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REDUCING THE RULE OF LAW TO RULE BY POLITICS

-CONSTITUTIONAL & STATUTORY IMMUNITIES

-PROSECUTIONS & INVESTIGATIONS

-SRI LANKA'S 'ENGINEERED' CONSTITUTIONS

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Editor's Note... ... ...

The *LST Review*, in this Double Issue, contains three papers reflecting the manner in which the Rule of Law has been reduced to Rule by Politics in Sri Lanka. This is the common thread evident in all three contributions, whether in the context of the investigative/prosecutorial systems, constitutional cum statutory immunities sanctioning abuse or indeed in the very manner that Constitutions are drafted and adopted in this country.

We publish firstly a critical analysis of immunities attaching to executive and state officials under the Constitution as well as statute law, tracing thereto the link to impunity. The judicial role therein is examined in some detail, both in its positive and negative forms. At the core of this debate lies, of course, the virtual elevation of the Office of the Executive Presidency above the law. As we can see, even though valiant judicial efforts have been made in some instances to roll back the reach of this immunity, these efforts have been faltering and ineffectual. In a most powerful sense therefore, the Executive President is able to violate the law and even the Constitution with impunity.

And spreading down from that zenith of near-absolute executive power is a web of other immunities operational particularly through anti-terrorism laws resulting in state officers being protected from gross human rights abuses. The minimising of justice seems inevitable in this process. Indeed, a different result cannot be expected.

Even worse, the centralization of power in the executive has resulted in a flawed legal system being selectively used as a weapon against those whom the government perceives as dissenters. Conceptually, as is contended, the notion of the 'juridical' in Sri Lanka's legal system is slowly but surely yielding to 'politico-administrative' pressure with dangerous consequences for the stability of the country's democratic systems.

As our second contribution details, the violence that has seeped into Sri Lankan society frames the subversion of law enforcement, the investigative process and the prosecutorial role. The concept of the State and of the government has merged into one; thus, the Attorney General whose role is that of the chief state law officer has been subordinated to the whim and fancy of the political establishment. The institution of the

police has suffered far worse; its placement under the authority of the Ministry of Defence has irreversibly militarised and politicized its function. Torture, death and disappearances at the hands of state agents are commonly reported four years after the ending of active conflict in the country. Civic life remains brutalized.

In that regard, the law itself has become conflictual; its accepted role in preserving order in society has diminished and the value attached to justice in the context of the legal process has been negated. The implicit danger in such a transformation is that judicial institutions themselves become bargaining places instead of fulfilling the traditional role of neutral arbiters of justice. From that viewpoint, the patently obnoxious 18th Amendment to the Constitution as well as the politically motivated impeachment of Sri Lanka's Chief Justice were natural consequences of the extreme deterioration of institutional independence which preceded these events.

In any event, as the final paper in this Issue reminds us, constitution-making in Sri Lanka has never been a wholesome process having the people's interests at heart, as contrasted to what was evidenced in India or in more recent times, in South Africa. On the contrary, Sri Lanka had 'engineered' Constitutions driven by the ambitions of opportunistic political leaders who used all the skill and dexterity of their considerable legal expertise to work against the public interest. These constitutional documents eventually impacted negatively on the rights of the majority and minorities alike but with more potentially inimical consequences for the minorities, given their vulnerabilities.

As observed in common by all contributors to this Issue, the mistakes of the past are being repeated with even deadlier intent in the present context.

Kishali Pinto-Jayawardena

From Immunity to Impunity: A Critique of Constitutional and Statutory Immunities in Sri Lanka

Kishali Pinto-Jayawardena[*], *Gehan Gunatilleke*[**] *& Prameetha Abeywickreme*[***]

1. Introduction

1.1 The Nature of Impunity

Those who abuse power almost invariably enjoy the power to abuse. Impunity is both a corollary of power and a tool for power retention; a phenomenon that, by design, perpetuates the misery of those affected by it. As suggested by Paul G. Lauren, understanding official impunity requires recognition of a government's inherent belief that the treatment of those under its control and the policies it pursues are beyond scrutiny.[1] In a sense, the international legal regime has helped galvanize the idea of impunity. Through the emergence of concepts such as nationhood and national sovereignty, governments began to realize with increasing regularity that their actions could not be subjected to scrutiny. As Lauren aptly puts it, 'victims therefore remained objects of international pity rather than subjects of international law.'[2] A widespread culture of impunity throughout the world was indeed the culmination of such normative and ideological developments.

More recent trends in international criminal law and human rights protection have led to a transformation in the way we view impunity. International momentum, as demonstrable by the plethora of rights conventions, resolutions and reports within the United Nations system, has begun to build towards an unequivocal demand for the end to official impunity.[3] In this context, the United Nations Updated Principles on Action to Combat Impunity defines 'impunity' in the following terms:

> [T]he impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since

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1 Paul G. Lauren, From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context, in Ramesh Thakur and Peter Malcontent (eds.) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, United Nations, (2004), ['Lauren, *From Impunity to Accountability*'] at 16.

2 *Ibid.* at 17.

3 *Ibid.* at 27.

> they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[4]

Despite the fact that those with power have certain natural inclinations towards impunity, contemporary international norms clearly recognize the general obligation of States to take effective action to combat impunity. Accordingly, principle 1 of the UN Principles on Action to Combat Impunity declares:

> Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered, to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

Thus there are five basic obligations cast upon States in respect of combating impunity: first, to investigate violations of human rights; second, to take appropriate measures against perpetrators including prosecution and punishment; third, to provide victims with appropriate remedies and reparation; fourth, to facilitate the ascertainment of the truth; and finally, to develop and implement preventive measures. The nature and scope of these obligations reveal that impunity is a systemic problem, which requires a systematic response. Thus States are responsible for not only combating impunity in individual cases but also for exposing its very fabric and transforming the culture that sustains it.

A number of commentators present compelling normative justifications for combating impunity.[5] Diane Orentichter for instance argues that international law obligations form an important counterweight to impunity and must be seen as 'another weight added to the scales on the side of justice.'[6] Moreover, other commentators such as Paul Lauren[7] and Martha Minow[8] present accountability as the central goal of justice. They contend that breaking through the 'walls of impunity' and moving to a 'culture of accountability' requires that offenders be held accountable.[9] Earlier authors such as Luc Huyse have

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[4] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, adopted 8 February 2005, E/CN.4/2005/102/Add.1, at 6.

[5] For a concise review of the literature on the subject, see Marco Fanara, *Prosecution or Impunity? Is there an Alternative?* United Nations Mandated University for Peace, available at http://www.monitor.upeace.org/archive.cfm?id_article=799.

[6] Diane F. Orentlicher, "Settling Accounts' Revisited. Reconciling Global Norms with Local Agency, in *The International Journal of Transitional Justice*, Vol.1, 2007, 10-22, at 15 ['Orentlicher, *Settling Accounts' Revisited*].

[7] Lauren, *From Impunity to Accountability, op. cit.* at 15ff.

[8] See Martha Minow (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols. US Institute for Peace, (1998).

[9] For a more in-depth analysis of Martha Minow's arguments in particular, see Stephan Parmentier, *Global Justice in the Aftermath of Mass Violence: The Role of International Criminal Court in Dealing with Political Crimes* (2003), at 205.

observed: 'to replace moral order requires that 'justice be done'...there is a moral obligation to victims to prosecute those responsible.'[10] Such reasoning is also implicit in Orentlichter's suggestion that prosecution is essential to justice, as it 'offers to restore the fundamental norms of human decency and to secure the moral integrity of society in addition to deterring future crimes.'[11]

Notwithstanding encouraging trends in international law and academic consensus on the importance of combating impunity, the practical response to the issue has tended to hinge on the gravity of the human rights violations concerned. The international community's response to both the Yugoslavian and Rwandan crises—though belated—were commendable, considering the Security Council resolutions that led to the establishing of two *ad hoc* tribunals. Thus at least a concerted effort was made to bring the perpetrators of some of the most heinous crimes of the recent past to justice. However, serious international condemnation of impunity appears to take place only in the context of the gravest of violations, leaving States today to continue to enjoy the benefits of incredible levels of impunity. The harder cases, such as those involving U.S. action in Iraq, Afghanistan and Guantanámo Bay, Cuba, have failed to see justice, accountability and victim reparation in the manner and form contemplated by international norms. In a sense, the lack of consistent international pressure has revealed the need for greater impetus in terms of enforcing the obligations of individual States to combat impunity within their jurisdictions.

Similarly, in the case of Sri Lanka, the international community, while acknowledging widespread impunity, has not interpreted gross human rights violations taking place in Sri Lanka as amounting to a threat to international peace and security.[12] Hence the primary obligation to investigate human rights violations, prosecute and punish perpetrators, and provide reparations for victims, remains with the Sri Lankan State. Whether impunity lies in respect of the gravest human rights abuses imaginable, as seen in Yugoslavia and Rwanda, or serious violations, as seen in Sri Lanka, the inescapable need to eradicate it remains the same. Accordingly, the words of former UN Secretary General Kofi Annan uttered over a decade ago, remains infinitely true, regardless of the context of impunity:

> There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.[13]

1.2 The Sri Lankan Crisis of Impunity

Several factors within the politico-legal system in Sri Lanka contribute towards its culture of impunity. This paper focuses on one particular aspect of this problem, i.e. constitutional and statutory immunities.

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[10] Luc Huyse, Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past, in : A. Jongman (ed.), *Contemporary Genocides* (1996), at p.4.

[11] Orentlicher, *Settling Accounts Revisited, op. cit.* at p.16.

[12] See United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.unhcr.org/refworld/docid/3ae6b3930.html, Chapter VII, which deals with 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.'

[13] See Kofi Annan, as cited in www.ictr.org, 31 October 2001 cited in Lauren, *From Impunity to Accountability*, at p.33.

and postulates that these immunities form the foundation on which the culture of impunity is built. Before delving into this focus area, it is perhaps important to briefly outline the entire gamut of factors that lead to impunity in Sri Lanka.

First, the origin of impunity is rooted in the concept of presidential immunity. Following the promulgation of the 1978 Constitution, the executive presidency was introduced and entrenched within the politico-legal system in Sri Lanka. The President now wields tremendous powers of governance, which clearly invade the spheres of other organs of government. His or her sphere of influence has expanded over the years, culminating in the passing of the Eighteenth Amendment to the Constitution. This Amendment effectively entrenched absolute power in the executive by removing the term limit of the presidency and ensuring that key appointments including that of the Chief Justice and the Attorney-General were made at the unilateral behest of the President. Hence granting immunity to an over-mighty executive invites an irrevocable system failure. Presidential immunity and other statutory immunities clearly set a structural tone which results in impunity, as the inherent lack of accountability flows from the highest seat of power down to the lowest state functionary.

Second, the introduction of the emergency regime has ensured the widespread permeation of impunity. It is no coincidence that the President plays a pivotal role within the emergency regime: by declaring states of emergency, calling out the Armed Forces to maintain law and order under the Public Security Ordinance No. 25 of 1947 (as amended) (PSO), and, as Minister of Defence, issuing detention orders under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA).The fact that—in theory at least—none of these actions may be effectively challenged in a court of law, provided an overarching cover of 'emergency' to law enforcement authorities inclined to violate human rights. Despite the fact that the Sri Lankan judiciary has attempted to limit the reach of these ouster clauses as traditionally termed, there is little doubt that the culture of impunity in Sri Lanka owes its entrenchment to the near perpetual state of emergency in the country. In recent years, the withdrawal of the state of emergency promulgated under the PSO has not changed Sri Lanka's 'emergency culture', which continues under the equally draconian provisions of the PTA and the regulations issued under it.

Third, the perpetuation of impunity is dependent on its sustained accommodation by the criminal justice system. Quite apart from the traditional immunities afforded to public officials and the *ad hoc* enactment of specific 'immunity laws', the role of the Attorney-General has been pivotal in this regard. The historical evolution of the Attorney-General's role—from an independent and impartial officer of the state, to a subservient agent of the executive—has taken place in tandem with the emergence of impunity in Sri Lanka. Hence the Attorney-General's role in prosecuting perpetrators of human rights violations, as well as in representing state agents accused of violating human rights, is decisive to the continued sustaining of the culture of impunity in the country.

Fourth, the erosion of judicial independence in Sri Lanka has impacted on the rule of law in the country. Factors such as the flaws in the system of judicial education and training, the lack of integrity in the process of appointing judges and the lack of security of tenure appear to have contributed to the erosion of the independence of the judiciary and have encouraged the prevalence of impunity.

Fifth, parliamentary privilege has had at least a notional bearing on the issue of impunity. Under section 4 of the Parliament (Powers and Privileges) Act No. 21 of 1953, no Member of Parliament 'shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of anything which he may have said in Parliament or by reason of any matter or thing which he may have brought before Parliament by petition, bill, resolution, motion or otherwise.' The courts have in fact interpreted proceedings in Parliament to not only include formal transaction of business in Parliament or in committees, but also to include matters connected with or ancillary to the formal transaction of business.[14] Moreover, the conduct of Members of Parliament has often been exempted from media reporting, thereby diminishing public accountability of parliamentarians.[15] The 1978 Amendment to the Principal Act gave Parliament concurrent powers with the Supreme Court to punish offenders including media personnel in respect of breaches of privilege specified in Part A of the Schedule of the Act. These concurrent powers were subsequently removed through an Amendment brought in 1997.[16] Yet the Amendment of 1980,[17]which penalizes the wilful publishing of any report of any debate or proceeding in Parliament containing words or statements after the Speaker has ordered such words or statements to be expunged from the official report of the Hansard, continues to persist. Such provisions appear to permit irresponsible Members of Parliament to evade public accountability for statements made on the floor.

While each of the five factors outlined above contributes towards the entrenchment, permeation and maintenance of the culture of impunity in Sri Lanka, we advance the view that constitutional and statutory immunities provide perhaps the most decisive contribution In this particular paper, we examine relevant case law, archival material and available literature on the subject of presidential immunity as well as statutory immunities afforded to public officials.

Unravelling the precise nature of impunity in Sri Lanka is indisputably relevant to on-going debates on accountability in Sri Lanka. The prevalence of impunity in respect of state officers committing human rights abuses lays claim to a complex history encompassing two insurrections propelled by radicalized Sinhala youth in the seventies and eighties as well as a separatist struggle in the North and East led by the Liberation Tigers of Tamil Eelam (LTTE). In the past two years, there have been calls for accountability in respect of violations of international human rights and humanitarian law committed by both parties to the conflict during the final stages of the war between the government and the LTTE. It is probable that some of the underlying structural forces that drive the present government's strikingly poor approach to accountability would also be revealed in the course of this analysis.

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[14] See *Gomes v. M. H. Mohamed, Speaker of Parliament* [1991] 2 Sri.L.R. 408.

[15] See Lakshman Gunasekera, Freedom of Expression and Media Freedom, in Law & Society Trust, *Sri Lanka: State of Human Rights 1998* (1998), at 105. Also see Kishali Pinto Jayawardena, Freedom of Expression and Media Freedom in E. Nissan, (Ed.), *Sri Lanka, State of Human Rights 2003*, Law & Society Trust (2003), at p.11.

[16] See Act No. 27 of 1997.

[17] Act No.17 of 1980.

2. Presidential Immunity

The 1978 Constitution introduced the notion of an executive presidency into the constitutional framework in view of the state's agenda to expedite economic development. Abandoning the previous Westminster style of government, (premised on a ceremonial Head of State with an executive Prime Minister and a Cabinet of Ministers collectively responsible to Parliament), that was the core of previous Constitutions in 1948 and 1972, the creation of this new supreme executive office was justified on the basis that it would ensure greater stability in terms of vital decisions taken in the national interest. The office of the Executive President, with its claiming of broad immunities, was also expected to provide greater protection for minorities in Sri Lanka. Hence the concept of presidential immunity became very much entrenched in the scope and structure of the present Constitution.

However, scarcely a decade later, it had become broadly recognised that the concentration of executive powers in one individual along with the immunities attached to the office had proved to be greatly inimical to the constitutional balance of powers. The manifestoes of political parties promised to revert to the old Westminster system of rule when competing for electoral votes. Yet, each government that came into power retained the executive presidency, with abuse of power becoming progressively more evident as the decades passed.

The enactment of the Eighteenth Amendment to the Constitution in 2010 brought to a close an era in which successive presidential candidates had promised to abolish the executive presidency. Instead, it ushered in a new epoch where an over-mighty president for *life* became a plausible reality. The relationship between constitutional and statutory immunities afforded to one individual and the culture of impunity in Sri Lanka is the essential focus of this section of the Study.

The present section undertakes an analysis of the presidential immunity clauses in both the Constitution of Sri Lanka and the Public Security Ordinance No. 25 of 1947, and thereafter examines the relevant jurisprudence and academic observations on the subject.

1.3 Analysis of the Constitution

1.3.1 The Basis for Presidential Immunity

Article 35(1) of the Constitution provides:

> While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

The above Article appears to provide absolute immunity to the individual holding the office of President for the duration of his or her tenure. The provisions of Article 35(2), however, explicitly limits immunity

to the duration of tenure, as it suspends the running of time during a person's tenure in office as President for the purpose of determining whether an action against that person is out of time or subject to prescription. Therefore, actions or omissions by the person holding office as President prior to assuming that position could be subject to litigation, once that person ceases to hold office as President. Pending actions against a person at the time of assuming office as President would effectively be suspended until the person ceases to hold office. Further, official or private acts or omissions of the President while holding office may be subject to litigation once the President relinquishes his authority under the Constitution. This would seem to be a simple reading of the text of Article 35(1) read with Article 35(2).

1.3.2 Restrictions on Presidential Immunity

Article 35(3) provides:

> The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament.
>
> Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

The provisions of Article 35(3) of the Constitution appear to further restrict the extent of immunity granted to an incumbent President. The President is permitted under Article 44(2) of the Constitution to assign to himself or herself any ministerial subject or function. For instance, the incumbent President has assigned to himself, the subjects of Defence, Finance, Ports & Aviation and Highways. However, it appears that his actions in his capacity as Minister of the relevant subjects are not exempt from suit. This is particularly important in terms of the President's actions in the capacity of Minister of Defence, where he is authorized to issue detention orders and promulgate regulations under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. The role of the Attorney-General in defending the President in proceedings falling within the purview of this Article will be closely examined later in this Study.

1.4 Analysis of Statutes

1.4.1 Public Security Ordinance

Section 8 of the Public Security Ordinance No.25 of 1947 (PSO) provides: 'No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.'

The office of the President itself promulgates these Emergency Regulations (ERs). Thus the Regulations fall directly within the scope of presidential immunity. The tone that such a clause sets is somewhat incredulous; as such regulations are not subjected to the rigorous process that is associated with lawmaking. Even Bills of Parliament are subject to a form of pre-enactment judicial review within a narrow window of opportunity.[18] ERs promulgated by the President, however, appear to be beyond judicial reach given the range of ouster clauses contained both in the Constitution and in the PSO.[19] Hence the law clearly permits the perpetuation of a state of emergency well beyond the need of the hour. The repercussions of this permissive framework will be discussed in greater depth in the next chapter. However, there have been sporadic instances where presidential acts have been the subject of judicial review. Particular judges of Sri Lanka's Supreme Court have taken care not to apply the doctrine of presidential immunity in a manner that results in blanket immunity to those purporting to act under the ERs. Most notably, there have been instances where ERs promulgated by the President has been successfully challenged in the Supreme Court.[20]

Such progressive judicial reasoning has, however, depended largely both on the individual capacity and commitment of the judge hearing a particular case as well as the political context of the day. These judicial precedents have proved to be insufficient in limiting institutionally entrenched presidential immunity as the succeeding analysis will demonstrate. There is little doubt therefore that the origination of impunity can be traced to the manner in which the system treats the one individual with the most amount of power. Instead of building checks and balances so as to avoid absolute power, the system grants the very thing that ensures absolution: immunity. In this context, a constitutional and legal culture in which accountability is under-prioritized is immediately established. The simple equation remains: where leaders are permitted to act with impunity, their followers act likewise. Hence impunity in Sri Lanka appears to be very much a structural problem, starting with the office of the Executive President.

1.5 Analysis of Case Law

This section examines several key cases that deal with the law on presidential immunity. It is noted that though the statutory framework excludes any judicial review of presidential decision-making, presidential immunity has been a subject addressed by certain progressive courts. For example, the courts have not

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[18] See Article 121 of the Constitution. Article 121(1) provides: 'The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.'

[19] See Article 35(1) of the Constitution and section 8 of the PSO.

[20] *Joseph Perera v. Attorney-General* [1992] 1 Sri.L.R 199; *Wickremabandu v Herath* [1990] 2 Sri.L.R. 348. More recently, see *Centre for Policy Alternatives v. Defence Secretary and Others* S.C. (F.R.) 351/08, Supreme Court Minutes, 15 December 2008 (per S.N. Silva CJ.). The case sought to challenge the proposed ERs of 2008. The Supreme Court granted leave to proceed despite the fact that the President had promulgated the impugned ERs. The Regulations were subsequently withdrawn, so the issue of presidential immunity in relation to the promulgation of the relevant ERs was not thoroughly examined by the Court.

applied the doctrine of presidential immunity in a manner that results in blanket immunity to those purporting to act under the ERs. The Supreme Court has consistently reviewed ERs promulgated by the President[21]

The following analysis is presented in chronological order so as to ascertain the direction in which jurisprudential shifts—if any—have taken place.

1.5.1 *Visavalingam v. Liyanage* (Case No. 1)[22]

This was the first case to deal with the question of presidential immunity under the 1978 Constitution. The case concerned the issue of whether the failure of the judges of the Supreme Court and Court of Appeal to take the necessary oaths before the President within the specified time limits under the Sixth Amendment to the Constitution resulted in their ceasing to hold office as judges. A five-judge bench had been constituted to hear a fundamental rights application, but the sitting was adjourned when it came to light that the Justices of the Court had not taken oaths as required by the Sixth Amendment.[23] The situation was compounded by the fact that all the judges received fresh letters of appointments and took their oaths afresh before the President after the time limits had run out. On resumption of the sittings, the question arose whether the hearing should be held *de novo* or merely continued. The State argued that proceedings should be held *de novo* because the judges had ceased to hold office and had been reappointed afresh, while the petitioner contended that the proceedings should be continued because the judges had not ceased to hold office *de jure*. One of the preliminary objections the State raised was that the Court was precluded from directly or indirectly calling into question or making a determination on any matter relating to the performance of the official acts of the President by operation of Article 35(1).

The majority of the Supreme Court held that proceedings could be continued because the judges had not ceased to hold office. In his concurrence, Justice Sharvananda (as he was then) dismissed the preliminary objection raised by the State. He observed:

> ...an intention to make acts of the President non -justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law.[24]

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[21] *Ibid.*

[22] [1983] 1 Sri.L.R. 203.

[23] According to the Seventh Schedule to the Constitution and under Article 157A and Article 161(d) (iii) of the Constitution, the judges of the Supreme Court and Court of Appeal are required to make the following oath: 'I, ... do solemnly declare and affirm swear that I will uphold and defend 'the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.'

[24] [1983] 1 Sri.L.R, at 210.

This was an important principle in relation to the scope of the doctrine of presidential immunity. The Court appeared to draw a crucial distinction between the person of the President—who is necessarily granted immunity from suit—and the acts of the President—which necessarily remain subject to judicial review. Justice Sharvananda further opined:

> Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.[25]

Thus, in this early case, the Supreme Court adopted a fairly liberal position vis-à-vis the scope of presidential immunity. It was hence concluded that the invocation of the President's acts by another person *per se* would not preclude the Court from inquiring into the legality of the President's act or omission.

1.5.2 *Kumaranatunga v. Jayakody*[26]

This case concerned the election for the Mahara seat in Parliament held on 18th May 1983. The petitioner and the 1st respondent were amongst the candidates and the 1st respondent won the election defeating the petitioner by 45 votes. The petitioner then filed an election petition seeking to have the election declared void on the grounds *inter alia* that the 2nd respondent, as agent of the 1st respondent, made false statements of fact in relation to the personal character and conduct of the petitioner, a corrupt practice under section 58(d) read with section 77(c) of the Ceylon (Parliamentary Elections) Order in Council of 1946. The defence pleaded presidential immunity, as the 2nd respondent held the office of President of the Republic of Sri Lanka at the time.

The Court of Appeal held that every case in which a party relies on a constitutional provision does not automatically involve the interpretation of the Constitution. It was held that 'interpretation' is the process of reducing the statute applicable to a single sensible meaning and the making of a choice from several possible meanings. 'Application' on the other hand is the process of determining whether the facts of the case come within the meaning so chosen. It was accordingly opined that the language of Article 35(1) of the Constitution is so clear and unambiguous that the need for interpretation of this Article did not arise. The Court was of the view that there were two aspects to Article 35(1): first, that the President is immune from all proceedings, and second, that the Court is barred from entertaining and continuing any proceedings against him. It was further held that there are only three exceptions to presidential immunity and they are set out in Article 35(3): proceedings in relation to the exercise of any ministerial function which he assigns to himself under Article 44(2) of the Constitution; impeachment proceedings under Article 38(2) read with Article 129(2) of the Constitution; and election petition proceedings relating to the election of the President himself under Article 130(a) of the Constitution. The Court also held that the

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[25] *Ibid.*

[26] [1984] 2 Sri.L.R. 45.

Ceylon (Parliamentary Elections) Order in Council of 1946 has not been elevated to constitutional status and that the requirements of joinder of parties set out in section 80A(1)(b) of the Order in Council cannot supersede Article 35(1) of the Constitution. Hence no petition can be instituted impleading the President as a respondent.

Justice Tambiah proceeded to opine:

> The language of Article 35 is clear and unambiguous. Article 35(1) embraces all types of proceedings and confers a blanket immunity from such proceedings, except those specified in Article 35(3). **The fact that the immunity will be misused is wholly irrelevant** (emphasis added).

The Court clearly adopted a conservative stance on the issue and declined to examine the question whether the President committed the corrupt practice of making a false statement. The petition was accordingly dismissed, thereby setting an unhealthy precedent in favour of granting broad immunity to the President. It is evident that such interpretation created a wide space for the President himself to act with impunity and possibly engage in certain corrupt practices to the benefit of his agents during elections other than presidential elections. Thus, in many ways, the case represented the genesis of an unhealthy judicial deference towards presidential acts. Such deference came at a critical time—when a pervasive culture of impunity within the country had already begun to emerge under the executive presidency.

1.5.3 *Mallikarachchi v. Attorney-General*[27]

The petitioner in this case was a member of the Politbureau of the Janatha Vimukthi Peramuna (JVP), which was a recognised political party, and was elected a member of the District Development Council of Colombo. He functioned in this capacity until the President proscribed the JVP on 30th July 1983, under the provisions of the then Emergency Regulations made under the PSO. The orders of proscription were continued periodically through publications in the Gazette. The petitioner alleged that the President was driven by *mala fides* and aimed at eliminating opposition, and that the petitioner and his fellow members were prevented from contesting and putting forward candidates for election to Parliament for the Kundasale and Trincomalee electorates. The petitioner claimed that the proscription infringed his fundamental rights under Articles 14(1)(a), (b), (c) and (d) and Article 12(2) of the Constitution.[28] The petitioner also made the Attorney-General a party to the proceedings.

The Supreme Court held that, by Article 35(1) of the Constitution, the President during his tenure of office was absolutely immune from legal proceedings in his official or private capacity. The immunity afforded by Article 35(1) is personal to the President. Citing Justice Ranasinghe in *Satyapala v. The*

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[27] [1985] 1 Sri.L.R. 74.

[28] Article 14(1) of the Constitution provides: 'Every citizen is entitled to (a) the freedom of speech and expression including publication; (b) the freedom of peaceful assembly; (c) the freedom of association; (d) the freedom to form and join a trade union.' Article 12(2) provides: 'No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.'

Attorney-General,[29] it was held that the order of proscription is 'not an order made by the President on the footing of any assignment of subjects and functions in terms of the provisions of Article 44 of the Constitution. It is not one done as a result of or because of any such assignment of subjects and functions. It is, on the other hand, an order made by the President under and by virtue of a power vested in him by an express provision of law, *viz.* Regulation 68 of the Emergency Regulations, made under the provisions of section 5 of the Public Security Ordinance...'

The Chief Justice at the time, Chief Justice Sharvananda went on to explain the rationale for the doctrine stating that '[i]t is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions.'[30] Dealing with the purpose of Article 35, he stated:

> The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office. and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.[31]

Following this reasoning, Chief Justice Sharvananda observed that the immunity of Head of State is not unique to Sri Lanka and noted that the efficient functioning of the executive required the President to be immune from judicial process. It was accordingly opined:

> If such immunity is not conferred. not only the prestige, dignity and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions. both official and private (emphasis added).[32]

Hence the Court held that these proceedings could not have been instituted against the Attorney-General. as he was not competent to represent the President in proceedings not covered by the proviso to Article 35(3). Moreover, it was held that Rule 65 of the Supreme Court Rules requiring the Attorney-General to be cited as a respondent in proceedings for the violation of Fundamental Rights under Article 126 of the Constitution does not contemplate the Attorney-General being made a sole party respondent to answer the allegations in the petition. Such inclusion merely serves the purpose of meeting the mandate of Article 134, which states that the Attorney-General shall be noticed and shall have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. Accordingly, the Court thought it fit to dismiss the application.

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[29] S.C Application No. 40/84, Supreme Court Minutes, 30 April 1984 and 11 May 1984.
[30] [1985] 1 Sri.L.R., at 77
[31] *Ibid.* at 78.
[32] *Ibid.*

Interestingly, Sharvananda C.J's reasoning was that presidential immunity is needed for the *dignity* of the office. Yet, this reasoning appears to be questionable, as accountability to the courts, in which the judicial power of the people is reposed, surely cannot undermine the dignity of the executive. It is clear that there is no incompatibility between answerability to courts and 'dignity' in a democratic sense. In fact, no citizen is less dignified by virtue of his or her answerability to the judicial process. What the former Chief Justice possibly meant by his sentiments on the loss of dignity was that a spate of frivolous cases against the President would cause unnecessary embarrassment to the office. Yet granting blanket immunity on these grounds is an overreaction. Frivolous cases could certainly be dismissed at a threshold stage without burdening the President's office. However, serious cases that credibly call into question the integrity of the President or his or her decisions ought to be heard by the courts. In fact, the integrity of the executive, and indeed, the entire system of governance is contingent on treating such allegations against the President seriously. In these circumstances, the view that the actions of the President are completely beyond the reach of the courts—however serious the allegations against the President are—encourages official acts of impunity, particularly where those acts could be traced to some presidential power. As history demonstrates, such impunity may be attributed to precisely these foundational judicial attitudes.

1.5.4 *Karunathilaka v. Dayananda Dissanayake (Case No. 1)*[33]

The period of office of the Central, Uva, North-Central, Western and Sabaragamuwa Provincial Councils came to an end in June 1998. Following the period of nomination and fixing a date for the main poll, the issue of postal ballot papers was fixed for 4th August 1998. However, by telegram dated 3rd August 1998, the respective returning officers suspended the postal voting without adducing any reason. The very next day, the President issued a Proclamation under section 2 of the Public Security Ordinance No. 25 of 1947 (PSO) and made an Emergency Regulation under section 5 of the PSO, which had the legal effect of cancelling the date of the poll. Thereafter, the Commissioner of Elections took no steps to fix a fresh date for the poll.

The Supreme Court, in a rare decision held that the making of the Proclamation and the Regulation as well as the conduct of the respondents in relation to the five elections, clearly constituted 'executive action' and the Court would ordinarily have jurisdiction under Article 126 of the Constitution. It was further held that Article 35 did not oust this jurisdiction, as it only prohibited the institution of legal proceedings against the President while in office. It did not exclude judicial review of an impugned act or omission against some other person who did not enjoy immunity from suit but relied on an act done by the President in order to justify his conduct. Importantly, the Court was of the view that it had the power, notwithstanding the ouster clause in section 8 of the PSO, to review the validity of the impugned Regulation. Accordingly, it was opined that the impugned Regulation was not a valid exercise of the power under section 5 of the PSO, as it was not an Emergency Regulation. In any event, the Court held that the impugned Regulation cannot be sustained as being for a purpose set out in section 5 of the PSO, as the petitioner had established that *prima facie* up to the end of July 1998, there was no known threat to

[33] [1999] 1 Sri.L.R. 157.

national security or public order, and the respondents failed to show that even in August 1998, there was any such threat.

The Court further held that the suspension of the issue of postal ballot papers was unlawful, arbitrary and *mala fide*, as it was done with the knowledge that the impugned Proclamation and Regulation would be made the next day and for a collateral purpose. Hence the respondents were directed to fix new dates for the issue of postal ballot papers and poll.

This case is significant for two reasons. First, the Court was prepared to grant a purposive interpretation to the presidential immunity clause contained in the Constitution. The Court effectively castigated public officials who sought to rely on the concept of presidential immunity to acquire immunity for their own actions. Hence the Court established the principle that even when acting upon or in anticipation of an act of the President, public officials were not immune from suit. This principle is crucial for the purpose of restricting official acts of impunity, since public officials may no longer seek the broad cover of presidential immunity to shield their actions. The principle may be expanded to include unlawful acts purportedly committed under Emergency Regulations notwithstanding the fact that the President was responsible for the promulgation of the Regulations. Second, the Court ignored the application of the ouster clause in section 8 of the PSO. As discussed later in this Study, this rare departure from a strict application of ouster clauses has been crucial for the occasional maintenance of checks and balances on the actions of public officials.

1.5.5 *Senasinghe v. Karunatilleke*[34]

This case concerned a fundamental rights application before the Supreme Court, and related to the assault and unlawful arrest of the petitioner by the Police during a public demonstration held in 2001. The background to the incident involved a presidential Proclamation under Article 70 of the Constitution, which sought to prorogue Parliament. Acting under Article 86 of the Constitution read with section 2 of the Referendum Act No. 7 of 1981, the President had also issued a Proclamation directing the Commissioner of Elections to hold a Referendum of the people on the need of a 'new Constitution'. The public demonstrations were in response to these Proclamations and the Referendum proposal. Acting under section 45 of the Referendum Act, which banned processions during the period in which a Referendum was scheduled to take place, the Police sought to suppress the demonstrations.

The petitioner established before Court that he was not a participant in the demonstrations, but merely a bystander. Yet the Police fired tear gas, which struck the petitioner. Even after identifying himself as an attorney-at-law, police officers shot the petitioner in the face with rubber bullets and arrested him. He was thereafter released due to his severe injuries for which he was hospitalized for two weeks.

Justice Mark Fernando opined that the proposed Referendum was invalid, as the question submitted to the people was incapable of an intelligible and meaningful answer.[35] Hence it was held that section 45 of the

[34] [2003] 1 Sri.L.R. 172.

Referendum Act under which the Police acted had no application. Accordingly, it was concluded that the State had violated the petitioner's fundamental rights under Articles 11, 13(1) and 14(1)(h) of the Constitution. These constitutional provisions respectively deal with torture or cruel, inhuman and degrading treatment, arbitrary arrest and the freedom of movement.

The Court also dealt with certain other fundamental questions that are relevant to the present Study. First, it held that it had the jurisdiction to review the legal aspects of the Referendum, particularly as Parliament, which could question the political aspects of the Referendum, had been prorogued.[36] Second, the Court dealt with the question of presidential immunity, as the President herself had issued the two Proclamations that were under scrutiny. Justice Fernando observed:

> It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred.[37]

The Court recalled that on a number of previous occasions, it had reviewed the acts of the entire Cabinet of Ministers inclusive of the President.[38] It was further held that Article 35 of the Constitution, 'only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.'[39] Thus the Court concluded that it had jurisdiction to consider whether the Proclamation and the Referendum proposal were in conformity with the Constitution and the Referendum Act.[40] Accordingly, the Court declared the Proclamation and the Referendum proposal to be invalid.

This case clearly illustrates the scope for judicial review of even presidential acts. Unfortunately, the instances where the Court has been willing to challenge presidential immunity remain exceptions to the general trend of judicial deference towards the President's decision-making authority. As demonstrable by later jurisprudence in more uncertain times where the independence of Sri Lanka's judiciary came to be the focus of considerable public scrutiny, the norm has been that the President's actions are simply not justiciable.

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[35] *Ibid.* at 187.
[36] *Ibid.*
[37] *Ibid.* at 186.
[38] See *Ramupillai v. Festus Perera* [1991] 1 Sri.L.R. 11; *Perera et al. v. Pathirana* S.C. (F.R.) 453/97 Supreme Court Minutes, 30 January 2003; *Wickremabandu v. Herath* [1990] 2 Sri.L.R. 348; *Karunatilleke v. Dissanayake* [1999] 1 Sri.L.R 157.
[39] [2003] 1 Sri.L.R., at 186.
[40] *Ibid.* at 187.

1.5.6 *Victor Ivan and Others v. Sarath Silva*[41]

The petitioners in this case alleged that the appointment of the 1st respondent (a former Attorney-General, Sarath Silva) as the Chief Justice by former President Chandrika Bandaranaike Kumaratunga, pending a disciplinary inquiry, infringed their fundamental rights under Articles 12(1) and 17. The petitioners sought a declaration that the appointment is null and void. The disciplinary proceedings were contemplated on the ground of alleged misconduct concerning interference with the proceedings in District Court Colombo Case No. 17082/Divorce and acts or omissions in respect of proceedings against a certain Magistrate. It was contended that the 1st respondent was the 'beneficiary' of the impugned appointment. Hence the appointment could be questioned through the 1st respondent. The petitioners relied on the *dicta* of Justice Sharvananda (as he was then) in the *Visuvalingam case*[12] that Article 35 did not preclude the courts from requiring any person who invoked the President's act in his support to prove the legality of such act. Hence it was argued that the burden was on the 1st respondent to establish the lawfulness of the President's act, notwithstanding immunity under Article 35, which was personal to the President.

The Supreme Court unanimously held that the conduct of the 1st respondent in holding office as Chief Justice in consequence of his appointment by the President under Article 170 of the Constitution did not constitute 'executive or administrative action' within the ambit of Articles 17 and 126 of the Constitution. Hence the 1st respondent could not have been 'invoking' the President's acts to justify his holding of office. Consequently, the petitioners had in effect challenged an act of the President in respect of which they were constitutionally precluded from challenging in a court of law.

The judgement in this case also considered the effect of legal precedents where the Supreme Court had struck down Emergency Regulations promulgated by the President. In the case of *Joseph Perera v. Attorney-General*,[43] a five judge bench of the Supreme Court ruled that Regulation 28 of the Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986 was *ultra vires* Article 15(7) of the Constitution and therefore void. None of the judges in that case, however, dealt with the issue of Article 35. The previous case of *Wickremabandu v. Herath*[44] had already held that Emergency Regulations could be declared void. As discussed above, Justice Mark Fernando in the case of *Karunatilake v. Dayananda Dissanayake* (1)[45] articulated the reasoning through which Emergency Regulations promulgated by the President could be struck down. He opined:

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[41] [2001] 1 Sri.L.R. 309.Piquantly, then Chief Justice Sarath Silva, in constituting the Supreme Court Bench to hear the very case against him (in a clear conflict of interest) nominated a Bench including judges who were junior in rank thereby bypassing the most senior judges of the Supreme Court. This was just one example of judicial bias in the composition of Benches during this period; for a more detailed analysis, see *Judicial Corruption in Sri Lanka*, Pinto-Jayawardena, Kishali and Weliamuna, JC in Transparency International Global Report, Cambridge University Press; 1st edition, 2007

[42] [1983] 1 Sri.L.R. 203.

[43] [1992] 1 Sri.L.R 199.

[44] [1990] 2 Sri.L.R. 348.

[45] [1999] 1 Sri.L.R. 157.

> What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law...I hold that Article 35 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...Immunity is a shield for the doer, not for the act...It (Article 35) 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 . . . It is the Respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.[46]

The Court in *Victor Ivan's case* dealt with Fernando J's sentiments in the following manner:

> Justice Fernando takes the matter beyond doubt when he clearly states that for such a challenge to succeed, there must be some other officer who has himself performed some executive or administrative act which is violative of someone's fundamental rights, and that, in order to justify his own conduct in the doing of such impugned act, the officer in question falls back and relies on the act of the President. It is only in such circumstances that the parent act of the President may be subjected to judicial review.[47]

The Court sought to distinguish the two cases by emphasizing that the 1st respondent had not committed any executive or administrative act while relying on a particular act of the President. Hence the Court was precluded from reviewing the President's act of appointing the 1st respondent as Chief Justice. This line of reasoning simply nullified the remarkable creativity demonstrated by earlier judicial precedents[48] through which Justice Fernando was prepared to engineer the review of decisions effectively flowing from the President. The Court in this case instead re-established the fundamental principle that the President's acts are beyond review and that even those that benefit from such acts cannot be questioned in a court of law. In the present case, the alleged misconduct of a high official was shielded by the fact that the President had now appointed him as Chief Justice. Hence, the former Attorney-General was exculpated by the Court even for interfering with the administration of justice, purely due to the Court's reluctance to review a presidential decision.

The resulting position was simply that the former Attorney-General (later appointed Sri Lanka's Chief Justice) was afforded the space to act with complete impunity. The case remains a classic example of how presidential immunity often lays the practical groundwork for acts of impunity by other public officials,

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[46] *Ibid.* at 177.
[47] [2001] 1 Sri.L.R., at 325.
[48] See *Karunathilaka v. Dayananda Dissanayake (Case No. 1)* [1999] 1 Sri.L.R. 157; *Senasinghe v. Karunatilleke* [2003] 1 Sri.L.R. 172.

departing from earlier jurisprudence, which construed the reach of that immunity in commendably strict terms.

1.5.7 *Senarath v. Kumaratunga*[49]

In contrast to the former decision, this case was decided at a period when the earlier amity between the former Chief Justice Sarath Silva and former President Chandrika Bandaranaike Kumaratunga had run its course. The matter involved an alleged infringement of Article 12(1) through the unlawful, unreasonable, arbitrary and *mala fide* executive action of the 1st respondent, Chandrika Bandaranaike Kumaratunga who at the material time had been President of the country. The case was filed soon after the 1st respondent ceased to hold office. The alleged conduct involved securing to herself *inter alia* a free grant of developed land and premises from which two public authorities were ejected, purportedly under the President's Entitlement Act No. 4 of 1986.

Then Chief Justice Sarath Silva held that the provisions of the President's Entitlement Act were worded in such a manner that only a former President was eligible for the entitlements in the Act. Hence an incumbent President would not have occasion to decide on his or her entitlements. Moreover, it was held that where the Executive, being the custodian of the People's power, abuses a provision of the law in the purported grant of entitlements under such law, and secures benefits that would not come within the purview of such law, it is in the public interest to plead a violation of the right to equality before the Court. The Court further concluded that a denial of *locus standi* in circumstances where there has been a brazen abuse of power to wrongfully gain benefit from public resources would render the constitutional guarantee of equality before the law meaningless.

The Court thus allowed the application and issued a declaration that the fundamental rights of the petitioners, guaranteed by Article 12(1), had been infringed by executive action in the purported grant of benefits to the 1st respondent contrary to the provisions of the President's Entitlements Act. Hence the case furnishes authority for the ability to sue a President for acts committed during his or her term of office after the end of such term of office.

1.5.8 *The Water's Edge Case*[50]

The petitioners in this case filed a fundamental rights application in the Supreme Court in the public interest. The petitioners alleged that their fundamental rights were violated due to the acquisition of the impugned land for a purported public purpose. However, it was found that the land was sold to a private entrepreneur to serve as an exclusive and private golf resort. This seminal case remains important with respect to the Court's expansive analysis of the public trust doctrine. Perhaps the jurisprudential contribution that is most relevant to this Study is the Court's examination of presidential immunity.

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[49] S.C. (FR) Application No. 503/2005, Supreme Court Minutes, 3 May 2007, also published in *LST Review*, Volume 17 Issue 233 March 2007.

[50] *Sugathapala Mendis v. Kumarathunga* S.C. (F.R.) 352/2007, Supreme Court Minutes, 8 October 2008.

The Court observed that the former President (Chandrika Bandaranaike Kumaratunga) had acted in excess of her power as Head of the Executive as well as Finance Minister during the material period in which the land transactions took place. It was revealed that the President herself was responsible for issuing the Cabinet Memorandum that set in motion the entire land transaction. Hence the Court thought it fit to hold the former President responsible for the corrupt transaction and ordered her to pay compensation of Rupees three million to the State. Justice Shiranee Tilakawardane, writing for the Court, observed:

> [B]eing a creature of the Constitution, the President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accord with the Constitution. In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust, and any attempts on the part of the President to do so should not be followed by the officials for doing so will (i) result in their own accountability under the Public Trust Doctrine, betraying the trust of good governance reposed in them under the Constitution by the People of this nation, in whom sovereignty reposes and (ii) render them sycophants unfit to uphold the dignity of public office.[51]

Crucially, the Court also pronounced on the applicability of the doctrine of presidential immunity:

> The expectation of the 1st Respondent as a custodian of executive power places upon the 1st Respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no attempt was made by the 1st Respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot **indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents—present and future—to engage in corrupt practices or in abuse of their legitimate powers** (emphasis added).[52]

In light of the fact that former President Kumaratunga had betrayed the public trust, the Court found no reason to hold that any remnants of previous immunity granted to her should hinder full judicial scrutiny of her actions. In light of this judgment, which later the Supreme Court refused to review,[53] it appears that the pervasive nature of presidential immunity is, after all, capable of being controlled. Hence Presidents who seek to abuse their power may no longer assume that they enjoy immunity for life. Such a realization may form the necessary basis for preventing immunity from transforming into impunity with the ease at which it has taken place during the past few decades under the present Constitution. Yet cases such as the

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[51] *Ibid.*

[52] *Ibid.*

[53] 'No Variation', *Lanka Business Online*, 3 August 2009, at http://www.lankabusinessonline.com/fullstory.php?nid=1896574906.

Water's Edge case cannot be genuinely regarded as trend-setting interventions of the Court. Such cases, unfortunately, remain anomalies or in a harsher sense, products of the peculiar political environment of the day.

1.6 Abolishing Presidential Immunity: Restoring 'Constitutional Equilibrium'

1.6.1 Recent Trends in Judicial Attitudes

What may be gleaned from the foregoing analysis is that, while Article 35 provides absolute personal immunity to the President, it only shields the President during his or her term. Hence acts committed during such tenor may later be called into question. A number of other cases may be cited where a former President's acts have been struck down in proceedings before the Supreme Court. Examples include the case of *Singarasa v. Attorney-General*[54] where the former President's ratification of the Optional Protocol to the International Covenant on Civil and Political Rights was held to be *ultra vires*; the case of *Wijesekara v. Attorney-General*[55] where a former President's act of merging the Northern and Eastern Province through a Proclamation made under the Emergency Regulations was held to constitute a continuing violation of the rights of the petitioners who were from the Eastern province; and the case of *Senarath v. Kumaratunga*[56] discussed above. Therefore, anyone invoking the act of a President to justify his actions is imposed with the burden of proving the validity of the President's acts.[57]

However, these trends must be understood in its proper context. In respect *of Singarasa v. Attorney-General*,[58] *Wijesekara v. Attorney-General*[59] and *Senarath v. Kumaratunga*[60] the factual context involved

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[54] S.C. Spl. (LA) No. 182/99.

[55] S.C. (FR) Application No. 243, 244 and 245/06 – Judgment delivered on 16 October 2006.

[56] S.C. (FR) Application No 503/2005.

[57] The issue of presidential immunity also received attention in cases such as *Public Interest Law Foundation v. the Attorney-General* C.A. Application No 1396/2003, Court of Appeal Minutes, 17 December 2003. This case was filed by a public interest group in the Court of Appeal, calling upon the Court to compel President to appoint the members of the Elections Commission under the Seventeenth Amendment to the Constitution. It was contended that Article 41B of the Constitution did not permit the President to wield unfettered powers over the appointment of the Elections Commission, and that she had no discretion over the appointments once the Constitutional Council forwarded its recommendations. However, it was held that Article 35(1) of the Constitution gave 'blanket immunity' to the President from proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in limited circumstances constitutionally specified in Article 35(3). The Court later reiterated this position in *Visvalingam v. Attorney-General* C.A. Application No. 668/2006, Court of Appeal Minutes, 2 June 2006, also published in *LST Review*, Volume 16 Issue 224 June 2006. This position may, however, be contrasted with the previous case of *Silva v. Bandaranayake* [1997] 1 Sri LR 92 where the majority of the Supreme Court examined the presidential act of appointing a Supreme Court judge despite the constitutional bar relating to presidential immunity. The appointment itself, however, was ultimately not struck down. Commentators have compared the two cases to arrive at the conclusion that the immunity principle has been inconsistently applied by the courts, which has led to uncertainty in the law. See Kishali Pinto-Jayawardena, *The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka*, The Rehabilitation and Research Centre for Torture Victims (2009), at FN.334.

[58] S.C. Spl. (LA) No. 182/99.

[59] S.C. (FR) Application No 243, 244 and 245/06, Judgment delivered on 16 October 2006.

former President, Chandrika Bandaranaike Kumaratunga and former Chief Justice Sarath Silva. The former Chief Justice had already developed a penchant for undermining the acts of the former President, as animosity had steadily grown between the two high officials, in contrast to the amity that existed during the first several years of the former Chief Justice's term. In later years, the former Chief Justice had struck down several of the initiatives of the Kumaratunga government, and had specifically targeted the acts of the former President. Hence the personal animosity that existed between the Court and the former executive and the clear political ambitions of the former Chief Justice simply cannot be ignored when examining these cases.[61]

Consequently, rather than an actual reversal of the trend of judicial deference towards the executive, these cases are more likely to be seen as historically and contextually explainable anomalies. Some of the decisions handed down by the Supreme Court during this period were indeed legitimately critiqued as judicial trespassing on the executive sphere.[62]Abrupt and temperamental shifts of initial judicial empathy and subsequent judicial hostility towards the executive became a hallmark of the Sarath Silva Court (1999-2009) and were an unprecedented development in the history of Sri Lanka's Supreme Court. This trend continued during the remaining years of the former Chief Justice's term, following President Kumaratunga's successor, the incumbent President Mahinda Rajapaksa being elected to presidential office.

With the departure of former Chief Justice Sarath Silva in 2009, these temperamental incursions into the executive sphere, which was characterised more by the personal motivations of the former Chief Justice rather than a commitment to the judicial role in the cause of constitutional governance, came to a predictable halt. In the face of an Executive President who moulded his office, particularly in his second term, on the strength of the victory of his administration over the LTTE, Sri Lanka's judiciary retreated to the shadows of a timorous reluctance to openly challenge executive actions except in very few cases and that too, more in the role of a conciliator rather than as a strong check on abuse of executive power.

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[60] S.C. (FR) Application No 503/2005, Supreme Court Minutes, 3 May 2007, also published in *LST Review*, Volume 17 Issue 233 March 2007.

[61] See International Bar Association (IBAHRI), *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, (May 2009), at 7. In this report, the ruinous impact of the politicisation of the Office of Sri Lanka's Chief Justice was pithily commented on in the following manner: 'The judiciary is currently vulnerable to two forms of political influence: from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between them at the time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues and through tensions between the judiciary and the executive...The perceived close relationship between the Chief Justice and the Government has from time to time made individual judges reluctant to return judgments which may be perceived to be critical of the executive. This may be illustrated by the scarcity of dissenting judgments during his tenure in office.'

[62] For an in-depth critique see R.K.W. Goonesekere, Arm of the Law, *LST Review*, Issue 254 Vol. 19, December 2008, pp.1-11.

1.6.2 Some Comparative Illustrations

The fluctuating judicial attitude towards immunity in Sri Lanka may be compared with trends in the United States in order to give meaning to the idea that law, and not the person of the President, is the ultimate 'ruler' within the system. It must be noted at the outset that, unlike the Sri Lankan Constitution, the U.S. Constitution does not provide for presidential immunity. The concept of presidential immunity in the U.S. context has evolved over time through judicial reasoning. Hence a survey of the U.S. case law on the subject may be undertaken for comparative purposes only while bearing in mind the variance in context.

In the case of *Clinton v. Jones*,[63] the Supreme Court considered President Bill Clinton's alleged sexual misconduct, which took place prior to taking up office. The Court unanimously held that litigation should not be delayed until the conclusion of the presidential term and distinguished the case of *Nixon v. Fitzgerald*.[64] In *Fitzgerald*, the President had already left office, so the question of 'distraction' was limited. Thus the main argument in favour of immunity was that the system should not chill the President's exercise of power by presenting the risk of subsequent litigation. In a split decision of 5-4, the Court ruled in favour of absolute immunity. However, the Court in *Jones* sought to depart from the previous ruling by holding that presidential immunity cannot extend beyond the scope of any action taken in an official capacity. It was held that such a reading of immunity did not violate the separation of powers doctrine, as the outcome of the case would have no bearing on the scope of the official powers of the executive branch. Hence it was concluded that there would be no misallocation of judicial or executive power when considering questions that relate entirely to the unofficial conduct of the individual who happens to be the President. More specifically, the reasoning in *Jones* provides an important counteraction to the sentiment that the answerability of the President to the courts undermines the dignity of the office.[65] The U.S. Supreme Court in *Jones* was of the firm opinion that defence of civil litigation would not unnecessarily burden the President in terms of time, nor affect the performance of his functions.

The recent judicial approach in the U.S. towards scrutinizing the President's private actions even while he remains in office sends a strong and clear message about the limits of power. It confirms that no individual—not even the President—is above the law. Hence even the President must be held accountable to the courts and ultimately to the judicial power of the people. The proper framework for defining the relationship between the judiciary and the executive was discussed at length in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[66] This case concerned the question as to whether the courts could review the President's *official* acts. The case involved the President's ordering of the Secretary of Commerce to take possession and operate the nation's steel mills following the failure of steel mill owners and workers to reach an agreement on a new wage contract during the Korean War. The issue before the Supreme Court was whether the President was acting within his constitutional powers when he issued an order to take

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[63] 520 U.S. 681 (1997).
[64] 457 U.S. 731 (1982).
[65] See *Mallikarachchi v. Attorney-General* [1985] 1 Sri.L.R. 74, per Chief Justice Sharvananda.
[66] 343 U.S 579 (1952).

possession of and operate steel mills. Hence the main question was whether the President's actions amounted to unconstitutional 'lawmaking' or whether it was a legitimate exercise of power implied in the aggregate power of the President arising from a necessity to avoid national catastrophe.

In a celebrated concurring opinion, Justice Robert Jackson presented an interesting framework in determining the scope for judicial review of presidential acts.[67] He opined that presidential power is not fixed but fluctuates in relation to Congress. If Congress sanctions a presidential act, the strongest presumptions and the widest latitude of judicial interpretation would support such an act. If the act is an independent act that is in an ambiguous area, which Justice Jackson regarded as the 'zone of Twilight', there would be concurrent authority, and the act can be legitimate only by reason of the inertia, indifference or acquiescence of Congress. The test of power and the scope of judicial review in such cases would depend on the imperatives of the events. Finally, if the act is contrary to what Congress has laid down i.e. there is no express or implied authority given by Congress, then the act falls under the President's own constitutional powers minus any congressional powers over the matter. In such a context, the courts must consider this with caution for 'what is at stake is the equilibrium established by our constitutional system.'[68] The majority of the Supreme Court ultimately held that the President did not have unrestricted power to seize private property in emergencies.

The U.S. experience gives credence to the notion that constitutional 'equilibrium' must be the governing factor that informs any court of its limits in reviewing presidential acts. Courts simply cannot neglect their ultimate allegiance to the Constitution. Hence it is a notion of constitutionalism that must prevail over presidential immunity. It is only through a transformation in judicial attitudes towards the executive, towards the courts' own limits of power and towards the supremacy of the Constitution that impunity flowing from presidential acts could be effectively curtailed.

2. Statutory Immunities

Apart from the overarching influence of presidential immunity on the culture of impunity in Sri Lanka, several other statutory provisions within the legal framework provide (or provided) an additional basis for granting immunity to state officials. Some of these key provisions are discussed in this section.

2.1 The Indemnity Act[69]

This Act was passed within a specific context to provide indemnity to politicians, service and police officers and any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office. It was an early precursor to widespread indemnity legislation,[70] and

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[67] *Ibid.* at 634.
[68] *Ibid.* at 638.
[69] No. 20 of 1982.
[70] The relevant ER provisions applicable between 2005-2011 provide for a similar framework and will be discussed later in this Study. For instance, Regulation 19 of Emergency Regulations of 2006 provides: 'No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka

was made applicable between 1st to 31st August 1977 and thereafter extended to 16th December 1988 by the Indemnity Amendment Act No. 60 of 1988.[71]

The salient provisions of the Act are found in section 2:

> No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing, whether legal or otherwise, done or purported to be done with a view to restoring law and order during the period August 1, 1977, to the relevant date, if done in good faith, by a Minister, Deputy Minister or person holding office under or employed in the service of the Government of Sri Lanka in any capacity whether, naval, military, air force, police or civil, or by any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office or so employed and done or purported to be done in the execution of his duty or for the enforcement of law and order or for the public safety or otherwise in the public interest and if any such action or legal proceeding has been instituted in any court of law whether before or after the date of commencement of this Act every such action or legal proceeding shall be deemed to be discharged and made null and void.

The Indemnity Act was met with severe criticism due to its encouragement of public officials to act with absolute impunity.[72]More recently, the UN Secretary General's Panel of Experts on Accountability in Sri Lanka described the Act as a law that 'greatly weakened the State's duty to pursue serious violations of rights.'[73] The defence advanced by governments of the day was that the provisions of the Act were never actually implemented. Yet the message that the law conveyed to the security apparatus including the military and the police with regard to the laxity with which human rights abuses would be viewed, was unmistakable. As discussed later, laws such as the Indemnity Act provided an unhealthy precedent that was carried forward by subsequent anti-terrorism and emergency laws.

2.2 The Penal Code and the Criminal Procedure Code

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to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.' Morover, Regulation 73 of the Emergency Regulations of 2005, section 9 and 23 of the Public Security Ordinance No. 25 of 1947 and section 26 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 each provide indemnity to public officials acting in good faith. See International Commission of Jurists, *Sri Lanka: Briefing Paper on Emergency Laws and International Standards* (March 2009), available at: http://www.icj.org/ IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf, ['ICJ, *Briefing Paper on Emergency Laws and International Standards*']. It is noted that these clauses were left untouched in the May 2010 amendments to the Emergency Regulations.

[71] Amnesty International, *Sri Lanka, Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992*, AI Index, ASA/37/04/98, February 1998, at 9.

[72] See Civil Rights Movement, *Proposed Indemnity Act* (1988); Amnesty International, *Sri Lanka: Repeal of Indemnity Legislation Sought*, ASA/37/01/89, January 1989.

[73] *Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, at www.un.org/News/dh/infocus /Sri _Lanka/POE_Report_Full.pdf, at 10.

Two provisions in the Penal Code No. 11 of 1887 and the Criminal Procedure Code Act No. 15 of 1979 are relevant to this discussion.

Section 69 of the Penal Code allows for the defence of mistake of fact in good faith under its chapter on 'General Exceptions' to liability. Interestingly, the first illustration contained in the section refers directly to a military official's action in good faith.

> A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.

Similar latitude is provided by section 97(2) of the Criminal Procedure Code in relation to the provisions dealing with unlawful assembly. The section reads:

> (a) A Magistrate, Government Agent, police officer or member of the Sri Lanka Army, Navy or Air Force or any other person acting under this Chapter in good faith; and
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> (b) A member of the Sri Lanka Army, Navy or Air Force doing any act in obedience to any order which under military law he was bound to obey,
>
> Shall not be liable in civil or criminal proceedings for any act purported to be done under this Chapter.

This provision was interpreted in the case of *Bernard Soysa v. The Attorney-General& Others*.[74]The case involved the holding of a *Sathyagraha* near the *Dalada Maligawa* (translated to mean the Temple of the Sacred Tooth Relic), which is an important public place of worship. The protest was considered to be unlawful, which purportedly warranted the intervention of the Police in the interests of public order. In the fundamental rights case filed by the protesters, the Supreme Court was of the view that the Police were in fact entitled in terms of the duties cast on them by the Criminal Procedure Code and the Police Ordinance No. 16 of 1865 to take steps to disperse the protestors. The Court specifically referred to the provisions of section 97(2) of the Code, which were held to grant to a police officer, exercising such power in good faith, immunity from civil or criminal proceedings for an act purported to be done under the relevant chapter of the Criminal Procedure Code.[75] Hence it was concluded that the Police action was justified and that there was no infringement of the fundamental rights of peaceful assembly and expression.

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[74] [1991] 2 Sri.L.R. 56.

[75] *Ibid.* at 66. The Court was of the opinion that '[i]f upon being so commanded such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, the police officer is empowered to proceed to disperse such assembly by the use of such force as may reasonably be necessary to disperse such assembly.'

Though the Criminal Procedure Code does not specifically refer to good faith clauses in relation to any other specific offence, the concept of good faith in relation to law enforcement is also found in section 92 of the Code. The relevant section reads:

> (1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under color of his office, though that act may not be strictly justifiable by law.
>
> (2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

The above provisions restricts the right of self defence against an act of a public servant or a person acting on the direction of a public servant, where the public servant acts in good faith, notwithstanding the fact that the act may be unlawful. The broad scope of this section appears to permit a public servant to engage in certain unlawful activities falling short of those that cause the apprehension of death or grievous hurt, provided that the defence of good faith is invoked.

Both the above statutory provisions are relatively unambiguous in terms of the broad indemnity they afford public officers. As discussed later in this section, these provisions have been in issue in instances where military officials have been accused of crimes and human rights violations.

2.3 Public Interest Privilege

2.3.1 The Statutory Basis for Public Interest Privilege

Sections 121 to 131 of the Evidence Ordinance No. 14 of 1895 incorporate the principle that although a witness may generally be compelled to give evidence, that witness may still refuse to answer certain questions on the well recognised grounds of public policy, professional or personal privilege. This principle goes so far as to state that even in instances where the witness may be prepared to do so, he or she will not be permitted to do so. This provision too appears to have profound significance with respect to the indemnification of public officials.

Certain grounds of exclusion, such as information for detection of crime, official communications and professional communications are generally accepted as exceptions to the fundamental principle that parties to litigation have a right to bring before the court, all relevant evidence and to call on others to produce that evidence. However, the inclusion of affairs of state within this category of excluded evidence in relation to criminal prosecutions invites brief discussion as to the extent to which this privilege may be resorted to, in order to render prosecutions for serious human rights abuses, nugatory

2.3.2 Judicial Thinking on Public Interest Privilege

This section refers to the relevant English legal principles[76] in order to demonstrate that the applicable Sri Lankan judicial thinking, in recent times, has been demonstrably conservative.

The doctrine of public interest privilege emanated from the concept of 'crown privilege' in the English law. It is has been long-accepted that the British Crown could make an application to a court for the purpose of suppressing evidence in matters of litigation in the public interest, largely if not totally, upon considerations flowing from national security. Thus the principle had assumed the tag 'crown privilege.' In *Conway v. Rimmer*[77] the House of Lords held that the Court had the right (in effect imposing an obligation on Court) to investigate the Crown's claim for suppression and determine whether it should be allowed or not, if on a balance, the need for secrecy was less than the need to ensure justice to the litigant.

This case encapsulated the rejection by the English courts of the principle of executive fiat, based as it were on a 'hands off policy.' This development reflected judicial thinking in the United States where in 1953, in the case of *US v. Reynolds*,[78] the U.S. Supreme Court laid down the principle that 'a complete abandonment of judicial control (re: executive claim) would lead to intolerable abuses.'[79] In *Conway v. Rimmer*,[80] the judiciary articulated the principle that the courts will investigate the Crown's claim to secrecy and suppression of evidence. It was also opined that while the public interest requires that justice should be done (without withholding evidence), that very same public interest requires not only the Crown but also, a party to litigation to take up the plea directed at suppression of evidence. Thus the concept of 'crown privilege' came to be replaced by the expression 'public interest privilege.' The resulting position in English jurisprudence was as follows:

(a) The Crown as well as a litigant could take up the plea of privilege to shut out evidence in litigation; and

(b) The Court will investigate into the plea, whether taken up by the Crown or by a litigant in the context of Court proceedings.

This expansion was taken further in *R v. Lewes Justices ex parte Home Secretary*[81] when the term 'public interest immunity' was upheld as a basis for disallowing information required from the government with regard to a defendant in a criminal prosecution. Thus, the transition from a plea of privilege initially perceived and/or conceived as the Crown's prerogative extended to a private litigant or party to assert the same in the public interest, culminating in the now established concept of immunity in the public interest.

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[76] The researchers particularly acknowledge the guidance provided by the project advisor as well as the reviewer in this part of the analysis.
[77] 1968 (AC) 910 (H/L).
[78] 345 US 1 (1953).
[79] *Ibid.*
[80] 1968 (AC) 910 (H/L).
[81] 1973 (AC) 388 (H/L).

In *Commissioner of Police, the Metropolis v. Locker*,[82] the Court enunciated the principle that, the existence (or otherwise) of public interest immunity would depend on whether the Court is satisfied that the nature and status of the procedure in which the class of documents was generated is of a type to which the plea should apply. The Court laid down the principle that 'whatever the class of documents in issue, it is the court that would ultimately arbitrate and decide on it.'[83] *The Case of Owen McCoughty and Pat Grew*[84] must be regarded as a seminal decision in the context of the scope and content of the doctrine of public interest privilege and immunity. In this case, it was held that the Police and the Ministry of Defence are under a duty to disclose all documents to the Coroner and then it is for the Coroner to assess their relevance. At that stage, if the Coroner is aware of any public interest concerns that the Police or Ministry of Defence may have in relation to the disclosure of the documents, he or she may present public interest certificates setting out their concerns. If they do so, it will then fall to the Coroner to determine the balance for and against disclosure.

The previous legal position in the United Kingdom pertaining to the conclusiveness of executive determinations on matters of privilege stood rejected in this case. Instead the Court ruled that the Police and the Ministry of Defence are charged with the duty to disclose all relevant documents pertaining to a case to the Coroner and that the *Coroner* was empowered to assess their relevance in relation to the public interest concerns of the executive authorities against disclosure. If the Coroner decides that the information sought to be withheld by the Police or the defence authorities do not relate to public interest concerns or that they in fact do relate to the said concerns, these determinations would be amenable to judicial review. In either of those eventualities, the salutary feature would be that the Court would be the final arbitrator on the matter.

Even prior to this decision, in *ex parte Willey* (1995),[85] the English Appellate Court itself held that, where a Minister examines a document which (in his opinion) is subject to public interest immunity and considers that the overall public interest does not favour its disclosure, or, is in doubt as to whether to disclose the information, then the Minister should put the matter to the Courts. It is therefore the Courts, and not the executive, which determines whether a public interest certificate is necessary. In the two consolidated cases of *Regina v. H and Regina v. C*',[86] the trial judge had held (at a preparatory hearing), that in order to comply with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[87] and a decision of the European Court of Human Rights,[88] special independent counsel should be appointed to represent the interests of the defendants in forthcoming *ex parte* public interest proceedings. The Court of Appeal allowed the appeal preferred by the Crown from the trial judge's ruling.[89] The aggrieved defendants appealed against the Court of Appeal ruling in an

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82 [1993] 3 All ER 584 (EAT).

83 In that case, the Court distinguished between police grievance procedures and police disciplinary procedures (the plea being available only to the latter on being a purely internal matter).

84 *In the matter of An Application by Owen McCoughty and Pat Grew for Judicial Review* [2004] NI Q.B.2.

85 See *The Times*, 30 September 1990. [1995] 1 AC 274.

86 See *The Times*, 6 February 2004. [2004] UKHL 3.

87 Article 6 of the ECHR deals with the right to fair trial.

88 *Edwards and Lewis v. UK* Application Nos. 39647/98 and 40461/98; Also see *The Times*, 29 July 2003.

89 [2003] 1 WLR 3006.

attempt to have the trial judge's decision restored. Dismissing the appeals, the House of Lords held that the appointment of Special Counsel to represent a defendant in an ordinary criminal trial as an advocate in matters concerning public interest immunity was a course of last, never the first, resort. Such an appointment should not be ordered unless and until the trial judge was satisfied that overriding requirements of fairness to the defendants required such a course of action. It was further held that the trial process must be viewed as a whole and a defendant's right had to be exercised in the framework of the administration of the criminal law ensuring fairness to all sides, namely the position of the accused, the victim and his or her family, and the public.

What is of concern in this instance, however, is that a portion of the Court's ruling concerned disclosure or withholding information in a criminal prosecution. The House of Lords referred to 'the Golden Rule' wherein fairness ordinarily requires that, any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against him, should be disclosed to the defence.[90] This decision provides an illuminating insight as to what could be interpreted as 'public interest' justifying non-disclosure of material in the prosecution's hands:

(a) Those most regularly engaged in the effective investigation and prosecution of serious crime, which might involve resort to informers and undercover agents, or the use of scientific or operational techniques, which could not be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations:

(b) In such circumstances, some derogation from the golden rule of full disclosure might be justified:

(c) But such non-disclosure had to be always the minimum necessary to protect the public interest in question and could never imperil the overall fairness of the trial.

Examining these principles in the context of the Sri Lankan law, the relevant provisions of the Evidence Ordinance has been the subject of a number of cases. Section 123 of the Ordinance stipulates an absolute prohibition against disclosing unpublished records relating to affairs of State, while section 124 provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest will suffer thereby. The legal principles are therefore clear. The privilege applies to an unpublished official record, not published records (following from English law). Moreover, affairs of the State have been interpreted broadly to include the business of the State including communications in regard to international diplomacy, minutes of public servants and state secrets.[91] Further, the Court has the power to inspect the document to satisfy itself that the essentials of privilege are satisfied under section 124.[92]

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[90] See *ibid, obiter*, Lord Bingham giving the opinion of the Appellate Committee.

[91] *Daniel Appuhamy v. Illangaratne*, (1964) 66 NLR, 97, at 103, 116 and 127; Also see for comparative purposes in the Indian context: *State of U.P. v. Rajnarain* AIR (1975) SC 865.

[92] *Keerthiratna v. Gunawardena* (1956) 58 NLR 62, at 66. Also see the comparative Indian precedent in *Gupta v. Union of India*, AIR (1982) SC 149.

In the comparatively recent decision of Sri Lanka's Court of Appeal in *Vandergert v. Zurfick*,[93] a plea of privilege was put forward by the Secretary to the Ministry of Foreign Affairs in relation to what was claimed to be part of an unpublished official record pertaining to the affairs of State. This plea had been rejected by the District Court, which concluded that the document does not relate to affairs of State or to the public interest. The Court had ordered its disclosure on the basis that this was necessary for the administration of justice.In appeal, the decision was reversed by the Court of Appeal, which held problematically[94] that where privilege is claimed, the public officer will be the sole judge of whether disclosure will be allowed or not and the courts have no discretion in this regard. Similarly, the right of judicial inspection was held to be relinquished if the document relates to the affairs of State. Hence it was judicially opined that the Sri Lankan law does not permit judicial activism in the manner evinced in the English and the Indian courts.

This decision exemplifies the classically conservative, or indeed excessively pro-State, thinking of the Sri Lankan judiciary in relation to the concept of public interest privilege in recent years. Even though this plea has not been taken in prosecutions of grave human rights violations, the judicial upholding of the plea in the wake of *Vandergert v Zurfick*[95] appears to be a grave possibility.

3. Conclusion: A Return to the Juridical

The normative shift that occurred in Sri Lanka after the 1978 Constitution has resulted in a skewed view of presidential immunity, which appears to be at odds with the basic tenets of a 'rule of law based' state. The overarching impact of presidential immunity on our legal system is further supplemented by the application of several regressive laws that grant immunity to other public officials. It appears that both presidential immunity and other indemnity provisions within the law contribute significantly towards the culture of impunity in Sri Lanka. While a state's obligation to investigate violations of human rights and punish perpetrators is basic, a constitutional *cum* statutory framework that runs counter to that basic norm paves the way for this culture of impunity.

In light of the above, the provisions in the present Constitution and statutory law that form the basis for official immunity must be narrowly interpreted to reflect greater consistency with the rule of law. Yet such an approach is wholly contingent on the independence and integrity of the judiciary as well as the competence of individual judges. It is also contingent on a transformation of the normative underpinnings of the Sri Lankan legal system. Such a transformation requires a 'juridical' approach, which is foundational to the rule of law. If the recognition of the 'juridical' is displaced by the 'politico-administrative', then the very foundation of the law is undermined. On the one hand, 'juridical' may be

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[93] [2000] 2 Sri LR, 111.

[94] *Ibid.* per Justice Nihal Jayasinghe opining that in *Keerthiratna v. Gunawardena* (1956) 58 NLR 62, Justice HNG Fernando had not given his mind to the possible overlap between sections 123 and 124 of the Evidence Ordinance and to the possible injury to the interest of the public.

[95] *Ibid.*

defined as 'relating to judicial proceedings or to the administration of justice.'[96] Hence the judicial system is composed of those who are expected to gather information, analyze it and come to findings on the basis of legal notions and 'the manner in which the law is practised.'[97] The essence of the juridical is therefore this allegiance to the law and its processes. On the other hand, what is meant by 'politico-administrative' is the manner of action of the executive as influenced by political interests.

It is imperative to understand that those who have obligations under the juridical and those who have obligations under the politico-administrative must think and act distinctly and separately.[98] In fact, the doctrine of separation of powers is founded on such thinking. A good example of this need is reflected in the case of arrest and detention. While the executive is likely to deal with arrest and detention from the perspectives of efficiency and expediency, the judiciary is compelled to uphold the rights of individuals and personal freedom when considering the same issue.[99] In the ensuing clash between notions of the juridical and the politico-administrative, the executive may wish to modify the law so as to displace juridical notions and to replace them with administrative policies and considerations.[100] If the executive succeeds in this endeavour, the juridical would be replaced with the politico-administrative.

The judiciary's response to such endeavours depends largely on the level of independence it enjoys. Though it is tempting to blame the judiciary in Sri Lanka for contributing to the perpetuation of impunity in the country, the lack of judicial independence must be understood as a systemic problem. This problem entails flaws relating to the legal education system, the integrity of the process of appointments and the security of judicial tenure. If the independence of the judiciary is in fact compromised as a result of such systemic flaws, it is likely that the judiciary will act in compliance with executive will. In this context, the juridical sphere would be displaced by the political logic of the administration.

What appears to be at the heart of the challenge faced in Sri Lanka is this apparent transformation of the juridical to the politico-administrative. As emphasized in this paper, this transformation originates from an over-mighty executive characterised by the constitutionally protected immunity of the President. The result is an entrenched culture of impunity. It is our view that constitutional reforms pertaining to the President's power, the repeal of post-emergency draconian laws and proactive measures to restore the independence of the judiciary are necessary to address the problem of impunity in Sri Lanka. If the hypothesis of this paper—that impunity originates from broad constitutional and statutory immunities, and that its curtailment is contingent on a proactive judiciary—is correct, these reforms must be introduced swiftly and implemented seriously. In such event, salvaging the damaged reputation of Sri Lanka's legal system and delivering justice to victims of gross human rights violations may cease to be unattainable goals.

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[96] *Black's Law Dictionary*, (3rd Ed.), (2006), at 393. This discussion originated from a useful reflection in Fernando, Basil, *The Rule of Law and Democracy in Sri Lanka*, Asian Human Rights Commission (March 2012).

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

The Privileging of Impunity in Sri Lanka's Prosecutorial Process and Legal System

Basil Fernando[*]

1. Introductory Remarks

> *"We have every reason to be proud of the fact that our judicial system has been adopted in so many different parts of the world. At the heart of it is fairness to everyone who holds views with which the government doesn't agree, and judicial independence. Without these ingredients, the wearing of wigs, the humble submissions and the quoting of House of Lords authorities become a meaningless parade of archaic customs and costumes."*
>
> *Sir John Mortimer QC*[1]

The late British barrister Sir John Mortimer was regarded as a legendary lawyer. The BBC made a series of documentary films on his cases[2]. He was also retained for cases in the former British colonies. The above mentioned quote was written on the basis of that experience. As he pointed out '*At the heart of it is fairness to everyone who holds views with which the government doesn't agree, and judicial independence.*' When these two elements are absent, a rule of law system as envisaged in the common law tradition cannot survive.

2. Remembering the two 'Golden Rules'

In Sri Lanka, the first element - that is, fairness to everyone who holds views with which the government does not agree - existed to a much a lesser degree from the very inception when contrasted with what prevailed in the domain of the country's colonial masters. Fairness to everyone who holds a view with which the government does not agree was achieved in the United Kingdom after centuries of struggles against the monarchy amidst many sacrifices by way of the blood of citizens of that country. The British, as colonial rulers, could not introduce this principle in its fullness in their colonies as that would have threatened their own rule. Demonstrating fairness to everyone who holds views with which the government did not agree could not go together. Thus, a defect present at the very birth has remained part of the limitations of Sri Lanka's justice systems and legal processes. These defects remain even after independence, to a much greater degree.

Moreover, holding views with which the government did not agree became gradually more problematic following the granting of independence. With the operation of the 1972 and 1978 Constitutions, the right

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[1] Mortimer, John, *Murderers and Other Friends*, (1994) p. 153

[2] BBC, 'John Mortimer: A Life in Words' (22 December 2009) <http://www.bbc.co.uk/programmes/b00gvfzp>

to hold views disagreeable to the government became restricted. Now Sri Lanka has arrived at a point where holding an expression of a view disagreeable to the government has become a risky affair. As this issue is well documented, with statistics of persons who have been killed or otherwise subjected to serious reprisals for holding views opposed to the government and lists of those who have to gone into exile, it is not necessary to go into those details in this short paper. Suffice it to say that one of the two golden rules stated above and one of the two conditions required for a functional rule of law system as stated by Sir John Mortimer exists only to a very limited degree in Sri Lanka.

In regard to the other golden rule enshrining the independence of the judiciary, the manner in which the independence of judiciary has been gradually undermined in Sri Lanka has been previously examined in detail.[3] Since that analysis, even the limited independence that existed earlier has drastically decreased. The arbitrary removal of Chief Justice Dr. Shirani Bandaranayake[4] has put into question as how much of this independence is left. In the course of this removal, a Writ of *Certiorari* issued by the Court of Appeal which quashed the findings of the Parliamentary Select Committee (PSC), was ignored by the government[5]. The issued writ was based on an authoritative interpretation by the Supreme Court of the constitutional provision relating to the removal of the Chief Justice in Sri Lanka[6]. By implication, the government also ignored this interpretation

It has been contended that within the common law tradition, it is not possible for a court to issue a writ on Parliament or a parliamentary select committee.[7] Yet this view is clearly unfounded.[8] For the purpose of this article it is sufficient to state that the Indian Supreme Court has held in several judgments that it is

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[3] Fernando, Basil, 'Sri Lanka: *The politics of habeas corpus and the marginal role of the Sri Lankan Courts under the 1978 Constitution', LST Review* Issue 275 &276, Vol. 21, September and October, 2010, pp 20-34, Law & Society Trust, 2010.

[4] A full dossier of document relating to the debate on this removal is available, published by the Asian Human Rights Commission under the title '*The Impeachment: Documenting the Rajapaksha Regime's Scheme*' <http://www.humanrights.asia/resources/books/the-impeachment-motion-against-shirani-bandaranayake> (PDF available at that website)

[5] C.A. (Writ) Application No 411/2012, CA Minutes 07/01/2013

[6] SC/REFERENCE 03/2012, SC Minutes 01/01/2013.

[7] Cooray, Mark, '*Impeachment; PSC Fulfilled All Requirements*', The Daily News,11/01/2013, 12/1/2013, 14/01/2013

[8] Fernando, Basil, The Colombo Telegraph, http://www.colombotelegraph.com/index.php/dr-mark-coorays-misrepresentation-of-the-way-a-judge-can-be-removed-in-uk/..08/08/2013. In this article, Dr. Mark Cooray's interpretation of Article 33 of the British Constitutional Reform Act of 2005 is comprehensively refuted. In brief, it must be said that at the time this act was being discussed, Lord Bingham, who was then Chief Justice, was working with the Government to establish a protocol surrounding judicial discipline and removal of judges. That protocol ended up developing into a bigger initiative which culminated in the establishing up of an Office for Judicial Complaints. The present procedure in the United Kingdom is essentially that where a complaint is made about judicial misconduct, an initial inquiry is conducted to see if the complaint has any merit. If it does, another judge is appointed to conduct an independent investigation of the complaint The investigating judge receives representations from various parties (including the judge in question). The investigating judge then gives advice to the Lord Chancellor about what to do. The Lord Chancellor and the Lord Chief Justice then make a decision (after receiving further representations). There is then a review body (comprised other judges and lawyers) who can conduct an appeal process (again after receiving representations). The review body then makes a recommendation to the Lord Chancellor and the Lord Chief Justice who then take a decision on the judge, see http://judicialcomplaints.judiciary.gov.uk/docs/Judicial_discipline_regs_-_consolidated_version.pdf.

within the jurisdiction of the Court to issue writs on Parliament or a parliamentary committee, when the Court is of the view that the Parliament or a parliamentary committee has acted in violation of the Constitution[9]. The Indian Court has proceeded on the view that it is the Constitution that is the supreme law and the power of the Parliament is subordinate to the Constitution. The Constitution needs to be interpreted in the light of the basic principles, such as the rule of law and the independence of the judiciary. No parliament or parliamentary select committee can act in a manner that could in any sense undermine these principles. If these principles are displaced, the entire foundation of the legal system built under the overall framework of the common law is destroyed.

The consequent result would be the displacement of the basic notions of the rule of law and the independence of judiciary.. The common law tradition on which a country's legal system is based would consequently be displaced. The system will become unwieldy. Thereafter, what would become of all the judicial precedents developed through over a century of judgments by the courts would be anybody's guess. The 'system' would be lost.

3. Looking at the Prosecutor's Role

When considering the issue of prosecutions, it is not possible to ignore the transformation that has taken place in Sri Lanka on the prosecutor's role. A pertinent question is as to whether the Attorney General's role in Sri Lanka still conforms to the status and the role of an Attorney General within the common law tradition. Today, the Attorney General's Department is functioning under the Presidential Secretariat. When the office of the Attorney General originally evolved in terms of the British tradition, the office was meant to be independent. On the one hand on matters of law, the role of the Attorney General was to advise the government on what the law is relating to a given situation. Today, the Attorney General must bend to whatever the government decides what the law should be. No Attorney General who gives an opinion contrary to what the regime expects, is likely to survive.

The Attorney General's other role is to be the prosecutor on behalf of the state. This means that the prosecutor must, without bias, prosecute anyone guided only by the law. However, prosecuting for political purposes has now become an accepted pattern. The prosecution of journalist, J.S. Tissainayagam, was clearly a political persecution rather than a legitimate prosecution. Several prosecutions launched against Sri Lanka's Army Commander Sarath Fonseka also belonged in that same category. Meanwhile, political bias is shown in the non-prosecution of cases which under normal circumstances, should have been prosecuted if the Attorney General's Department acted only on the basis of the law. The list of such non-prosecutions is long and has been exhaustively recorded in the public domain.

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[9] *Kesavananda Bharati v State of Kerala And Anr*,24 April, 1973: *The State of Kerela v R. Sudarsana Babu*, ILR (Kerela) 1983 p. 661; *O.S Manian v Speaker*, Tamil Nadu Legislative Assembly (2000) MLJ 121; *Raja Ram v Hon'ble Speaker*, Lok Sabha and Ors, (2007) 3 SCC 184; S. Godavari Mishra v Spaker, Orissa State Legislative Assembly, AIR 1953 Orissa 111; *A.J Faridi v Chairman, UP Legislative Council*, AIR 1963 Allahabad 75; *Regina: Powers, Privileges and Immunities of State Legislatures*, AIR 1965 SC 745; *Karnataka v Union of India* (1977) 4 SCC 608; *Gunupati Keshavram Raddi v Nafisul Hasan and the State of UP*, AIR 1954 SC 636

Moreover, a fundamental notion guiding all trials and inquiries is that all persons are equal before the law. This position is also enshrined in Article 14 (1) of the International Covenant on Civil and Political Rights. However, in recent times the Attorney General has enjoyed a position that is unequal to the position of lawyers appearing in cases, particularly when counsel representing the Attorney General is allowed to 'give evidence from the Bar Table'. When applications such as fundamental rights cases are brought about by way of papers filed by Petitioners, officers from the Attorney General's Department appear in court and make submissions orally without submitting any papers relating to the facts of the case. This is a disturbing trend regarding the Attorney General's role in the courts which is of common knowledge to legal practitioners.

Usually the essence of such submissions is the denial of the positions of the Petitioners filed by way of their petitions. Thereafter, the petitions are often dismissed merely on the basis of the submissions of state counsel which amount, in fact, to giving evidence from the Bar Table. Some documents are shown by state counsel to the courts without filing them on record. The phrase, "only for the eyes of the court" is used. These documents are not shown even to the counsel appearing for the Petitioner. Such documents are taken as 'evidence' and decisions are made on that basis.

As one senior counsel reported in a recent discussion with me, he had appeared in a case where the petitioner had relied on the fact that she had received the highest marks in a job interview but, however, someone else was selected for the job. The counsel appearing for the Attorney General showed a document to the court without revealing the contents to the counsel for the petitioner and the case was dismissed. The counsel for the petitioner then asked for the document shown to the court which clearly indicated that the original content of the document had been altered. As the document was not shown to the counsel at the same time that it was shown to the Court, he was in no position to make any objection. Clearly, lawyers for the Attorney-General's department must not be treated in a more favourable position compared to other counsel by allowing them to "give evidence from the Bar Table" and present documents that are not open to scrutiny by legal practitioners of the unofficial Bar appearing for petitioners alleging violation of rights.

4. A Few Important Questions Regarding Impunity

There are some well-entrenched practices that violate rights in Sri Lanka and which govern the culture of impunity..

a. The practice of killing after arrest: Particularly following the 1st Southern uprising of the Janatha Vimukthi Peramuna (JVP) in 1971, persons have been killed after arrest on a large scale. The number in 1971 was counted at around 10,000. In the counterinsurgency measures taken by the state dring the 2nd JVP uprising in 1987 -- 1991, again at least 20,000 people were killed after arrest. These are normally referred to as forced disappearances. In the North and East, from the late 1970s up to 2009, the number of persons who were killed after arrest has never been estimated.

b. Killing people after arrest is a heinous crime. However, in Sri Lanka, this has become an excusable practice in dealing with alleged insurgents. There is also an implied assumption that it is not always possible to distinguish between people who are insurgents and people who are not, and if some persons who are innocent have also been killed after arrest, then that too is excusable. Gradually, killing after arrest has also been 'approved' of in relation to persons who are labelled as serious criminals. However, there have been allegations that several persons who do not have any criminal record have been included in this category. Perhaps the highest indictment against the Sri Lankan state is this practice of killings after arrest. Even up to date, there has not been any attempt by the judiciary, the Human Rights Commission of Sri Lanka or any other authority to take this matter seriously. Perhaps the weakness of the Sri Lankan state is most manifest in this failure.

c. 'Approved killings' by soldiers or paramilitary using live ammunition on persons participating in protests and demonstrations: Several killings of this nature have come to light in recent times. The state authorities have not taken serious steps to either investigate or take preventative measures. At the moment, such practices of using live ammunition as a method of crowd control remains 'approved' practice and will probably be resorted to by state officers time and time again.

d. Magisterial orders which readily accept the police reports relating to custodial killings, thus preventing proper inquiries into what are most likely to be murders, are also another aspect of this problem. We are used to hearing unbelievable explanations by the police that a person who is in custody and has been handcuffed by policemen who are armed, had tried to attack the policemen and therefore was shot dead. These lies are often repeated at magisterial inquiries without further inquiry. This has become encouragement for further killings.

e. Prolonged detention: Large numbers of persons, particularly from the North and East, have been kept under prolonged detention and no authority seems to take that matter as anything of great importance. Thus, this practice, too, continues as an 'approved' practice.

f. Persons who are arrested are almost always tortured. This matter has been thoroughly documented and many reports have been made. And yet, the practice continues unabated. Such large-scale practices of torture and ill-treatment can only occur because the government and higher authorities in the police encourage the continuance of these practices. It is not in the nature of the state that the actual causes for this widespread practice should be searched for. Rather, these heinous practices are encouraged.

g. The use of state media in a criminally provocative manner against citizens who have different views from the government has now become a routine practice: Such happenings could not take place without the direct approval of the highest authorities. The state media is used in a slanderously propagandist manner contrary to basic rule of media ethics. Besides the negative effects that such practices have on the political and legal systems, the country's language and

culture is also adversely affected. The effect that such media behaviour has on the psychology of young people is particularly troublesome.

The above list is not meant to be exhaustive on all human rights issues but merely details some of the glaring violations of the state.

5. Mere Facade of a Functioning Legal System

It is in the light of the above discussion that words like 'impunity' and 'prosecution' and other basic legal terms that constitute the legal jargon of Sri Lanka should be viewed. If the two golden rules mentioned by Sri John Mortimer are absent, a legal system would continue to exist only as a facade. Addressing judges as 'My Lords' and 'My Ladies', quoting from previous judgments and assuming all kinds of dresses and mannerisms that give an impression of the existence of tradition cannot, as Sir Mortimer has pointed out, create a system of justice.

In a previous publication, *The Phantom Limb: Failing judicial systems, torture and human rights work in Sri Lanka*[10], the gradual collapse of the rule of law system and the prevalence of mental habits that survive such collapse and retain the belief in an imagined system while confusing it for a real functioning system was documented. Medical doctors have observed that a person who has undergone the amputation of a limb may still believe that the limb still exists. The patients, for example, would complain of pain in a hand that is no longer physically attached to them. The doctors had to devise methods of pretending treatment on the non-existent limb so as to mentally satisfy their patients. This is called the Phantom Limb Syndrome[11]. A similar approach is adopted by litigants, lawyers and even judges who make themselves believe that they are still working in a rule of law system when the system has, in fact, ceased to exist.

The recent intensification of the breakdown of the rule of law is exemplified in the continuing violations of rights of expression and religion of Sri Lanka's minorities, the political terrorizing of entire villages in the South, the gang-rapes of small children by local level politicians. These incidents form a pattern which should be adequately reflected on from the point of view of the existence or non-existence of a legal system in Sri Lanka It is essential to engage in such studies now in order to arrive at a sensible understanding of what has taken place in Sri Lanka.

A recent book entitled *Narrative of Justice in Sri Lanka: told through stories of torture victims*[12] reports on four hundred cases of police torture and contains graphic details on how torture takes place, what happens when complaints are made and what happens in the courts relating to these matters. The book provides valuable empirical evidence of what justice has begun to mean in Sri Lanka. Other reflections by

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[10] Anderson, Morten Koch, The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka (2009) <http://www.humanrights.asia/resources/books/AHRC-PUB-007-2009/?searchterm=phantom%20limb>

[11] http://www.news-medical.net/health/What-is-a-Phantom-Limb.aspx

[12] (2013) <http://www.humanrights.asia/resources/books/ALRC-PUB-001-2013>

lawyers have made valuable contributions to understanding what has become of practices within the courts today. [13] The detailed information made available in the book should be seriously studied by any person who is interested in finding an answer to the question as to what kind of legal system currently exists in Sri Lanka.

6. Litigation without the Rule of Law

Litigation can still continue even after the collapse of a rule of law system and even when the possibility of justice no longer exists. Such systems are found in countries where the existence of a military regime over a long period of time has displaced the previous legal system. Indonesia, during the period of Suharto, was an example of this. The façade of courts and litigation before such courts continued despite the fact that the courts were unable to give any judgment that was not approved by the military regime. One consequence of this situation was extreme forms of corruption that spread through such courts.

Another example is Cambodia, where, due to the 'revolution' attempted by Pol Pot (1975-1979), the country's entire economic and social structure collapsed. All the intelligentsia, including former judges, lawyers and others who knew of the legal system, either perished or fled into refugee camps or to foreign countries. When the recovery process started, Vietnamese experts tried to fix various aspects of the society, including the court system. Persons without any formal education were appointed as 'judges' and presided over the 'courts'. However, the actual purpose of the courts was to create legitimacy for the actions of the new regime. A similar situation also developed between the periods of 1962 to 1988 in Myanmar/Burma under the dictatorship of General U Ne Win. This system continues with little modification up to date.[14]

The most dramatic example of the transformation of a legal system was in Russia under the regime of Joseph Stalin. Stalin's prosecutor, Andrey Januarevich Vyshinsky, designed the legal system to protect the state against the citizens. Instead of the liberal democratic idea that the role of the courts was to protect the individual against the arbitrary actions of the state, in this new Stalinist system - which came to be known as the Soviet system of jurisprudence - the duty of the courts was to safeguard the executive. The common factor is the the replacement of the law with the supremacy of the executive. Naturally, there is no actual recognition of the separation of powers within such a system, despite the maintenance of the façade that the courts are independent. Under such a system, the prosecutor's role is to defend the state. The rights of the individual are of no concern to the prosecutor. The judges can only survive to the extent that they are loyal to the executive.In Sri Lanka, the struggle for the protection of the court system as an independent system can only happen through undoing the process of the displacement of the rule of law.

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[13] Gunesekara, SL *'The Lore of the Law & Other Memories'*, (author publisher), 2011.

[14] In his doctoral thesis (*The criminal juridical system as marketplace (Chapter 5)* unpublished, 2012 Dr. Nick Cheesman, Research Fellow, College of Political Science, Australian National University (ANU), Canberra discusses interesting facts of this phenomenon,observing that litigation is reduced to a form of bargaining which benefits lawyers, prosecutors, judges and everyone else, except perhaps the actual litigants. The situation is somewhat similar to Cambodia, where there is a popular saying that at the end of any litigation, the winner is left only with his suspenders, and the loser with nothing.

This implies breaking the linkage between the executive and the judiciary. That could only happen through a political process which will end authoritarianism. In that regard, the following suggestions are relevant for a thorough overhaul of the Sri Lankan investigative, prosecutorial and legal system.[15]

1. When an FR application is supported for Leave to Proceed and the Respondents have not yet filed any objections, none of the Respondents (which includes the Attorney General) should, at that stage of the case, be permitted to make submissions controverting the facts stated in the petition of the Petitioner.

2. If the Supreme Court makes order refusing Leave to Proceed in an FR application, or refusing Leave to Appeal or Special Leave to Appeal in an application for Leave to Appeal or Special Leave to Appeal, the Supreme Court should give reasons for the refusal

3. The Supreme Court should not force parties to settle FR applications. Supreme Court also should not terminate proceedings in an FR application merely because the Respondents are to settle the matter by paying some compensation to the Petitioner. The Supreme Court should proceed to decide whether the Respondents had violated a fundamental right of the Petitioner or not.

4. Suspended sentences of imprisonment should not be given as punishment for the serious offences of murder and rape.

5. Redressing malpractices at the Attorney General's Department:

   (a) failure to implement the CAT Act, No.22 of 1994.

   (b) AG should not permit the dragging on of Magistrates' Court cases by delaying advice sought by the Police in such cases.

   (c) AG should not show leniency in criminal cases towards suspects/accused who are connected to the Government or politicians of the party in power..

6. Redressing malpractices at the Attorney General's (AG) Department: state lawyers should not be treated by the Courts at a higher level than lawyers of the unofficial bar; judicial officers should not privately see and discuss with State Counsel pending cases in the absence of the counsel for the opposite party.

[15] These suggestions evolved through collective discussions hosted by the Asian Human Rights Commission with twenty Sri Lankan legal practitioners, Bangkok, 12-15 April 2013.

7. Parliament should without delay enact a statute defining the different types of contempt of court and punishments therefor. The Law Commission of Sri Lanka and the Bar Association of Sri Lanka (BASL) have already submitted draft legislation in this regard.

8. Judges should not harass lawyers for personal reasons which have no connection to the parties to the case or the facts of the case.

9. A Judge should not pre-judge a case. He/she should be open to persuasion by submissions made by counsel in the case, either on the facts of the case or the applicable law.

10. The Court should recognize and always uphold the principle that their judgments can be criticized so long as no bad faith is attributed to the judge who wrote the judgment.

11. Judges should not proceed to act on what the police or other state officer says merely because they are state officers, but must always give due consideration to whatever evidence is given and/or submissions are made by the opposite parties.

12. Effective steps should be taken by state authorities to stop touting by police officers, prison officers and by court staff.

13. Judges should not be compelled to depend on the favour of the Executive arm of Government in obtaining vehicles for their use, in obtaining temporary appointments in foreign countries while they are still judges in Sri Lanka, and in obtaining other perks or advantages for themselves or their families.

14. Lawyers should not be reluctant to take up cases against the police or other state officers merely due to fear of incurring their wrath.

15. Serious notice should be taken of public perceptions regarding the abusive practices of bribery and corruption within the legal system.

16. The assignment of the Department of the Attorney General under the Presidential Secretariat should be changed. That department should continue to be assigned under the Ministry of Justice.

17. The Police Department must be removed from the Ministry of Defence. Policing is a different concept from defence. Assignment of the Police Department to the Ministry of Defence undermines public confidence in the police and concentrates too much power in the Secretary to the Ministry of Defence.

18. Judicial officers should show more sensitivity regarding extra judicial killings and torture by police officers.

19. The Urban Development Authority should be removed from the purview of the Ministry of Defence.

20. The Department of Immigration and Emigration should be removed from the purview of the President.

21. Unnecessary issues relating to the security of the State being raised in objection to bail applications should stop and the Attorney General must strictly supervise the grounds of such objections to bail.

22. Following the lifting of the emergency, the police and security services should not abuse the provisions of the Prevention of Terrorism Act.

23. Serious note should be taken of the public perception that judges and magistrates who do not comply with demands and wishes of politicians are victimized through immediate transfer to a distant and inconvenient station and that there is abuse of the disciplinary process against judges for political reasons and that some are favoured while others are falsely implicated.

24. Serious note should be taken of the need to ensure the transparent and non-politicised functioning of the Judicial Service Commission (JSC).

25. The period of one month allowed by the Constitution to file an FR application before the Supreme Court is grossly inadequate and should be changed forthwith.

26. The JSC must without delay, make and publish in the Gazette, regulations relating to the substantive law and procedure relating to disciplining of judges and magistrates as well as court staff over whom they have disciplinary power.

27. Serious note should be taken of the perception among lawyers that some judicial officers lack an adequate knowledge of the law, especially the civil law, which is essential for the proper and satisfactory discharge of their duties, that judgments even in the highest courts do not show an adequate appreciation of submissions of counsel, and reflect lack adequate reasoning and adequate quality and further, that unethical and uncalled for comments are made by some judges in regard to lawyers, such as calling a lawyer a liar without adequate reason and thereafter failing to apologize even when it is shown that the judge resorted to such conduct due to an inadequate knowledge of the law applicable to the case under consideration.

'Engineered' Constitutions in Sri Lanka – Remembering the Past and Deploring the Present

Mathuri Thamilmaran[*]

1. Introduction

Constitutions and constitution – making play an important role in the process of governing a country. Constitutional Law itself develops from the manner in which a given government uses the powers bestowed upon it by a Constitution. This includes all three pillars of government – the legislature, executive and judiciary. The process of constitution making then plays an important role in how a government and the sovereign People of a country view the interrelationship between themselves. These factors impact in particular in regard to the protection of vulnerable communities, i.e. the minorities.

Constitution making and governance has generally been a controversial process in Sri Lanka. Post-independence Sri Lanka has been governed by three Constitutions, two of which were autochthonous. The effect that each of these Constitutions had on the country and the People is manifold. For example the concentration of power in one arm of the government, (for e.g. in the legislature under the 1972 First Republican Constitution and the executive under the 1978 Second Republican Constitution) led to the undermining of the other arms of government.

Under all three Constitutions, the institution that seems to have been affected the most is the judiciary, the one arm of government that would not have aspired for more power. At the same time, the concentration of power within one institution is also inconsistent with the notion of separation of powers and the use of checks and balances, which keeps each arm of government within limits. For example, under the 1972 Constitution the supremacy of the National State Assembly allowed it to interfere with the appointment of Judges and the members of the Public Service. This had a direct impact on the independence of these institutions making them liable to increasing politicization. This trend, begun under the 1972 Constitution, continued under the 1978 Constitution. The 1978 Constitution built upon the centralizing and authoritarian trend of its predecessor. The centralization of powers had an impact on the People whose sovereignty is exercised by the three arms of government. The will of the People became distorted due to centralization and the People were reduced to subservience when faced with an authoritarian decision maker who cannot be challenged.

The introduction of human rights protection in the Sri Lankan constitutional scheme has been complex. Under the Soulbury Constitution, Section 29 provided what was generally believed to be a safeguard for minorities. Whether it was applied in such a manner is questionable since some of the egregious acts of

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discrimination on racial grounds like the Citizenship Act denying citizenship to a large number of Indian Tamils and the introduction of the 'Sinhala Only' Act took place while the country was being governed by the Soulbury Constitution. In the 1972 Constitution, provision was made for fundamental rights in principle. But, the wide restriction clause and the fact that there was no specific procedure for invoking the jurisdiction of the highest court of the land in such claims, negated its promise. The 1978 Constitution built on the fundamental rights provision introduced in the 1972 Constitution and introduced a Fundamental Rights Chapter with limited restrictions. Rights were made justiciable in the Supreme Court.

It is a given that constitution making must address the aspirations of the people of a country. This includes both the majority and minority communities. If a Constitution fails to address the concerns of a part of the population, it leads to general dissatisfaction and leads to that part of the population ignoring or refusing to abide by the Constitution as was seen in Sri Lanka. A successful Constitution, Senator Nadesan notes, is that which reconciles the predominance of the majority with the liberty of the minority.[16] For instance, in Post- Apartheid South Africa, the new Constitution provided for official language status to many of the languages spoken by minority communities while also providing a federal-like structure of government with a large measure of autonomy.

In Sri Lanka, minority communities have been pushing for autonomy since the pre-independence days. The level of autonomy requested by the Tamil community in particular has increased in consonance with the discriminatory acts of successive governments. As minority rights continued to be increasingly trampled upon, the demand for autonomy by the Tamil community reached its peak with the Vaddukoddai Resolution in 1976, which called for the establishment of a separate state of Tamil Eelam for the Tamils, and which proved the predecessor for the militant violence which engulfed the country soon after, and lasted till the end of the war in 2009. The Constitutions of the day which were drafted ignoring the claims put forward by the affected minority communities were a pivotal reason for the perpetration of violence and senseless killing between ethnic communities in Sri Lanka. If reasonable diligence had been used during the constitution drafting processes in addressing the claims of minorities, this could have been prevented.

A striking feature of Sri Lankan constitutional history thus is the essential role played by all the organs of government: the executive, through Proclamations and detention orders; the legislature, through the enactment of draconian legislation and the mechanical endorsement of states of emergency; and the judiciary, through reluctance to challenge executive authority. Only some judges have demonstrated any will at all to curb impunity through occasional progressive judgments. Yet these rare interventions have been totally insufficient to transform the culture of impunity in the country. In effect, it is clear that impunity has penetrated the system and corrupted its very core.

[16] See http://tamilnation.co/nadesan/autonomy.htm

2. The Independence Constitution of 1948

2.1. History

The Soulbury Commission, a three member Commission headed by Lord Soulbury, was sent to Sri Lanka (then Ceylon), by the British Government in December 1944, in order to make recommendations for constitutional reforms. The Commission solicited proposals from the public before making its recommendations. It also took into account the Memorandum on Constitutional Reforms prepared by the then existing Board of Ministers. The Commission's proposals would eventually lead towards independence, as the main objective of the Ceylonese during that period was to achieve dominion status for Ceylon.

2.2. Enactment

The Soulbury Constitution or the Ceylon (Constitution) Order in Council of 1946 revoked the Ceylon (State Council) Order in Council of 1931 and provided for a Constitution with an executive comprising the Prime Minister and a Cabinet acting in the name of the British Monarch, and a legislature comprising the British Monarch, the House of Representatives and the Senate.[17] The British Monarch was represented by the Governor.[18] Till independence was granted the Order in Council did not provide for full responsible government and the Governor had more powers than a nominal Constitutional head, while restrictions existed upon the powers of the legislature. These limitations were later removed by the Ceylon (Independence) Act of 1947 and the three Ceylon Constitution (Amendment) Orders in Council passed in 1947 containing minor amendments to the 1946 Order in Council. The result after amendment became the 1948 Constitution of Ceylon upon independence on February 4th, 1948.[19]

The 1948 Constitution was based to a large extent on the British Constitution, and was considered a Westminster Model with a Prime Minister and Cabinet and two Houses of Parliament, namely the House of Representatives and the Senate. While therefore British Constitutional Law could be considered as a source of Constitutional Law of the 1948 Constitution, LJM Cooray notes a few points on which the 1948 Constitution differed from its British counterpart, these being,

i) The British Constitution was primarily unwritten while the 1948 Constitution was written one,

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[17] W.I. Jennings and H.W Tambiah, The Dominion of Ceylon: The Development of its Laws and Constitutions (1952), p. 46.

[18] *id.*

[19] The 1948 Constitution was said to comprise the Ceylon (Constitution) Order in Council, 1946 (as amended by the Orders in Council of 1947); the Ceylon Independence Act, 1947 and the Parliamentary (Elections) Order in Council, 1946 as the main constitutional statutes. Other statutes having constitutional significance in the period leading up to the First Republican Constitution of 1972 were the Citizenship Act, 1948; Indian and Pakistani (Residents) Citizenship Act, 1949; Parliamentary Powers and Privileges Act, 1953; Indo –Ceylon Agreement (Implementation) Act, 1967 and the Public Security Ordinance, 1957.

ii) The Courts under the 1948 Constitution has the power to declare an Act of Parliament to be void, a power that the British Courts did not seem to possess;

iii) Separation of Powers existed to a greater degree under the 1948 Constitution than in Britain:

iv) The 1948 Constitution did not adopt the doctrine of Sovereignty of Parliament as seen in in Britain.[20]

2.3. Contents

The Ceylon (Constitution) Order in Council of 1946 as subsequently amended comprised about 90 sections.[21] The headings of the parts gave a general view of its structure. Part I (sections 1 to 3) contains the short title and application, dates of operation and the interpretation of terms. which were contained in the enactment. Part II (sections 4 to 6) was titled the Governor-General and dealt with the appointment and the functions of the Governor- General, his salary and provision for a person to administer the government whenever the Governor-General was abroad. Part III (sections 7 to 39) had two sub-headings. Under the sub-heading 'General' the constitution of the Legislature was provided for.

The second sub-heading was titled 'The Legislative Powers and Procedures' and dealt with powers of the parliament and the procedure of legislation. Part IV (sections 40 to 44) was titled 'Delimitation of Electoral Districts'. Part V (sections 45 to 51) was titled 'The Executive' and referred to the composition and powers of the Cabinet. Parliamentary Secretaries and connected officers.[22] Part VI (sections 52 to 56), headed 'the Judicature' dealt with the appointment, transfer, dismissal and disciplinary control of judges of the Courts and tribunals. Part VII (sections 57 to 65) was titled 'The Public Service' and dealt with appointment, transfer, dismissal and disciplinary control of public servants creating a body called the Public Service Commission entrusted with the power to carry out such functions. Part VIII (sections 66 to 71) was titled 'Finance' and dealt with matters in which the government should act in financial matters. Part IX (sections 72 to 91) was titled 'Transitional Provisions, Repeal and Savings'.[23]

The Legislature

The Legislature under the Independence Constitution was bi-cameral consisting of a House of Representatives and a Senate. The Members of the House of Representatives, which was the Lower House, were elected from territorial constituencies. Ninety-five members were thus elected, and 6 further members were appointed by the Governor General.

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[20] L.J.M. Cooray, Constitutional Government in Sri Lanka, 1984, p. 47.
[21] *id.* at p. 49.
[22] *id.* at p. 50.
[23] *id.*

The Senate, which was the Upper House comprised 30 members, 15 of them appointed by the Governor General and the other 15 elected by the Members of the House of Representatives. The Senate was created so that eminent persons in different fields could contribute to the legislative process as well as providing representation for minorities who were inadequately represented in the House of Representatives. Bills passed in the House of Representatives needed to be passed by the Senate as well in order to become law. Therefore the Senate was considered a delaying mechanism in the legislative process.

The Senate during its 25 years of existence challenged the House of Representatives only twice and did not serve as an effective check upon the Lower House.[24] But instead it is the contribution of the Senators to the legislative process in terms of the experience and knowledge they brought to the debates and discussion in the Senate that highlights its significance.

The Executive

The Executive under the Independence Constitution comprised the Governor General, the Cabinet and the Prime Minister. The Governor General was the nominal Head of the Executive. He was appointed by the Queen, upon the advice received from the Prime Minister of Ceylon. The Governor General's term of office lasted five years and could be extended upon the discretion of the Prime Minister.

It is the Governor General who appoints the Prime Minister, this was done following English tradition where the leader of the party securing the highest number of seats in Parliament after a general election was appointed as the Prime Minister. Every function exercised by the Governor General was necessarily to be done with the consent of the Prime Minister and his Cabinet. The Governor General was also responsible for the summoning, proroguing and dissolution of Parliament. He also appointed the Cabinet of Ministers, high officials of State, Ambassadors and Judges of the Supreme Court. Each of these functions was to be done on the advice of the Prime Minister.

The Cabinet was in charge of the executive functions of the government even though the Governor General was the nominal head. It was headed by the Prime Minister, and was composed of members of either House of Parliament. Of these at least 2 members should be from the Upper House, one of them to be the Minister of Justice. The Prime Minister was in charge of Defense and Foreign Affairs. This system was similar to the British Westminster Parliamentary model. While the Ministers of the Cabinet were formally appointed by the Governor General on the advice of the Prime Minister, there developed an unwritten convention that a few of those ministers should be from minority ethnicities and castes.

The Prime Minister was the leader of the Cabinet. He/She formed the Cabinet, assigned Ministries to the members of the Cabinet and had control over its functions. Furthermore, the Prime Minister was responsible as the policy – coordinator for forming Government Policy. The main function of the Cabinet

[24] R. Edrisinha & N. Selvakkumaran, *The Constitutional Evolution of Ceylon/Sri Lanka 1948-98*, at p. 10.

was to implement the laws passed in Parliament and similarly to the British system 'collective responsibility' for decisions was practiced by it.

The Judiciary

During the period governed by the Soulbury Constitution, the Queen of Britain was Ceylon's Head of State and all judicial functions were carried out in her name. While the Supreme Court was the highest Court in Ceylon, further appeal was possible to the Privy Council in Britain which served as the final Court of appeal. The Soulbury Constitution had some measures in place to protect the independence of the judiciary. These included provisions relating to appointment (Supreme Court Judges were appointed by the Governor General, and could not be removed without consent of both Houses of Parliament), a salary safeguard (salaries of the Supreme Court Judges were paid out of the Consolidated Fund and could not be reduced), the requirement that the Minister of Justice be a member of the Senate and not an elected member, and the creation of a Judicial Service Commission.

The Judicial Service Commission comprised the Chief Justice (as the Chairman), a Supreme Court Judge and a former Judge of the Supreme Court or a present Judge and was responsible for the appointment, transfer, dismissal and disciplinary control of judicial officers. The Commission was appointed for a period of five years. Any attempt to influence the activities of the Commission was considered an offence. These safeguards were put in place to administer justice in an independent and impartial manner. The Constitution also enabled post enactment Judicial Review of Legislation, which became impossible under the Republican Constitutions that followed. While instances questioning the independence of the judiciary were relatively few during the period leading up to 1972, the judiciary has been criticized on the manner it approached issues concerning the minorities.

The Public Service

The Soulbury Constitution provided that all activities of the Public Service came under the supervision of the Permanent Secretaries appointed by the Governor General to each Ministry. Many departmental heads, deputy heads and other officials came under the Permanent Secretaries. Public servants were obliged to implement the policies of the government in power without regard to which party was in power. The impartiality of the Public Service was sought to be protected by the establishment of a Public Service Commission (comprising three members and appointed for five years,), which controlled matters of appointment, transfer, dismissal and disciplinary action of public servants. This prevented politicians from interfering in the work of the Public Service thereby protecting its independence. The Soulbury Commission also recommended that the majority and minority be afforded equal opportunities in gaining employment in the Public Service. The Public Service Commission's record under the Soulbury Constitution was highly praised since there had been several instances where the Commission had refused to bow down to political pressures relating to the transfer and dismissal of members of the public service,

which had the effect of bolstering the morale of the public servants while also building up public confidence in the same.[25]

3. The First Republican Constitution of Sri Lanka (1972)

3.1. History

After Independence in 1948, Sri Lanka was governed by the Independence Constitution, with the Queen as Head of State. Therefore, there was a notion that Ceylon as it was known then was not truly independent in a sense and that hence there existed a need for a new Constitution, which truly emanated from a mandate given by the People of the country. Therefore for the 1970 General Election, the United Front led by Mrs. Srimavo Bandaranaike's SLFP in its election manifesto asked the People for a mandate to introduce a new Constitution in order to create an independent sovereign republic.

After the United Front won the election it convened a Constituent Assembly comprising all the elected members of the House of Representatives (under the Soulbury Constitution) who set about the task of drafting a new Constitution, which was adopted by the Constituent Assembly on the 22nd of May 1972. It was opined that the Constituent Assembly had a legal and moral right to function because it consisted of the elected representatives of the people in an election where an exceptionally large proportion (87%) of the population turned out to vote and where the drafting of a new Constitution was one of the issues put forth. Arguments were made that all political parties had agreed to be part of the Constituent Assembly and that the Assembly had the overwhelming support and confidence of the public, with all sections of the community sending in memoranda with their own proposals.[26]

3.2. Enactment

The Minister of Constitutional Affairs, Dr. Colvin R. de Silva in the 1970 United Front government played a crucial role in the creation of the new Constitution. The Minister for Constitutional Affairs stated at that time that he had presented to the Steering and Subjects Committee set up by the Constituent Assembly to prepare a new Constitution for Sri Lanka, the basic resolutions prepared by him with the assistance of a drafting committee which had been set up.[27] Criticisms were made that the basic resolutions were formulated by the Minister and his assistants which made the resolutions essentially a party matter while it was also noted that the requirement that amendments to the resolutions should not go beyond the United Front's election manifesto severely affected the proposed Constitution being a non-partisan consensus document.[28]

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[25] R. Edrisinha & N. Selvakkumaran, *The Constitutional Evolution of Ceylon/Sri Lanka 1948-98*, at p. 11.
[26] L.J.M. Cooray, Reflections on the Constitution and the Constituent Assembly, 1972, p. 130.
[27] L.J.M. Cooray, Constitutional Government in Sri Lanka, 1984, p. 250.
[28] S. Nadesan, Some Comments on the Constituent Assembly and the Draft Basic Resolutions, 1971, p. 8.

As Senator Nadesan noted, this is unlike the situation in India where the Constituent Assembly was told by the then Prime Minister Jawaharlal Nehru that the members of the Assembly should work in cooperation and as equal partners in drafting a new Constitution.[29] The basic resolutions came up for debate in the Constituent Assembly in March 1971, but the JVP insurrection of April 1971 adjourned the debate process as the government had to deal with a situation of emergency until May 1971. Senator Nadesan also noted the important fact that even though the United Front had a majority of seats it had received less than half the number of votes in the general election.[30] Thus whether a Constitution drafted in adherence to its election manifesto truly reflects the will of the People is questionable.

Amendments to the resolutions which stated that Sinhala would be the Official Language, and that the Republic of Sri Lanka would be a Unitary State, were proposed by the Federal Party in June 1971. These amendments were not accepted by a vote of 88 votes to 13 in the Constituent Assembly, and this incident led to the Federal Party stating that the proposed Constitution did not adequately provide for the rights of Tamils and therefore there was no use in the Party being involved in the deliberation process of the Assembly in future. The Federal Party therefore made a decision not to go back to Assembly. Hence, the major party representing the Ceylon Tamils did not engage in the drafting process or accept the First Republican Constitution, paving the way for the anti-government militant violence in the mid 1970s.

The draft Constitution prepared in accordance with the basic resolutions was placed before the Assembly and published in the Government Gazette. After the resolution adopting the draft Constitution was adopted, the Assembly divided itself into eleven committees with parts of the draft Constitution to be assigned to each committee. The Public was also invited to send in their views in the form of memoranda to the appropriate committees. The lack of public contribution to the debates has been commented upon.[31] The final reports of the committees were then collated and revised by the Steering and Subject Committee which then presented it to the Constituent Assembly After each clause of the Constitution was considered and amendments proposed, the Draft Constitution was adopted as the Constitution of the free, sovereign and independent people of Sri Lanka on the 22nd of May 1972. The members of the UNP voted against the adoption of the Constitution citing a long list of objections, including the extension to seven years of the term of the First National Assembly which was a continuation of the existing House of Representatives.[32] The 13 members of the Federal Party boycotted the vote and instead were involved in observing a day of mourning in Jaffna; where the general public were involved in displaying black flags, a boycott of schools and the stoning of buses.[33]

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[29] *id.*, p.9.

[30] *id.*, p.10.

[31] See Nihal Jayawickreme, *Constitution Making in Sri Lanka: The Philosophy and Legitimacy of Sri Lanka's First Republic Constitution*, Speech at Colvin R. de Silva's Birth Celebrations 2007.

[32] *id.*, at pp. 252-254.

[33] Nihal Jayawickreme, '*Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective*,' in 'The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice' (Asanga Welikala, ed.), CPA (2012), at p. 84.

3.3. Contents

The Legislature

Unlike the legislature under the Soulbury Constitution, the legislature under the First Republican Constitution was unicameral (comprising one house or a single chamber) called the National State Assembly [NSA]. Section 3 of the 1972 Constitution declared that the sovereignty of the Republic of Sri Lanka belonged to its People and was inalienable. The NSA was the supreme body under the Constitution exercising the sovereignty of the People (Section 4 of the Constitution). The NSA exercised the legislative power of the People. It also exercised through the President, Prime Minister and the Cabinet of Ministers, the Executive Power of the People, including national security and defense, and through the Courts and other institutions created by law, the judicial powers of the law. The powers of the NSA therefore were extremely far reaching. Senator Nadesan in his commentary on the proposed resolutions of the Constituent Assembly noted that such a vesting of power in one organ identified as a National Assembly or Parliament was seen only in Communist countries and not found in countries that followed a Parliamentary Democratic System of Government.[34] He likened the proposed NSA to earlier monarchic regimes who were not only sovereign but also enjoyed legislative, executive and judicial power.[35] The similarity between authoritarian regimes and an all powerful Parliament thus was seen even before the Constitution was passed and hence the actions that followed during the existence of the NSA would not have come as a surprise to the enlightened ones.

The NSA comprised elected representatives of the People. The number of representatives elected to the NSA was determined by a Delimitation Commission.[36] The tenure of an elected NSA was for 6 years. Section 39 of the Constitution provided that any act of commission or omission by the NSA could not be questioned in a Court or other institution administering justice. Section 44 of the Constitution stated that the legislative power of the NSA was supreme. The NSA could not abdicate, delegate or alienate any of its powers nor could it set up any Authority with legislative powers. But, it was allowed to set up Authorities that could make subordinate laws (e.g. a Local Government Authority). The Powers and Privileges of the NSA, were similar to that of the previous House of Representatives.

During a period of emergency, the NSA had the power to delegate to the President the power to promulgate emergency regulations in order to maintain public security and peace, to quell riots and to provide the necessary goods and services essential for day- to- day life.

Bills become law when they were passed by the NSA, and subsequently endorsed by the Speaker's certificate that it had been passed. The requirement of assent by a second chamber which existed in the

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[34] S. Nadesan, Some Comments on the Constituent Assembly and the Draft Basic Resolutions, 1971, p. 42.

[35] *id.*

[36] The Delimitation Commission was appointed by the President and was supposed to divide each province into electoral districts on the basis of its population and area. Delimitation had to be done one year after each census. The first Delimitation Commission fixed the number of representatives to the NSA at 168. Out of these 154 were from single member constituencies and 6 from multiple member constituencies.

Soulbury Constitution was removed. This affected proper discussion and deliberation of Bills before they were passed and also deprived the legislature of a more knowledgeable and experienced category of legislators who could provide considered and timely input to the legislative process. Similarly the fact that the Speaker and not the President assented to Bills becoming Law strengthened the power of the Legislature in comparison to the Executive.[37] Criticism was made of the fact that the life of Parliament elected for 5 years was extended by a further two years due the enactment of the Constitution in 1972 since it gave the existing Parliament (elected in 1970) newly renamed the NSA, a 5 year life time.[38]

Executive

The First Republican Constitution ,in Section 19, provided for the institution of a President who was the Head of State. Section 1 of the Constitution freed Sri Lanka from its previous dominion status and declared it to be a free, independent, sovereign Republic. The President replaced the Queen as the nominal Executive of the country. The President was nominated by the Prime Minister and served office for a term of four years. Section 27 of the Constitution provided that the President should act on the advice of the Prime Minister. The President's functions included the declaration of war and peace, the summoning, prorogation and dissolution of the NSA as well as the appointment of judges to the higher Judiciary and the appointment and accrediting of ambassadors. The President could not be brought before a Court for any act of omission or commission and according to Section 23, legal proceedings cannot be instituted against the President either in his personal or official capacity.

The members of the Cabinet of Ministers were appointed by the President on the advice of the Prime Minister. The Cabinet was collectively responsible to the NSA. The Prime Minister was appointed by the President who chooses the person commanding the maximum confidence of the NSA to such post. The Prime Minister served as the Head of the Cabinet and it is he/she who decided the number of Ministers and their functions and could change or remove them if he/she so wished by recommending such to the President. The Cabinet had the responsibility of holding office even after the dissolution of the NSA until the next General Election is held. The post of Prime Minister, it can be observed is very powerful considering the immense powers the NSA had acquired for itself and the fact that the Prime Minister was inevitably the leader of the party who held the majority number of seats in it.

The Judiciary

The 1972 Constitution gave the power to set up judicial authorities to the NSA. When setting up these Courts, out of the two higher Courts, the Supreme Court and the Court of Appeal, the latter was given the power to be the final Court in an appeal decision. Under the previous Constitution, the final Court to consider appeals was the British Privy Council. Appeals to the Privy Council were abolished. The 1972 Constitution gave the power of final appeal to the Court of Appeal thus making it the highest judicial

[37] See Nihal Jayawickrema, *Constitution Making in Sri Lanka: The Philosophy and Legitimacy of Sri Lanka's First Republic Constitution*, Speech at Colvin R. de Silva's Birth Celebrations 2007.

[38] See S. Nadesan, Some Comments on the Constituent Assembly and the Draft Basic Resolutions, 1971, p. 8.

institution in Sri Lanka. There also existed a Judicial Services Advisory Board appointed by the President and consisting of 5 members with the Chief Justice as the Chairman. Appointments to the Judiciary, were done by the Cabinet upon the advice of the Judicial Services Advisory Board, while transfers of the judicial officers were done by the Board itself. Any appeal against a transfer had to be made to the Minister of Justice. This made political intervention in the judicial appointment process inevitable. Under the 1972 Constitution, the judiciary was referred to as "the most crippled arm of government."[39]

A Judicial Services Disciplinary Board was also established. The Chief Justice headed this Board, which comprised two other members. This Board dealt with the dismissal and disciplinary control of judicial officers. Section 131 of the Constitution was meant to safeguard the Independence of the Judiciary. Judicial Officers were not supposed to yield to pressure or influence from anyone and persons attempting to thus influence the judicial officers could be sentenced to one year's imprisonment and a fine or both. But this provision did not seem to have much effect considering the excessive government influence of the judiciary through the working of the other provisions which allowed for Cabinet interference.

Public Service

Public servants as well as judicial officers were brought under the category of 'staff officers' and under the control of the Cabinet of Ministers in respect of their appointment, promotion, transfer, dismissal and disciplinary control and decision-making in that respect could not be questioned by a Court of law. This started the process of politicizing the Public Service, which continued under the 1978 Constitution. Advisory bodies were also appointed to assist the Ministers in this regard. The Permanent Secretaries to the Ministries were politicized since they had to operate under the direction and control of their respective Ministers. There was also a provision in the Constitution, which stated that every state officer holds office during the pleasure of the President.[40] An independent public service therefore was not provided for under the 1972 Constitution.

Fundamental Rights

The 1972 Constitution was unique in that it introduced the concept of fundamental rights to Sri Lanka. Section 18 of Chapter 6 of the Constitution enumerated a few fundamental rights to the citizens of Sri Lanka. The rights comprised the traditional civil and political rights. There was a general limitation clause that limited the exercise of the fundamental rights where interests of national unity and integrity, public order, public safety, protection of morals, etc. were concerned. There was no provision in the Constitution though to provide for the justiciability of these rights which meant that anyone complaining about the violation of his fundamental rights had to petition the District Court to begin a case. This is unlike the situation under the 1978 Constitution where anyone complaining of any violation of fundamental rights could directly access the Supreme Court. There was only one case alleging a fundamental rights

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[39] Radhika Coomaraswamy, "Sri Lanka: The crisis of the Anglo-American Constitution Traditions in a Developing Society", Stosius Inc/Advent Book Divisions, 1984, p. 29.

[40] Section 107(1) of the First Republican Constitution of 1972.

violation, *Gunaratne v. People's Bank*[41] which started as a declaratory action in the District Court and went all the way to the Supreme Court and was decided in 1986 long after the 1972 Constitution had been replaced by the Second Republican Constitution of 1978.

The Minister of Constitutional Affairs at that time Mr. Colvin R. de Silva thought of the Fundamental Rights and the Principles of State Policy[42] provisions as safeguards for minorities.[43] He maintained that these provisions were more wide than the protection offered by section 29 of the Soulbury Constitution. He cited the Equality provision as a protection meant for the Sri Lankan Tamils.[44] The Civil Rights Movement (CRM), a prominent civic body begun in 1971, however criticised the fact that the prevention against torture was not a fundamental right under the 1972 Constitution.[45] Them CRM also criticized the wide restrictions imposed on fundamental rights, which would weaken the safeguards provided in the fundamental rights provisions.[46]

3.4. Aggravation of Tensions between the Minorities and the Majority

The lack of minority rights protection as was seen in the law and in practice fueled the ethnic conflict, which reached gigantic proportions post 1977 under the UNP regime and led to the lack of reconciliation which exists to-date. These included doing away with the protections guaranteed by section 29 of the Soulbury Constitution, abolishing the second chamber, the entrenchment of Sinhala as the only Official Language (s.7 of the Constitution), affording Buddhism the foremost place thus placing it on a higher altar and the introduction of the concept of a unitary state.

The United Front which represented only a minority of the electorate since it had received less than half the number of polls received, still had the majority within the Constituent Assembly. Therefore there was very little that Parties representing the minority communities like the Federal Party or the All Ceylon Tamil Congress could do to safeguard minority interests. The debates at the Constituent Assembly between the members of the Federal Party and the other Members regarding the introduction and entrenchment into the Constitution of the concept of a Unitary State, highlighted the concerns and fears of the minorities within a majoritarian constitutional setting. The Federal Party, in all earnest submitted a memorandum and model Constitution for a federal state[47], which was completely ignored by the other

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41 (1986) 1 SLR 338.

42 Principles of State Policy were Directive Principles which the State should take into account in policy making and are not justiciable in Courts.

43 Colvin R. de Silva, *Safeguards for the Minorities in the 1972 Constitution*, 1987, p. 16.

44 *id.*

45 Civil Rights Movement, *The call for return to the 1972 Constitution*, CRM , EO4A/8/82.

46 *id.*

47 For excerpts from the '*Memorandum on the Constitution and Model Constitution of The Federal Republic of Ceylon*' , see Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala, Power Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008 (Colombo· Centre for Policy Alternatives), pp. 238-247.

members of the Constituent Assembly.[48] They also forcefully articulated the necessity of having a Federal State during the Assembly debates.

Mr. V. Dharmalingam, M.P. of the Federal Party explained the Tamil demand for the right to self-determination and a Federal State of Ceylon positing it within a socialist democracy.[49] Mr. K.P. Ratnam, M.P. of the Federal Party warned with alacrity that if the request for a federal state was not accepted at that time, there were fears that a call for a separate state would arise and accused the Sinhalese of using the Federal Party for their own advantage. This was in the context that the Federal Party had faced a split in 1969 when one of its intellectual giants and former M.P. Mr. V. Navaratnam had split from the party forming his own party, the "Thamilar Suyatchi Kazhakam' which had contested the general elections on the platform of demanding a separate state for the Ceylon Tamils.

Though Navaratnam had lost in the election, his cause had found much support among the Tamil youth and the Federal Party feared that its inability to gain the Assembly's approval for a federal state would only lead to increasing agitation amongst the Tamils for a separate state. Mr. Neminathan, M.P. of the Federal Party stated that their demand for a federal state arose out of the idea of a united Ceylon, where the majority community due to its strength in the government had no need for constitutional safeguards, but the minorities needed such safeguards in order to resist alienation within Ceylon. Surprisingly even the minority friendly leaders in the Leftist Parties expressed their opposition to Federalism calling it a dirty word and questioned the Federal Party's motives. This is an example of lack of foresight by the politicians of the majority community, which unfortunately proved to be one of the forerunners for the current crisis in ethnic relations.

The Federal Party during the Constituent Assembly Debates also opposed the abolition of the bicameral system, with Mr. V. Dharmalingam M.P. stating that there was no need to abolish the Senate because it had done its job to perfection, that of acting as a cooling place for legislation. He further stated that a powerful second chamber where minorities would get enough representation was to be preferred instead.[50]

Dr. Colvin R. de Silva explained the decision to give Buddhism the foremost place and state protection by contending that the Constitution did not make Buddhism the state religion and that this provision was subject to section 18 (1) (b) which protected the fundamental right of religious belief which gave everyone the equal right to express their religious beliefs.[51] Yet unfortunately, the practice, 1972 onwards by the State Institutions, has been to treat Buddhism as the state religion, and in recent times cases have been decided in deference to its foremost status and to the detriment of other religions. This is in contrast to Dr. Colvin R.de Silva's pronouncement that Sri Lanka was a secular state.

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[48] Dr. Colvin R.de Silva stated subsequently that the Federal Party Memoranda divided the country into five parts. three of in which the Tamil minority would be the majority and that thankfully he 'did not allow that dynamite to have effect.' – Colvin R. de Silva, Safeguards for the Minorities in the 1972 Constitution, 1987, p. 19.

[49] See Constituent Assembly Debates (1971), Vol.1, 16th March 1971, column 386 *et seq.*

[50] See Constituent Assembly Debates (1971), Vol.1, 16th March 1971, p. 194.

[51] Colvin R. de Silva, *Safeguards for the Minorities in the 1972 Constitution*, 1987, p. 24.

4. The Second Republican Constitution of Sri Lanka (1978)

4.1 History

The 1977 July General Election that followed five years after the enactment of the First Republican Constitution brought into power a government formed by the UNP which had been the main opposition during the period 1970 -1977 when the United Front was in power. The UNP came into power thanks to the single /multi member electoral system that existed at the time, received more than 5/6ths of the number of seats (140 seats) while the previous governing party only obtained 8 seats. The UNP had a different political and economic agenda to the previous regime, and opted to pursue these through the adoption of a new Constitution that provided for a strong and stable Executive President directly elected by the People.

4.2 Enactment

The UNP had before the General Election of 1977, sought the mandate of the people to enact a new Constitution that would replace the First Republican Constitution. As soon as it came into power, the UNP brought an amendment to the First Republican Constitution (the Second Amendment to the 1972 Constitution) by which it established an executive Presidential form of government, which would later be carried on into the Second Republican Constitution. J.R. Jayawardene who was the Prime Minister at that time took office as the Executive President. In 1978, the UNP government appointed a Select Committee for the Revision of the Constitution. Consequently the 1978 Second Republican Constitution was enacted under Article 51 of the 1972 Constitution. The 1978 Constitution thus draws its legality from the 1972 Constitution. All laws that existed prior to the 1972 Constitution were validated by Article 12 of the First Republican Constitution. These were further validated by Article 16 of the 1978 Constitution.

The new Constitution which came into effect on September 7, 1978 provided for a unicameral Parliament and an Executive Presidential system of government. The Constitution also introduced a Proportional Representation election system. The Constitution had provision for an Independent Judiciary and guaranteed Fundamental Rights providing for any aggrieved person to petition the Supreme Court when faced with a violation of such rights. The Constitution also introduced the referendum as an alternate voting method in which the people could directly express their views regarding a given question.

4.3. Contents

Article 2 of the 1978 Constitution, states that the Democratic Socialist Republic of Sri Lanka is a unitary state. The retention of the unitary label led to further ethnic violence that lasted for more than 30 years since the introduction of the 1978 Constitution, and is still a major bone of contention between the Sinhalese and Tamils in the country. The Sovereignty of the Republic of Sri Lanka is vested in the

people[52] who exercise such power through the legislature, the executive President, and the judiciary.[53] This sovereignty not only included the powers of government, but also fundamental rights and the power of franchise.[54] How such sovereignty has been exercised from 1978 to date through the mechanisms mentioned above will now be the subject of analysis.

The Legislature

Under the 1978 Constitution, the Parliament is composed of 225 members of whom 196 are elected members while 29 members are appointed from a 'National List' in proportion to the number of votes each party attains in the parliamentary election. The Parliament is elected for a period of 6 years unless dissolved early by the President. The Parliament elects the Speaker who presides over meetings in parliament on its first day of sitting. Members of the Cabinet are drawn from the Parliament. Parliament has been entrusted with the duty to enact laws.

The role of a Member of Parliament was hugely different to how it had been perceived earlier. Members of Parliament (MP) enjoy a lesser degree of independence under this Constitution. For example, when an MP is expelled from his/her party, resigns or decides to join another party that MP automatically loses his/her seat in Parliament.[55] Another person could then be nominated as MP by the party he/she belonged to. This it has been argued would be in contravention of the views of the public who voted in the said MP, for reasons other than the party he/she belonged to (e.g. his/her personality and character). This also prevents MPs from voting according to their conscience and requires them to toe the party line if they wished to retain their seat in Parliament. A dissident MP has the right to appeal to the Supreme Court in order to stay an order of expulsion by his/her party. The Supreme Court has in recent times almost always decided in favor of those joining the ruling party while in earlier judgments in the 1990s it has held that it would decide only as to whether such expulsion of a member from his/her party is according to the party constitution and following the rules of natural justice.[56] This anomaly led to the importance of the legislature as a deliberative assembly diminishing, since MPs were obliged to follow the dictates of their party leadership, and prevented Parliament from serving as an effective check on the powerful executive.

Further, the supremacy of Presidential power over the legislature, is seen through the working of the Public Security Ordinance where the President is entitled to introduce new regulations which could have the effect of over-riding, amending or suspending the operation of any law enacted by Parliament.[57] Even though Parliament could review the need for the continued existence of a state of emergency, the President's status as leader of the majority party (except during the short period of cohabitation in 2001-

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[52] Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[53] Article 4 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[54] Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[55] Article 99(13) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[56] In *Gunawardena and Abeywardena v. Fernando* (S.C. 50,51/87 Spl.), the Supreme Court declared that an MP was only a cog in the party wheel while in *Dissanayake v. Kaleel* (1993 (2) SLR 135) the Supreme Court stated that under a system of proportional representation the party was pre-eminent and that a MP was bound to vote according to the will of the party leadership
[57] Article 155 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

2004) does not make this possible. Considering that the Sri Lanka had been in a state of emergency on and off for about 40 years till 2011, this is proof of how the executive has powers over the decisions made by the legislature. Another aspect which devalues the legislature is the power given to the President to dissolve Parliament if he/she so wished after one year of a Parliamentary election.[58] This allows the President to decide the fate of the Parliament according to his/her whims and fancies and is not in accordance with the public confidence that reposes in the MPs they elected to Parliament.[59] Furthermore, the power of dissolving Parliament would have the effect of making the Parliament subservient to the President since the Members of Parliament would always be in fear of the weapon of dissolution he/she wields. Even the French system to which the Sri Lankan executive system has often been compared, provides that the President can dissolve the French National Assembly only after consulting the Prime Minister and the Presidents of the Assemblies.

The Parliament has the power to impeach the President, but this is a complicated and long process, which would take over an year to fulfill and includes a hearing before the Supreme Court, as well as obtaining on three different occasions, the signatures of a 2/3 majority of the whole number of Members of Parliament. Only once was there such an impeachment attempt in 1991, and it failed miserably. An ineffective legislature combined with the over- mighty executive thus serves to strengthen the process towards increased authoritarianism in Sri Lanka as seen in recent times.

The Executive

The Presidential form of government that was introduced through the 1978 Constitution was a combination of the French and American models and provided for an over-mighty executive president.[60] This was premised on J.R. Jayawardene's personal belief that that political stability and economic development required a strong leader at the helm who was not bound by Parliament. The President under the 1978 Constitution is elected directly by the people for a period of 6 years. After the 3rd Amendment to the Constitution was adopted, there is now provision for a President to seek re-election after four years of governing. An earlier term limit that a President could only stand for election twice which would reduce his/her years of being in power to maximum of twelve years, was removed by the Eighteenth Amendment in 2010 whereby paving the way for an erstwhile authoritarian regime to consolidate its stranglehold on power.

The President has the power to summon, prorogue and dissolve Parliament (after a period of one year) and he/she presides over Cabinet, decides the number of Ministries and appoints the members of Cabinet from the MPs from the party that has a majority of seats in Parliament. He/ She is not even bound to consult the Prime Minister in making these appointments.[61] Sometimes the Cabinet is appointed first and

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[58] Article 70(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

[59] An example of this would be how former President Chandrika Bandaranaike Kumaratunga who belonged to the People's Alliance dissolved Parliament in 2004 where the UNP was in a majority after a brief period of cohabitation (2001- 2004).

[60] See A.J. Wilson, The Gaullist System in Asia: The Constitution of Sri Lanka, 1980 (Macmillan).

[61] Article 44 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

then the person in whom the President has the most confidence within the Cabinet is appointed Prime Minister. The Cabinet is collectively answerable to Parliament but President is not similarly bound.

N.M. Perera as early as in 1979 imagined a situation where the President and the majority in Parliament belonged to two different parties with different political ideologies.[62] This was entirely possible since the Presidential election and the Parliamentary election were not held together but separately in different years. He stated that a strong elected Prime Minister with popular backing may refuse to bow down to an equally strong elected President.[63] This would he said create a deadlock and result in the President dismissing the Prime Minister and appointing a substitute.[64] He states that a similar incident happened in France. These words proved prophetic as events have shown during the period of cohabitation (2001-2004) between the elected President belonging to the People's Alliance and the Prime Minister and Cabinet belonging to the United National Party, and which finally resulted in the President dissolving Parliament.

The President is under Article 43 of the Constitution answerable to Parliament with regard to the proper discharge of his/her functions and the exercise of the powers bestowed upon the position, but the Constitution does not seem to indicate how this must be done. The Cabinet and the Prime Minister hold office at the will and pleasure of the President. The President may also assign to himself/herself any portfolio or function that he/she considers necessary.[65] Though not stated in the Constitution, the President always retains the Defense portfolio since he/she is the Commander- in- Chief and has all authority to take measures for the defense and security of the country.

N.M. Perera observes that the power of the President over the legislature is almost complete except for the fact that the subject of 'finance' remains under the control of Parliament.[66] This includes the appropriation of money for expenditure and the levying of taxes, and the President would be powerless if Parliament denies him the resources to run the administration.[67] In a situation where the majority in Parliament and the President are from the same party, this is not much of a limitation in power, instead it increases the absoluteness of the President's power as is seen today.

The powers of immunity granted to the President under Article 35 of the Constitution makes it impossible to institute proceedings in Court against the President for any official or private act committed by him/her while in office. Granting such immunity to a politically partisan figure with enormous powers is not justifiable since it prevents the President from being held accountable for genuine grievances. A President could for example make extremely defamatory statements against opposition candidates during election campaigns that if made by any other person would be a violation of the laws governing elections or

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[62] N.M. Perera, Critical Analysis of the New Constitution of the Sri Lanka Government, June 1979, at p. 13.
[63] *id.*
[64] *id.*
[65] Article 44 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
[66] N.M. Perera, Critical Analysis of the New Constitution of the Sri Lanka Government, June 1979, at pp. 62-63.
[67] *id.* at p. 63.

defamation and the aggrieved party would not have any recourse to follow.[68] The only remedy to this is that a former President can be questioned in Court after he/she ceases to hold office. An example of this is the judgment in *Sugathapala Mendis & Others v. Chandrika Bandaranaike Kumaratunga & Others*[69] (the Water's Edge Case) in which former President Chandrika Bandaranaike Kumaratunga was found to have engaged in corrupt deals and contracts and of receiving a benefit, and was penalized for it.

As N.M. Perera correctly observed, the Presidential system offers 'unlimited scope for wielding absolute power' and such an 'unlimited power grows with the feeding and the lust cannot be easily satiated'.[70] The prophetic nature of this statement came to light with the passing of the Eighteenth Amendment to the Constitution in 2010, which removed Presidential term limits thereby giving an opportunity for a President to remain in power for an unlimited time.

The Judiciary

The provisions relating to the Judiciary in the 1978 Constitution was an improvement from the previous Constitution. There was a separate section in the Constitution entitled the 'Independence of the Judiciary' whereby provision is made for the appointment of Supreme Court and Court of Appeal Judges to be appointed by the President, hold office during good behavior and not be removed from office without an Order of the President made subsequent to an address of Parliament supported by a majority of the total number of MPs for removal on the ground of misbehavior or incapacity. Other safeguards were also included.[71] This included the creation of the Judicial Service Commission which has the power of appointment, disciplinary action, transfer and dismissal of the minor judiciary. The Seventeenth Amendment introduced the Constitutional Council who made recommendations as to the appointment of Judges to the higher judiciary, the Chief Justice and the Attorney General to the President and which he/she was bound to comply with. Unfortunately with the passing of the Eighteenth Amendment this requirement was removed.

In other democracies a much better consultative process is followed in the appointment of Judges. For example, in South Africa, the Chief Justice, the Minister of Justice, the Minister of Law and Order, the Bar Association and academics are all consulted in the appointment process by the body in charge of appointing the judges. There is an open process through which the judges apply for the post and a public hearing is held where the judge's opinions on specific matters are made known. The formal appointment is then made by the Head of State. The USA has a process where the President's appointees to the Supreme Court require the approval of the Judiciary Committee of the House of Representatives and the Senate. This provides the necessary checks and balances between the three arms of government.

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[68] Chanaka Amaratunga, *'Alternative Institutional Forms for the Sri Lankan State'*, in "Ideas for Constitutional Reform", 1989, at p. 350.
[69] 2008 (2) SLR 339.
[70] N.M. Perera, Critical Analysis of the New Constitution of the Sri Lanka Government, June 1979, at p. 15.
[71] See Arts. 107, 108 and 112 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Further, as N.M. Perera observes in his analysis of the 1978 Constitution, appointments made to the higher judiciary by the President have not always been based on seniority. He quotes Dr. Colvin R. de Silva, '[T]o leap-frog colleagues over the heads of their seniors is to discriminate against the seniors concerned. Supreme Court Judges are colleagues and are a collegium. The Chief Justice is only *primus inter pares*'.[72]

The Constitution does not provide for Judicial Review of Legislation following the 1972 Constitution in that respect. The constitutionality of Bills can be challenged only in the pre-enactment stage.[73] Unfortunately Bills are rushed through Parliament and MPs hardly have the time to read the legislation therefore the lack of judicial review of legislation could provide for violation of the Constitution if not challenged pre-enactment. There is also provision in the Constitution for a government to rush through a Bill if it is declared 'urgent in the national interest'. This provision was used in the early years of J.R.Jayawardene's presidency to pass two draconian laws without much public scrutiny.[74] Judicial review as has been observed is a form of majority constraint in a democracy since it is argued that a democracy does not connote only majoritarianism but also other rights and liberties.[75] When it is perceived that majoritarianism acts counter to these rights and liberties, judicial review is the mechanism that is sought to remedy this since the judiciary is a non-majoritarian agency.[76] Unfortunately both the autochthonous Constitutions of Sri Lanka seem to have considered Judicial Review as something alien to the Sri Lankan governance process.

- *Impeaching the Chief Justice*

Article 107 of the Constitution provides for the method in which a Judge of the Supreme Court or the Court of Appeal may be removed from office.

(1) Article 107 (1)- The Chief Justice, the President of the Court of Appeal and every other Judge, of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

(2) Every such Judge shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity :

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[72] Dr. Colvin R. de Silva in the Socialist Nation 20.08 1978, cited in N.M. Perera, Critical Analysis of the New Constitution of the Sri Lanka Government, June 1979. at p. 94.

[73] See Article 80 (3) of the Second Republican Constitution of Sri Lanka (1978).

[74] (i) Proscribing of Liberation Tigers of Tamil Eelam and other similar Organizations Act, No. 16 of 1978; and (ii) Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979.

[75] Rohan Edrisinha, *'In Defence of Judicial Review and Judicial Activism'*, in "Ideas for Constitutional Reform", 1989, at p. 468.

[76] *id.*

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of a such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative '

In 1984, an attempt was made to sack the Chief Justice (CJ), Justice Neville Samarakoon QC in response to a speech he had made at an award ceremony in a tutory in which he had criticized the government of the day. A select committee chaired by Hon. R. Premadasa was appointed to examine his conduct. The majority decision of the Committee was not in favor of the Chief Justice and a resolution requesting his removal, was subsequently signed by 57 members from the government side of Parliament. A second Select Committee chaired by Hon. Lalith Athulathmudali was then set up to investigate the conduct of the CJ and to report to Parliament. Senator Nadesan QC appeared for the CJ and analyzed the findings of the first select committee and argued that they were manifestly wrong and had misled the MPs who had signed the impeachment motion. He argued that the procedure of establishing a select committee was unconstitutional, since the select committee process led to Parliament using judicial powers in contravention of the Constitution and therefore the Standing Order prescribing the select committee procedure was *ultra vires* and unconstitutional. [77]

At the end of the Second Select Committee process (the CJ had already retired by that time), the Select Committee again came to a divided decision, the majority of which found that while the CJ's speech at the tutory did not amount to 'proved misbehavior' it did constitute 'a serious breach of convention and has therefore imperiled the independence of the judiciary and undermines the confidence of the public in the judiciary'. The minority decision of the Select Committee was that they did not find anything in the speech and its contents which could be interpreted as 'proved misbehaviour'.[78] The minority decision also requested the President to amend Standing Order 78A to something similar to the procedure in India where the removal of a Supreme Court Judge should be conducted by Judges chosen by the Speaker from a panel appointed for that purpose. This advice was unfortunately not followed upon and led to the unhappy events of January 2013 as discussed below.

A second attempt to impeach a Chief Justice was made in 2003 during the cohabitation period in which President Kumaratunga was forced to cohabit with a Parliament comprising a majority belonging to the United National Front. It was alleged that President Kumaratunga favored the then CJ Sarath N. Silva and had received judgments beneficial to the government and the independence of the judiciary was at an all time low. The UNF had tried for two years to impeach the then CJ and finally did so after a clash in Court

[77] Suriya Wickremasinghe, of Nadesan and Judges, The Nadesan Centre, 2003 at p.15.
[78] *id.*

between the CJ and the then Attorney –General. President Kumaratunga as a response to the impeachment motion took over three vital ministries and declared a state of national emergency. The impeachment motion included charges that CJ Sarath N. Silva had behaved in a manner unbecoming of a judge, had engaged in delaying tactics with regard to cases which were against certain highly connected people and of using the minor judiciary for his own purposes. The impeachment process came to a standstill though because of the Executive President using her powers to prorogue and then dissolve Parliament while the UNF struggled to retain the support of members who would vote in favor of the impeachment.

In late 2012, attempts were made to impeach Chief Justice Shirani Bandaranayake. The purported charges were, acting in a manner unbecoming of a Chief Justice, influencing the process of delivery of justice, conflict of interest as well as financial improprieties. Chief Justice Bandaranayake's appointment to the post of Supreme Court Judge itself had been a controversial one and had been challenged in Courts by prominent lawyers.[79] Justice Bandaranayake was appointed Chief Justice in May 2011 in order of seniority. It was generally thought that she would be less troublesome to the executive considering that in September 2010 she had presided over the bench that had upheld the constitutionality of the Eighteenth Amendment to the Constitution. As expected, in the first year of her being Chief Justice, several pro-government judgments/orders were handed down by the Court. These included the challenging of the new Emergency Regulations brought under the PTA, the challenge against compulsory leadership training by the military for university entrants and the indefinite postponement of election for some local authorities.[80]

This deferential position seemed to change when the Supreme Court considered the constitutionality of the 'Town and Country Planning (Amendment) Bill' which was challenged in Courts by the CPA.[81] The Chief Justice who chaired the bench that heard the case held that the subject of private lands was a devolved matter and therefore the Bill needed to be referred to all the Provincial Councils before being brought before Parliament. A similar decision was made when considering the constitutionality of the 'Divineguma Bill' (again challenged in Courts by the CPA).[82] In the Determination of the Divineguma Bill, the Chief Justice held that since a number of devolved subjects were involved, prior reference to the Provincial Councils was necessary. A second challenge to the Bill was made when the Government made reference to all Provincial Councils except the Northern Provincial Council which had not been constituted. The second challenge mentioned that certain provisions in the Bill were still inconsistent with the Constitution. The Government had referred the Bill to the Governor of the Northern Province. The Court held that reference to the Governor did not satisfy the requirement of reference to the Provincial Council and that certain provisions in the Bill were inconsistent with the Constitution and therefore

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79 *Edward Francis William Silva, President's Counsel and 3 Others v. Shirani Bandaranayake and 3 Others* (1997) 1 SLR 92.

80 Niran Anketell & Asanga Welikala, '*A Systemic Crisis in Context: The Impeachment of the Chief Justice, The Independence of the Judiciary and the Rule of Law in Sri Lanka*', Policy Brief, Centre for Policy Alternatives, April 2013 at pp. 5-6.

81 In re Town and Country Planning Ordinance (Amendment) Bill, SC Spl. Determination 3/2011.

82 In re a Bill titled Divineguma, SC Spl. Determination 1-3/2012.

required a two-thirds majority to be passed in Parliament.[83]

Attacks on the Judiciary had begun earlier that year in July 2012, when a Government Minister, Rishard Bathiudeen threatened a Magistrate in Mannar culminating in his supporters pelting stones at the Mannar courthouse. On September 19, 2012, the Secretary of the Judicial Service Commission (JSC)[84] Mr. Manjula Tillekeratne issued a statement that there were attempts being made to destroy the independence of the Judiciary which was later found to refer to an attempt made by the President to summon members of the Commission to meet him at his residence. This statement came close upon a vilification campaign being carried out against the Chief Justice and others opposed to the Divineguma Bill, in the State media.[85] The consideration and application of the Thirteenth Amendment by the Chief Justice in the aforesaid judgments was criticized by State media as encouraging separatist forces. Further, on the 28th of September the JSC Secretary addressed the media stating that there was a serious security threat to all of JSC members including 'the person holding the highest position in the judicial system.'[86] Subsequent to this on the 7th of October, 2012, Mr. Manjula Tillakeratne was assaulted by an unidentified gang in his car and was found seriously injured.[87]

On the day that the second communication by the Supreme Court on the Divineguma Bill was made, several MPs representing the governing UPFA communicated to the Speaker of Parliament a resolution containing fourteen allegations against the Chief Justice and signed by 117 Members of Parliament. Many improprieties and factual errors were noted by the general public when these charges became public. Nevertheless upon receipt of this Resolution the Speaker published the impeachment motion in the Order Paper of Parliament and eleven members of Parliament were appointed to a Parliamentary Select Committee in order to examine the conduct of the Chief Justice. Seven members of this select committee were from the government side and the remaining four were from the opposition.

Subsequently several Petitioners filed writ application in the Court of Appeal seeking to prohibit the select committee from continuing its proceedings. The Court of Appeal referred to the Supreme Court a question of constitutional interpretation on the day prior to the first scheduled sitting of the Select Committee.[88] The Supreme Court made a request to the Select Committee that it halt its proceedings till a determination was made on the constitutionality of Standing Order 78A which set out the procedure to remove senior judges. Unfortunately, the Select Committee which met the next day decided to continue with its proceedings despite the objections made to such action by the opposition members in the

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[83] In re a Bill titled Divineguma, SC Spl. Determination 4-14/2012.

[84] The Chief Justice is the *ex-officio* Chairperson of the Judicial Service Commission.

[85] Niran Anketell & Asanga Welikala, '*A Systemic Crisis in Context: The Impeachment of the Chief Justice, The Independence of the Judiciary and the Rule of Law in Sri Lanka*', Policy Brief, Centre for Policy Alternatives, April 2013 at p.7

[86] Daily Mirror, JSC Secretary says danger to the security,29th September 2012, accessed at http://www.dailymirror.lk/news/22281LjscLsecretaryLsaysL.dangerLtoLtheirLsecurityL.html

[87] Colombo Gazette, JSC Secrtary Assaulted, 7th October 2012, accessed at http://colombogazette.com/2012/10/07/jsc-secretary-assaulted/

[88] Niran Anketell & Asanga Welikala, '*A Systemic Crisis in Context: The Impeachment of the Chief Justice, The Independence of the Judiciary and the Rule of Law in Sri Lanka*', Policy Brief, Centre for Policy Alternatives, April 2013 at p. 8.

Committee. Chief Justice Bandaranayake then appeared before the Select Committee. The manner in which the Committee functioned was controversial with the Chief Justice being abused by several members of the Committee leading to her walking out of the proceedings. The opposition members of the Select Committee also announced that they would not participate further in the proceedings. The government media continued its mudslinging campaign against the Chief Justice.

The Select Committee shortly continued its proceedings and in its report found the Chief Justice guilty of 3 of the 14 charges made against her. The Chief Justice then filed a writ application in the Court of Appeal seeking to quash the report of the Select Committee and to prohibit the Speaker from acting on the report made by the Select Committee. The Supreme Court in the meanwhile commented on the reference made to it by the Court of Appeal stating that even though Article 107(3) provided for Parliament to address all matters relating to the presentation of a resolution, addressing, procedure of impeachment, proof of misbehavior and right of the Judge to appear and be heard through law or standing orders the procedure to be followed by a select committee had not been provided for either by law or standing order.[89] The Supreme Court determination also made reference to the fact that the investigation and proof of charges need to be exercised through a body established by law and that Standing Orders were not 'law' recognized by the Constitution and therefore Standing Order 78A should be considered unconstitutional. The Court of Appeal used this determination of the Supreme Court to quash the report of the Select Committee.[90]

Notwithstanding these decisions by the Higher Judiciaryand despite the strenuous objections of the Sri Lankan legal fraternity and the international legal community, Parliament went ahead with its impeachment motion requesting the President to remove the Chief Justice from office. This motion was passed with a vote of 155 in favour. The President immediately removed the Chief Justice from office and appointed former Attorney General Mohan Pieris as the new Chief Justice. Efforts were made to threaten Chief Justice Bandaranayake (who continued to question the legality of the impeachment) into subservience by using the armed forces to block her from leaving her house when she attempted to attend Courts.[91]

All in all, the circumstances surrounding the impeachment and its aftermath were unhealthy to the country's democratic system. In Parliament the language used during the debate on the impeachment motion also comprised filthy, abusive language with no regard to the respect that the position of the Chief Justice commands. The language of the Parliamentary debate as well as other news items in State media did not even concentrate on the protection of democracy, the independence of the judiciary or the rule of law ,but instead dealt with vilifying the Chief Justice. Likewise the impeachment was greeted by celebrations on the part of the government, including a large number of hooligans who were brought to Colombo to block a protest by lawyers against the impeachment that had been held on the 10th of January

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[89] *Chandra Jayaratne v. Anura Yapa and others*, SC Reference 3/2012, SC Minutes 01/01.2013.

[90] Court of Appeal Order on CA Writ No. 411/2012, CA Minutes o7/01/2013.

[91] For further reading on the impeachment see Impeachment: Documenting the Rajapaksa Regime's Scheme, Asian Human Rights Commission, March 2013.

2013, the day prior to the motion being passed.[92]

It was also telling that the impeachment received widespread attention throughout the world and attempts were made to soften the government stance on the impeachment. The International Commission of Jurists (ICJ) in a strongly worded statement called upon Parliament to stop the government's 'sad slide away from the rule of law' and to 'not act in defiance to the country's judiciary' since it would lead to a 'massive breakdown in the rule of law and checks and balances'. [93]The ICJ stated that the impeachment and its surrounding events left little room for State Officials responsible for human rights violations to be held accountable and was part of the climate of impunity that the government was fostering.[94] The ICJ had previously issued a statement requesting the government to adhere to international standards and practices during the impeachment process, a request which had fallen on deaf ears.[95]

In November 2012, the Special Rapporteur on the Independence of the Judiciary, Gabriela Knaul had expressed her concerns about executive interference with Sri Lanka's judicial system and the impeachment proceedings that had commenced against CJ Bandaranayake. Following up on this, concerns were expressed by the Commonwealth Secretary General as to the preservation of the rule of law and the independence of the judiciary. These concerns were echoed by Commonwealth Lawyers, Magistrates and Judges in separate statements.[96]

The Bar Association of Sri Lanka had also passed a resolution requesting the government to not proceed with the impeachment motion, warning that if the impeachment went ahead they would boycott the ceremonial welcome of a newly appointed Chief Justice. As the impeachment motion went through, the Bar Association, in a break with tradition, refrained from attending the ceremonial welcome of Chief Justice Mohan Pieris. The impeachment of Chief Justice Bandaranayake was the final nail in the coffin of an already weakened judiciary following the passage of the Eighteenth Amendment which allowed for political favoritism by giving the President a free hand in the appointment of judges to the higher judiciary. The impeachment also heralded the well known fact that it was the Executive which was all powerful and that the separation of powers was virtually non-existent in the face of a subservient Parliament and a dysfunctional opposition party, which put into question the genuineness of the democratic character of the State. The repercussions of being faced with a politicized judiciary to rule of law activists and minority communities will be telling especially in situations where the Supreme Court does not give reasons for dismissal of petitions.

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92 For more on this see Impeachment: Documenting the Rajapaksa Regime's Scheme, Asian Human Rights Commission, March 2013; and Kishali Pinto-Jayawardene, '*Democracy Mourns for Judgment fled to Brutish Beasts*', The Sunday Times (Sri Lanka), 13th January 2013.

93 See http://www.icj.org/sri-lankas-parliament-should-reject-motion-to-impeach-chief-justice/

94 *id.*

95 See http://www.icj.org/impeachment-of-sri-lankan-chief-justice-government-must-adhere-to-international-standards-of-due-process/

96 See Impeachment: Documenting the Rajapaksa Regime's Scheme, Asian Human Rights Commission, March 2013 for excerpts.

The Public Service

The 1978 Constitution like its predecessor rejected an independent Public Service. The Public Service Commission was reintroduced but its powers were diluted since it had to depend on Cabinet approval and delegation in making its decisions. For a short period of time, this was reversed during the period the Seventeenth Amendment was in operation since the Constitutional Council had the power to recommend the members to be appointed to the Commission. This was reversed by the Eighteenth Amendment and the Public Service is subject to much politicization at present.

Fundamental Rights

Chapter III of the 1978 Constitution provides for Fundamental Rights (FR) in more detail than found in the 1972 Constitution. The rights and freedoms are detailed and the restrictions are narrower and an enforcement mechanism (not found in the previous Constitution) was introduced by which a person whose fundamental rights was violated or who feared a violation by executive or administrative action could petition the Supreme Court, the highest Court of the land for redress.[97] However Article 126 of the Constitution provides a limitation for FR applications with the requirement that any person complaining of a FR infringement needs to approach the Supreme Court within one month of becoming aware of the violation. The Court expanded on this requirement by not taking into account the period such a complaint was before the Human Rights Commission for inquiry when calculating the one -month period.[98]

The Fundamental Rights in Chapter III is more detailed than the 1972 Constitution and has extra rights added to the list of rights protected. But, it still restricts itself to civil and political rights only while socio-economic objectives have been listed in the Directive Principles of State Policy in Chapter VI. This is in contrast to the innovation in the South African Constitution that lists economic, social and cultural rights in its Bill of Rights while the restrictions attached to such rights are connected to the resources available to the State in fulfilling them, a requirement similar to that found in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. (ICESCR).

Article 16 has been critiqued for undermining the supremacy of the Constitution because it affirmed the validity of pre-existing written and unwritten law notwithstanding any inconsistency with the FR Chapter of the Constitution. Since most of the law had been enacted in the 19th century, they were all validated even if they were in violation of the provisions in the FR Chapter. This is a major anomaly since no Constitution in the world had similar provisions. For example, the South African Constitution of 1996 stated in Article 2 that the Constitution was the supreme law of the land and any law or conduct inconsistent with it is invalid. The 1997 Constitution of Thailand had a similar provision in section 6.

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[97] Article17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

[98] See *Hewakuruppu v. Tea Commissioner*, SC Application 118/84, S.C.M. 30.11.1984, *Edirisuriya v. Navaratnam*, (1985) 1 SLR 394, *Siriwardene v. Brigadier J Rodrigo* (1986) 1 SLR 384 for further examples of the relazation of the one month time period. Further the Supreme Court in *Sriyani Silva v. Iddmalgoda, OIC Payagala & Others*, [2003] 1 Sri.L.R. 14, the Court held that the wife of a person who had been tortured to death could claim a fundamental rights violation on his behalf thus relaxing the rules of *locus standi*.

Therefore, Article 16 of the 1978 Constitution is a constitutional provision that serves to devalue the Constitution by making pre- existing laws superior to the provisions in the Constitution.

Seventeenth Amendment to the Constitution

The Seventeenth Amendment to the Constitution was adopted in October 2001 by the government led by the People's Alliance President Chandrika Bandaranaike Kumaratunga as a response to much criticism about the political partisan behavior of the public institutions. the Janatha Vimukthi Peramuna (JVP) led the calls for de-politicization of public institutions. Under the Seventeenth Amendment a Constitutional Council was set up which would comprise well respected, educated persons who are nominated by a select group comprising the President, Prime Minister. and those representing minority parties. The members of the Constitutional Council then identified people for other key institutions. These institutions were the Human Rights Commission, Public Service Commission, National Police Commission, Elections Commission, Bribery Commission, Finance Commission and the Delimitation Commission. The Constitutional Council also nominated names for the appointment of judges to the higher judiciary. as well as the Attorney-General, and the Auditor General. The President then made these appointments after consultation and with the concurrence of the Constitutional Council.

The provisions in the Seventeenth Amendment made it possible for public institutions to be independent from political interference since the choices for the independent Commissions were made by a non-partisan formation. Unfortunately, after the lapse of the time period of the first Constitutional Council, there was no agreement reached as to the composition of the second Constitutional Council between the political parties due to political antagonism. This led to an impasse which the Presidents of the time made use of to appoint their own political appointees to public institutions. Finally, the UPFA government in 2010 introduced the Eighteenth Amendment to the Constitution that removed many of the provisions in the Seventeenth Amendment including the creation of a Constitutional Council.

Eighteenth Amendment to the Constitution

The Eighteenth Amendment removed the previously existing two term limits on the Presidency and removed the need for the President to consult and concur with an independent, non-partisan body in making appointments to public institutions. This effectively led to further politicization of the public institutions as well as the judiciary (since the appointments to the higher judiciary were made directly by the President) and removed all the positive aspects introduced by the Seventeenth Amendment.

The Eighteenth Amendment provided for a Parliamentary Council comprising members of Parliament who could make observations about the persons nominated for the public commissions and the higher public positions stated above. The appointments are made by the President. But, the President is not bound to have their concurrence in making the appointments. Therefore the President can appoint any one he/she wishes to the posts whereby making such decision a political and partisan one. This can be seen

especially in the appointment of judges to the higher judiciary and the appointment of a new Chief Justice in January 2013 where seniority in the judiciary was not considered.

Referendum

The referendum is a unique feature in the 1978 Constitution. It provides for the President to place a question/proposal before the people and receive their approval. This dilutes the power of the legislature since it allows the President to approach the people bypassing Parliament. As N.M. Perera warns this would be potentially dangerous and widen the chasm between the President and Parliament when there is a cohabitation government (i.e. the President and majority in Parliament belong to different parties) in place.[99] Another use of the referendum is where if any amendment to the Constitution impacts on the fundamental provisions of the Constitution then it needs to be approved by a two-thirds majority of Parliament as well as by the people in referendum[100]. This provides for greater protection to certain constitutional provisions. The referendum has only been used once in a much critiqued instance when the right to vote at a parliamentary election was denied. The question asked and replied to affirmatively by the people in December 1982 was as to whether the people would like their elected representatives at the 1977 election to continue to hold their seats for a further period (till 1989) in lieu of an election. As a result, Parliament's term of office was extended till 1989. The people were thus denied their right to vote and select appropriate representatives till the Parliamentary Election in 1989.

The Proportional Representation Electoral system

A new and much fairer system of representation was introduced under the 1978 Constitution. The deficiencies in the earlier electoral system (First Past the Post/Single/Multi member electoral system) which allowed seats to be allocated disproportionately to the number of votes gained was quite clear during previous elections. For example, in the 1977 election, the UNP secured 83% of the seats while having obtained just 51% of the votes and the TULF (the main opposition emerging from that election) obtained 11% of the seats even though it obtained just 6% of the votes. The proportional system was expected to deliver seats in proportion to the number of votes gained by each party and allow for wider representation along the political spectrum within Parliament.

The new system of electoral representation did away with the earlier constituencies and made the District function as a constituency with the number of seats allocated to each district being in proportion to the total population of the district. Political parties would put forward competing electoral lists for each district and a person had to first vote for a party and then cast three preference votes within the party list. Therefore the emphasis was more on the party as being of importance and not the individual who stands for election. But since the voters were allowed preference votes, it allowed the persons who had the confidence of the people to be elected within the party and seats were not granted according to the wishes

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[99] N.M. Perera, Critical Analysis of the New Constitution of the Sri Lanka Government, June 1979, at p. 77.

[100] A question is considered approved if the more than two-thirds of the registered voters have voted and more than half of them have voted 'Yes'. If the total number of votes cast is less than two-thirds it is considered approved if more than one third of the total number of registered voters have voted 'Yes'.

of the party high command. This electoral system is not without its flaws, for example, the distancing between an elected MP and the people he/she represents since he/she represents a much bigger constituency. There have been proposals to modify this system of electoral representation but to little avail so far.

5. Conclusion

The Soulbury Constitution was enacted with a focus on the constitutional models of Britain and the other members of the Commonwealth. The Commissioners took into account the plural nature of the communities in Ceylon and attempted to diffuse ethnic tensions in building up a national consciousness through the Independence Constitution (e.g. through the creation of multi-member constituencies). The 1972 and 1978 homegrown or autochthonous Constitutions were enacted in order to further the economic goals of the ruling party at that time. For example, the United Front government designed the First Republican Constitution in order to further its radical economic agenda.[101] Constitutional scholar, the late Dr. Neelan Tiruchelvam has commented on this phenomenon by stating that the autochthonous Constitutions were designed as instruments for achieving political or economic goals.[102]

This was seen in the strengthening of particular arms of government in order to serve their particular purpose. For example, the 1972's National State Assembly was made all powerful despite the fact that this impinged on the notion of separation of powers. The Second Republican Constitution built upon the experience gained by the working of the First Republican Constitution and created a powerful executive. Sri Lanka is still experiencing the ill effects of these 'engineered' Constitutions, decades after independence, especially in the context of a severe crisis in regard to the rule of law. This necessitates a thorough study of our constitutional history to avoid repeating the mistakes of the past.

[101] R. Edrisinha & N. Selvakkumaran, "The Constitutional Evolution of Ceylon/Sri Lanka 1948-98", at p. 11.
[102] *id.*

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