 74%) were in respect of post-election violence, and within this category the preponderance was concerned with post-election violence after the 2001 General Election, which accounted for 98 complaints.

Next in significance was the pre-election or campaign-related violence during the General Election, which accounted for 24 complaints. In summary, the CIEREV received 16 times more complaints relating to the General Election than the Local Authorities elections.

As regards the nature of violence alleged in the complaints received by the CIEREV, a total of 07 Murders, 01 Attempted Murder, 4 acts of Robbery, 10 Assaults, 03 incidents of Arson, 04 acts of Intimidation, 97 reports of Mischief and 01 Damage to Property, comprised the complaints that CEIREV investigated. In 43% of these cases, the perpetrator was allegedly identified by the complainant.

Facts relating to these 137 incidents were reported to Courts by the police in 64% of the cases, but as of December 15, 2002, only 12 cases (or 9%) have been formally filed in the appropriate court of law. The others have not been filed due to a number of reasons, which include the inability of the police to arrest all suspects associated with a particular incident, as well as apparent lapses and delays on the part of the authorities.

Of the 137 complaints considered by the CIEREV, the alleged perpetrators were identified in 78 (57%), and it would be reasonable to assume that, unless a settlement was effected either by the police or at the Mediation Board, these cases should have come before the Courts, both to ensure justice as well as to act as a deterrent for the future. However, the CIEREV, has identified 15 such cases of unacceptable police delay, which it recommends the attention of the Attorney General should be drawn for necessary action.

In terms of the political affiliations of the complainants and alleged perpetrators, the CIEREV did not wish to identify individual political parties since, at this late stage, it would have been counter-productive. Instead, the CIEREV has categorized both complainants and perpetrators simply as supporters of the government prevailing at the time or not, as the case may be. In these terms, 50% of the alleged perpetrators belonged to the party in power at the time of the election, 35% to the opposition, while the affiliation of 15% was not known.

Thus, supporters of the government in power were responsible for nearly one-and-a-half times the number of incidents of non-government supporters, and for nearly two-thirds of the total number of incidents of violence in which he alleged perpetrator's political affiliation had been identified in the complaint. This statistic points to an important finding of the CIEREV, which has been reiterated by independent election monitoring groups, that the government in power, whatever political hue it may take on, is the major culprit in election-related violence in Sri Lanka. However, the CIEREV is hopeful that after the National Police Commission

constituted in terms of Article 155A of the Constitution commences to function, these issues will be addressed.

General Overview of Violence during these Elections

Though the CIEREV has not examined all of the incidents recorded, and is thus unable to verify their individual veracity, we provide below a summary of the total number of incidents as identified by the Police Election Secretariat, the CMEV and PAFFREL/MFFE, in order to provide the broader context of violence within which the elections under consideration were held.

	Total Number of Incidents of Violence during General Election 2001				**Total Number of Incidents of Violence during Local Authorities Election 2002**			
	Pre-	**During**	**Post-**	**Total**	**Pre-**	**During**	**Post-**	**Total**
Police Election Secretariat Data	2142	385	731	3258	601	459	49	1109
PAFFREL / MFFE Report	567	2168	421	3156	108	419	32	559
CMEV Report	2735	1473	653	4861	726	1777	37	2540

Recommendations

Article 21(1) of the Universal Declaration of Human Rights states –

> '*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;*'

Article 21(3) further elaborates –

> *'The will of the people should be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'*

The same concept of expression of the free will of the people at elections is articulated by Article 25 of the International Covenant on Civil and Political Rights. Indisputably, it is the responsibility of the Government of Sri Lanka to translate into action the aspirations spelt out by those Articles as an essential part of its international obligation to the comity of nations;

the Government too has to live up to its Constitutional obligations as Article 93 of the Constitution of Sri Lanka decrees that –

> *'the voting for the election of the President and of the Members of Parliament and at any Referendum shall be free, equal and by secret ballot.'*

CIEREV is of the view that to ensure representatives of the People are freely chosen at genuine, free and fair elections certain preconditions are necessary. These are broadly:

(1) Only eligible voters should be permitted to vote at elections;

(2) Every eligible voter should be permitted to vote ensuring secrecy and freedom of choice;

(3) Only registered voters ballots should be counted;

(4) All contesting political parties and candidates should enjoy equal public facilities;

(5) All contesting political parties and candidates should have equal access to the print and electronic media;

(6) Election laws should be implemented without discrimination on a non-partisan basis;

(7) Elections must be free from intimidation, bribery, violence, coercion and every act calculated to subvert the free will of the people; and

(8) Money-power, muscle-power and state-power should not be permitted to distort the result of an election.

With the above preconditions in view, we venture to make our suggestions for the reform of the electoral system.

1. The Establishment of the Elections Commission

The CIEREV considers the establishment of the Election Commission (EC) by the 17th Amendment to the Constitution, with the given object of conducting free and fair elections and Referenda, as a step in the right direction (Article 103 (2)). However, the CIEREV, having considered the statutes of few other countries in relation to elections, and the object to be achieved by the EC, is of the view that further legislation is necessary to strengthen the hands of the EC. For example, while Article 104B (4)(a) empowers the Commission, by a direction, to prohibit the use of property belonging to he State or any Public Corporation,

(briefly put) for the purpose of promoting the election of a candidate or a political party, no sanction is attached to the failure to obey such a direction.

Even the Commissioner of Elections in his Administration Report for the year 2001 observed, 'There is no provision in the 17th Amendment to enable the Commissioner to take legal or disciplinary action against (those) who defied his directions and guidelines.' The CIEREV considers that further legislation is necessary oh the following lines:

(a) Failure to obey the directions or to comply with the orders given by the EC, in the exercise of achieving its given object, be made a penal offence punishable of achieving its given object, be made a penal offence punishable by the Supreme Court. The failure to obey the directions or to comply with the orders should be considered as an offence of contempt against the Supreme Court on the lines similar to the provisions enacted in the Human Rights Commission of Sri Lanka Act No. 10 of 1996 or the Special Presidential Commission of Inquiry Act No. 7 of 1978.

(b) Empowering the EC to make rules for the purpose of achieving its given object. Those rules are to have legal effect only when presented to the Parliament by the Prime Minister with the concurrence of the Leader of the Opposition and passed by Parliament. Breach of those rules requires to be made a penal offence punishable by the Magistrate's Court or the High Court with the sanction of the Attorney-General.

2. System of electing representatives of the People at Parliamentary Elections, Provincial Council Elections and Local Authorities Elections

(a) Parliamentary Elections

The CIEREV considers the present system of Parliamentary and Local Government Elections to be conducive in encouraging money-power to play a key role in the conduct of electioneering and failing to provide a level playing field to persons who genuinely desire to serve the country as representatives of the People. The CIEREV also notes that in the present system of Parliamentary elections, there is a failure to retain the umbilical code between the voter and his representatives.

The CIEREV also considers the preferential votes system as promoting, encouraging and furthering confrontational electioneering, even within a party, and also fostering unwanted divisions on the basis of caste and creed. The CIEREV recommends.

(1) Reversion to the election of representatives on the single electorates system on the basis of first-past-the-post (FPP) in each electorate, and in addition, election of representatives on the basis of proportional representation of the registered political parties district-wise on a list system (LS). The percentage of representatives elected

under the FPP and the LS will have to be determined after careful consideration. It is pointed out that the Indian Law Commission has suggested, as far as India is concerned, that of the representatives 75% should be elected under the FPP system and 25% under the LS.

(2) Abolition of the preferential vote system. To achieve the above objects, the CIEREV recommends that suitable amendments be made to Article 96, 97, 98 and 99 of the Constitution.

(b) Provincial Council Elections and Local Authorities Elections.

The CIEREV suggests that suitable amendments be made to the Provincial Councils Elections Act. No. 2 of 1988 and the Local Authorities Election Ordinance No. 53 of 1946, introducing the FPP system and the LS. In the case of Local Authorities, the CIEREV suggests that the system of electing representatives ward wise be re-introduced.

3. Quality of Representatives

The CIEREV considers that to ensure free and fair elections and decriminalize politics, the quality of the contestants need to be improved. It is to be noted that in Pakistan, a candidate for the parliamentary elections must be a graduate of a university recognized by the University Grants Commission of Pakistan. The CIEREV is of the view that appropriate legislation should be made to enable the recognized political parties to nominate, at any election, at least 30% of the candidates from amongst those with post secondary and / or professional qualifications. The CIEREV also considers that a proportion of the nominated candidates by a recognized political party, at any election, be reserved for women and the bringing of women into the hustings will have a positive effect in decriminalizing politics.

4. Voter identification and voting

(a) The CIEREV considers it desirable to make legal provision to identify a voter at the polling booth, mainly with the aid of his national identity card issued under the Registration of Persons Act No. 32 of 1968. It is to be noted that the law compels every person, on attaining 18 years of age, to apply for a national identity card. According to the booklet titled "The Electoral System of in India" (1999) issued by the Elections Commission of India, at the general election to the *Lok Sabha* in 1998 while the number of voters was 375, 454, 034, the government issued electors' photo identity cards to over 373 million. However, at an election, a voter could prove his identity with one of several other documents in lieu of the electors' identity card, such as the driving license, passport, student ID card, pass books issued by banks and electricity bills etc. The CIEREV is of the view that legislation on similar lines as in

India, making the key, but not exclusive, method of identification based on the national ID card, would help to eliminate incidents of personation at voting.

(b) As regards voting and counting, the CIEREV would recommend that legislation be made and facilities be provided for Electric Voting Machines (EVM). The face of a EVM is similar to that of a ballot paper which gives, *inter alia*, the symbols and names and where in a ballot paper space is provided for making a cross, in the EVM a button occupies that space which the voter is expected to press. In the booklet titled *'The Electoral System in India' referred to earlier, the Election Commission states 'Electronic Voting machines have been developed to facilitate easy polling and counting. The use of machines is to save cost of paper and printing etc. and also to get the result within three to four hours, thus saving a lot of manual exercise involved in conventional counting'*: The Commission further states thus: *'The Commission plans to use the machines extensively throughout the country in the forthcoming elections for the 13th Lok Sabha. EVMs will be used in 46 Parliamentary Constituencies spread over 17 States and Union Territories. These constituencies have more than 65,000 polling stations and cover electorate(s) exceeding 60 million. Almost 100,000 machines are likely to be used during this electoral event.'* In contrast, it may be noted that according to the Administration Report of the Commissioner of Elections (of Sri Lanka) for the year 2001, at the Parliamentary Election of that year, twenty-two Electoral Districts of the Island had only 9,981 polling stations.

(c) *Migrant Workers*

The CIEREV has observed that the absence from Sri Lanka of the migrant workers whose names appear in the electoral registers, on the day of the polls, has occasioned in some instances to facilitate personation. Since Sri Lanka is a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (acceded on March 11, 1996), the CIEREV is of the view that the Government of Sri Lanka is obliged in terms of Articles 41 and 84 of that Convention, to make legal provision for the migrant workers to exercise their franchise from the country in which they are currently engaged in employment.

5. Polling booths, the area surrounding and the day of polling

In the opinion of the CIEREV a fair amount of election related violence takes place in and around the polling booth areas on the day of polling. Several steps could be taken towards the elimination of these incidents.

(i) It has been the practice of several registered parties to sponsor one or more sets of Independent political groups to contest elections, so that those registered political parties could obtain the assistance of more persons than they are lawfully entitled to, at the polling stations and counting stations. This has led to over crowding and disorder particularly at polling stations. To discourage this unhealthy practice the

CIEREV suggests that the deposit to be made by each Independent candidate at an election be enhanced to prevent abuse. It may be noted that in India the Law Commission has recommended a total ban on independent candidates contesting elections.

(ii) Certain acts are prohibited within the precincts, and at a distance of half a kilometre from the entrance of a polling station on the day on which a poll is taken. These acts are (a) canvassing for votes (b) soliciting votes (c) persuading not to vote for a particular person or a party or not to vote at all (d) distributing or exhibiting any political handbill, placard, poster etc. These prohibitions are laid down in section 68 of the Presidential Elections Act No. 15 of 1981; in section 68 of the Parliamentary Elections Act No. 1 of 1981; section 68 of the Provincial Councils Elections Act No. 2 of 1988; section 81A of the Local Authorities Election Ordinance No. 5 of 1946 and in section 44 of the Referendum Act No. 7 of 1981.

The CIEREV is of the view that most of the unruly incidents happen on the day of the polling as a result of canvassing etc. and that there is no justification to do any of those specified acts *anywhere* on the day of the poll and those acts should be totally prohibited on that day. The CIEREV is of the view that one of the primary sources of election violence is the intimidatory presence of a large number of supporters of candidates who congregate outside polling stations on the day of polling, and legislation should be brought to prevent such congregation. Suitable amendments should be made to the enactments referred to earlier to give effect to the abovementioned suggestions.

(iii) The CIEREV notes that while some party/ candidate's election offices which are kept open on the day of the poll are targeted for violence, some others are used on that day as launching pads of violence. The CIEREV is of the view that there should be only one election office for each polling division on the day of the poll, and that this should be located at a specified distance away from any polling centre.

(iv) In the opinion of the CIEREV, another major factor contributing to use of violence on the day of the polls is the unrestricted movement of vehicular traffic on that day. The election officers usually carry the requisite official labels on their vehicles; but all others plying vehicles on that day for legitimate business must carry labels applied for and issued by the police, specifying the route, time and purpose, prominently displayed on their vehicles; others who are permitted to transport physically disabled persons, should carry labels applied for and issued by the returning officers, prominently displayed on their vehicles. As the law stands, there is no restriction placed on public transport plying on that day and there is no difficulty in identifying those vehicles. The laws regarding use of vehicles on the day of the poll need to be suitably amended.

(v) The CIEREV sees no justification for candidates being permitted to freely enter any poling station (some with their armed security men) when they have their election agents in every polling booth. Permitting candidates to go around visiting the booths has occasioned in many a clash between rival groups. The CIEREV is of the view

that the law should provide that none carry arms, during the period commencing from the date of the proclamation of an election and ending seven days after the results are announced, except those of the armed forces and police deployed on elections duty.

6. Postal Voting

The CIEREV considers postal voting at the voter's own place of work to be unsatisfactory as at some work places certain intimidatory elements are present. Instead, the CIEREV suggests that a system of voting in advance, as followed in some other countries, be introduced, to enable the postal voter to cast his vote at a common booth outside his work place. The CIEREV is also of the view that the atmosphere prevalent at some work places on the day of poll where postal voting takes place, is conducive for the postal voters being subjected to undue influence.

7. Posters, Flags, Cut-Outs etc.

The CIEREV is o the view that the law regarding election posters, cut-outs etc. is observed in the breach and that putting up of posters etc. at public places has given rise to many unruly incidents. The total ban on posters etc. in public places, will place the less affluent candidates who can ill afford television space for advertising, at a disadvantages who can ill afford television space for advertising, at a disadvantage. We recommend that all local authorities should provide, at few public places, boards for the display of a limited number of posters by a single candidate, and that putting up of posters other than on those boards should be completely banned. We suggest that by law, the size of posters and flags should be regulated.

8. Maintenance of audited accounts by political parties

The CIEREV is of the view that in order to ensure transparency in the matter o collection of funds and the manner in which those funds are expended by the registered political parties, legislation must be passed to compel the political parties to maintain accounts. The auditing should be done by institutions specified by the Commission. These accounts should be made available for public inspection. In addition, CEIREV is of the view that every political party participating at an election, should submit to the Election Commission, an interim account of the election expenses incurred on account of such election, within 6 months of the results are publication of the results.

9. Limiting election expenses

The CIEREV considers that making of legal provisions is necessary to limit election expenses of a candidate or a recognized political party at any election. After every election, the candidate or his agent should within 60 days, submit to the Commission a return and a declaration of accounts as was done earlier (to the commissioner) in terms of section 70 of the Ceylon (Parliamentary Elections) Order in Council. The Commission should be empowered to fix the ceiling on election expenses after consulting the political parties and

incurring expenditure over the permitted ceiling should be made an illegal practice, the proof of which should result in unseating a candidate.

10. Code of Conduct for candidates at all elections

The CIEREV is of the view that all registered political parties should agree on a code of conduct for their candidates at all elections as has been done in India. A suggested code is annexed hereto marked **I**.

11. Parliamentary Elections to be held under an independent caretaker government

One of the major obstacles to a free and fair election is the misuse of state resources and government administrative machinery during the campaign period. Moreover, the CIEREV considers that when an incumbent minister contests an election, he enjoys inherent advantages which are unfair to the opposing candidates. In these circumstances, the CIEREV proposes that the Constitutional Council should be empowered to select a seven-member non-partisan caretaker government within one week of the dissolution of Parliament and the announcement of the election.

12. A declaration of assets by every candidate at an election

Corruption in public life is something not unknown in Sri Lanka. The Indian Law Commission in its report dated May 1999 states –

> *'There has been mounting corruption in all walks of public life. People are generally lured to enter politics or contest elections for getting rich overnight. Before allowing people to enter public life the public has a right to know the antecedents of such persons. The existing conditions in which people can freely enter the political arena without demur, especially without the electorate knowing about any details of the assets possessed by the candidate are far from satisfactory. It is essential by law to provide that candidates seeking election shall furnish the details of all his assets movable / immovable possessed by hi / her, wife / husband dependent relations, duly support by an affidavit.'*

The Law Commission has recommended that no person should be qualified to file his nomination, unless that person files a declaration of assets of that person and f other persons near and dear to him, as indicated above, along with his nomination paper, supported by an affidavit, declaring the particulars to be true. The CIEREV recommends that legislation on similar lines should be introduces in Sri Lanka, with provision enabling public access to such declarations.

13. Higher penalties for election related offences

At present election related offences carry the following penal sanctions.

(a) Penal Code Chapter IXA. Offence of Bribery – Section 169 E – fine not exceeding 500 rupees; if by treating 200 rupees. Section 169F Offence of Personation – a fine not exceeding 300 rupees. Section 169HG – Offence of making false statement regarding a candidate – a fine (amount not mentioned) Section 169H – Offence of failure to keep accounts (required by any law in force) – fine extending to 300 rupees.
(b) Election and Referendum Acts

Referendum Act o. 7 of 1981 – Section 43 – Offences relating to ballot papers – imprisonment of a term not exceeding 2 years and for 7 years of becoming incapable registered as a voter and if MP he vacates his seat. Section 56b Corrupt Practices – Offence of Personation – RI not exceeding 12 months and fine not exceeding 500 rupees; Treating, Undue Influence and Bribery – RI not exceeding 6 months or a fine not exceeding 500 rupees. In addition a person becomes incapable of being for a period of 7 years, registered as a voter and if MP he shall vacate his seat. Illegal practices – offences of Transport of voters etc. – fine not exceeding 300 rupees and becoming incapable for a period of three years of being registered as a voter and if MP he shall vacate his seat. In the Presidential Elections Act 15 of 1981, offences (under section 66) relating to ballot papers, nomination papers, poll cards, (under section 80) Corrupt Practices and (under section 86) Illegal Practices, carry identical penalties as in the Referendum Act. Similarly the Provincial Council Elections Act No. 2 of 1988 (section 66) ballot papers etc., (section 82) Illegal Practices, carry the identical penalties.

However, it is noted that the identical offences relating to Ballot papers etc. in terms of the Parliamentary Elections Act No. 1 of 1981, (section 66) carry a penalty of a fine not exceeding 1000 rupees and / or imprisonment not exceeding 6 months. Penalties for Corrupt Practices (section 81) and for Illegal Practices (section 87) are same the Acts referred to earlier. In terms of the Local Authorities Elections Ordinance No. 53 of 1946, the offences relating to ballot papers etc. carry penalty of a fine not exceeding 500 rupees and / or to imprisonment not exceeding 6 months. Penalties for Corrupt Practices (section 82E) and Illegal Practices are almost similar to the provisions in the Acts referred to earlier.

Any person, who for the purpose of promoting an election displays any handbill, placard, poster, notice photograph of a candidate, symbol, sign drawing, flag of banner, on or across any public road in terms of section 74 of the Presidential Elections Act No.15 of 1981; section 50 of the Referendum Act No. 7 of 1981; section 74 of the Provincial Councils Elections Act No. 2 of 1988; section 74 of the Parliamentary Elections Act No. 1 of 1988 and section 81B of the Authorities Elections Ordinance 53 of 1946 of an offence punishable with a fine not exceeding 100 rupees and / or for a term not exceeding one month. The exercise of displaying handbills etc. in public places, particularly in the cover of darkness, has often given rise to clashes between groups.

The CIEREV is of the view that most of these penalties are woefully inadequate and that there should be prescribe a minimum penalty for serious election related offences. It is

also of the view that instead of having several enactments relating to elections it is describe to have one single composite enactment on elections.

It is to be noted that in Pakistan the Representation of Peoples Act has been amended to include a new section declaring Capture of polling stations and polling booths a penal offence. The offence is punishable with imprisonment for a term which shall not be less than three years and which may extend to five years and with a fine which shall be not less that 50,000/- rupees and which may extend to 100,000/- rupees and which may extend to 100,000/- rupees. In India, the same offence carries a minimum punishment of imprisonment of not less than one year, which may extend to three years and a fine; if the same offence is committed by a person in the service of the Government, it carries a minimum penalty of three years imprisonment which could extend to five years imprisonment with a fine.

14. Election Monitors

Election monitoring by independent monitors is today universally recognized as one of the methods by which free and fair elections are ensured; it is also accepted as one of the mechanisms used to increase public acceptability of the election results. It is observed by the CIEREV that only foreign Election Monitors are permitted to enter polling booths and counting centres. There should be no discrimination between local and foreign Monitors and legal provision should be made to enable the Election Commission to permit genuine local Monitors, selected on some objective criteria, to enter the booths and counting stations, on specific conditions. We suggest that the Election Commission, as far as practicable, should obtain the assistance of recognized election monitoring agencies in training the election staff, so that the staff will receive the benefit of the experience of the monitors.

15. Education of Students and Public Servants on the need for transparent, fair and equitable elections

The CIEREV is of the view that, at the level of secondary education, in the subject of Social Studies, preferably at the level of grade 10, students should be given a basic education on the principles underlying the Rule of Law and representative democracy. In the case of all government servants without exception, their syllabi for the first efficiency bar examination, should include a sound knowledge of the Rule of Law and representative democracy.

16. Participation of Civil Society

The CIEREV is of the view that before reforms of the election laws are launched, the Government and the Opposition should encourage civil society to organize itself in making suggestions from an apolitical point of view so that, civil society will feel that it has been a partner in the process of reforms.