Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects

Edited by

Asanga Welikala

"*Let the entire system of government be strengthened, and let the balance of power be drawn up in such a manner that it will be permanent and incapable of decay because of its own tenure. Precisely because no form of government is so weak as the democratic, its framework must be firmer, and its institutions must be studied to determine their degree of stability … unless this is done, we will have to reckon with an ungovernable, tumultuous, and anarchic society, not with a social order where happiness, peace, and justice prevail … Let us give to our republic a fourth power with authority over the youth, the hearts of men, public spirit, habits, and republican morality. Let us establish this Areopagus to watch over the education of the children, to supervise national education, to purify whatever may be corrupt in the republic, to denounce ingratitude, coldness in the country's service, egotism, sloth, idleness, and to pass judgment upon the first signs of corruption and pernicious example.*"

– Simón Bolívar, Address to the Congress of Angostura, 15th February 1819

"*It is needless to say that the executive power may not proceed from the Parliament … lest the resulting confusion of powers lead the Government to soon be nothing else but a cluster of assembled delegations … The truth is that the unity, the consistency and the internal discipline of the French Government must be sacred, lest the very ruling of the country be rapidly powerless and disqualified. How could such unity, such consistency, such discipline be preserved on a long term, should the executive power stem from the other power that it must balance and each of the members of the Government be, in their position, only the representative of a party, whereas the Government is collectively responsible before those representing the whole nation? The executive power must therefore proceed from the Head of State, placed above parties, elected by a college that encompasses the Parliament but that is much larger than it, and made up so he can be the President of the French … Republic … It behoves the Head of State to pay attention to the general interest when it comes to choosing men from the prevailing orientation of the Parliament. His mission is to appoint ministers and, first of all,*

obviously, the Prime Minister, who will conduct policies and lead the work of the Government … The Head of State's function is enabling laws and issuing decrees, because the former and the latter involve citizens in the State. His is the task of presiding over Cabinet Meetings and exerting that influence of the continuity from which a nation cannot be deprived. His role is serving as a referee above political contingencies, either ordinarily in attending Cabinet Meetings, or, in moments of serious confusion, in inviting citizens to express their sovereign decision in elections. His is the duty of being the warrant of national independence … should the fatherland ever be endangered."

– Charles de Gaulle, Address in Bayeux, 16th June 1946

"*When I addressed you last in 1948, the year we regained our freedom, our people had great expectations and high hopes. When we look back over these 18 years, not in one sphere alone but over the whole gamut of life in this country, we find a record of achievements in some and failures in others…the per capita wealth of our people has not kept pace with similar progress among people of the developed nations of the world. The politicians, especially those in power are the target of criticism. It is argued that the politicians in power know what is wrong in the economy, they are aware of the remedy, but the desire to be popular and to secure a majority of votes at a general election prevents them from taking the correct remedial measures. They in turn blame the system of government … While continuing the preservation of democratic freedoms as one of our achievements since independence, we have not achieved the economic freedom our people are entitled to. This has been one of our major failures … If then the system of democratic government has failed in some aspects, we should not hesitate to think of changes and amendments in that system where necessary … [In the presidential systems of France and the US]… the Executive is chosen directly by the people and is not dependent on the Legislature during the period of its existence, for a specified number of years. Such an executive is a strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature; not afraid to take correct but unpopular decisions because of censure from its parliamentary party.*

This seems to me a very necessary requirement in a developing country faced with grave problems such as we are faced with today."

– J.R. Jayewardene, Keynote Address to the Ceylon Association for the Advancement of Science, Colombo, 14th December 1966

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Government, Fundamental Rights, and States of Emergency in Sri Lanka (2008); and as co-editor, *Essays on Federalism in Sri Lanka* (2008), and *Power Sharing in Sri Lanka: Political and Constitutional Documents 1926 – 2008* (2009). He is currently working on a monograph on the Sri Lankan constitution for the Constitutional Systems of the World Series (Hart), and a co-edited collection with Sujit Choudhry and George Anderson on territorial cleavages in constitutional transitions (Oxford University Press). His research interests lie in comparative constitutional law, applied constitutional theory, and Commonwealth constitutional history.

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PREFACE

Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects is the second in a series of volumes published by the Centre For Policy Alternatives (CPA) on the structure of the state, the first being *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* also edited by Dr Asanga Welikala, currently ESRC Teaching Fellow in Public Law at the School of Law, University of Edinburgh, Associate Director of the Edinburgh Centre for Constitutional Law, and CPA's Senior Researcher in Constitutional Affairs.

This volume on presidentialism comes out some thirty-seven years after the executive presidency was introduced to the constitutional architecture of Sri Lanka and in the midst of yet another attempt to reduce the powers of that office, if not abolish it altogether. Abolition of the executive presidency has been a persistent theme in presidential elections with the last two winning candidates – in 1994 and 2005 –promising to do so on election: a promise never kept. In the recently concluded presidential election of 8th January 2105, in which democratic governance, corruption, and the abuse of power were the main elements of the opposition campaign, abolition of the executive presidency served as the centrepiece of the campaign, drawing support from political actors across the country.

This book comes out as the Nineteenth Amendment to the Constitution reducing the powers of the Executive President, restoring the balance of executive powers in favour of the Prime Minister and Parliament, and restoring the oversight committees of the Seventeenth Amendment is being finalised. The CPA, which has since its inception consistently advocated and supported constitutional reform for liberal democratic governance, including challenging the Eighteenth Amendment in the Supreme Court, is both pleased and proud to publish this volume as an integral component of its core research and advocacy programme. CPA hopes that this book will serve both as an intellectual resource that will inform the debate that follows and as a reference work into the future for policymakers, scholars,

and indeed, the citizens of Sri Lanka who are the primary stakeholders in the constitution-making process.

The book contains contributions from eminent Sri Lankan and foreign scholars and activists, many of who have been identified with constitutional reform in this country. CPA thanks them for their commitment, acknowledges and is greatly appreciative of the quality and richness of their contributions, clearly informed and underpinned by considerable expertise and experience in the field. Special thanks are due to Dr Welikala. He conceived and designed this series, has now edited four volumes in it, notwithstanding the pressures of writing and receiving his doctorate in the process. The series is a testament to his commitment to the organisation and its extensive research and advocacy in the field of constitutional reform.

CPA expresses its thanks to its initial funding partner in the series, the Friedrich Naumann Stiftung für die Freiheit (FNF), who were effectively shut down in Sri Lanka by the previous regime. We gratefully acknowledge their support to us throughout the years in advancing liberal democracy in Sri Lanka. Likewise, CPA expresses it special thanks to the Swiss Federal Ministry of Foreign Affairs, which supported us thereafter to the successful launch and publication of the book. This support enabled Professor José Antonio Cheibub of the University of Illinois at Urbana-Champaign, a leading expert on presidentialism, to deliver the keynote address at the online launch of the volume and to participate in a roundtable discussion on the subject with leading Sri Lankan stakeholders.

Constitutional reform has been on the public policy agenda of Sri Lanka for decades and may well now be entering a decisive phase. CPA hopes that in pursuance of its mandate, this book too will serve as a valuable and constructive resource in this process and for scholars in the years to come.

Dr Paikiasothy Saravanamuttu
Executive Director
Centre for Policy Alternatives

EDITOR'S INTRODUCTION

In 2015, the Second Republican Constitution of Sri Lanka marks the 37th year of its promulgation in 1978, making it the longest serving constitution in post-independence Sri Lanka. It instantiated executive presidentialism as its centrepiece – the institution itself having been introduced prior to its enactment by way of an amendment to the previous 1972 Constitution – which has had a deep and abiding influence on Sri Lanka's legal and political culture. At the time of its enactment, it represented a radical departure from the models of executive collegiality that had hitherto characterised the constitutional forms of Ceylon / Sri Lanka since the introduction of universal electoral democracy in 1931, and it has since come to dominate both institutional relations within Sri Lanka's system of government, as well as the landscape of electoral politics more broadly. Ever since its introduction, there has been vigorous debate about the adverse consequences of executive presidentialism from the perspectives of democracy and pluralism.

During the period of its operation, the constitution has been amended eighteen times, but the predominant motivation underlying the large majority of these amendments has been to strengthen the presidency at the cost of democracy and checks and balances. Two exceptions to this have been the Thirteenth Amendment, which introduced a framework of provincial devolution but which has not been implemented to the full extent of its potential; and the Seventeenth Amendment which sought to de-politicise key state services, but which was neutralised by the Eighteenth Amendment.

With the enactment of the Eighteenth Amendment to the Constitution in 2010, which by abolishing term limits and the restraints on presidential power established by the Seventeenth Amendment, strengthened and further entrenched the institution even beyond what was contemplated in 1978, Sri Lanka entered a phase of hyper-presidentialism. The changes wrought by the Eighteenth Amendment were only the formal veneer of a more insidious style and approach to government adopted by the

regime of President Mahinda Rajapaksa, which was based on a package of ethnic chauvinism, populist authoritarianism, and clientelist corruption not seen before.

Until the dramatic political events in the latter part of 2014 saw the wholly unexpected rejection of the Rajapaksa regime in the presidential election of 8th January 2015, it appeared not only that presidentialism would be with us for the foreseeable future, but also that the entire nature of the Sri Lankan state would be changed beyond recognition under the influence of Rajapaksa presidentialism. With the election of President Maithripala Sirisena and a new government formed under Prime Minister Ranil Wickremesinghe, there is now a 100-day reforms programme underway which contemplates the abolition or at least a substantial reduction in the powers of the executive presidency. The new institutional configuration of the Sri Lankan state in general and the shape of its executive in particular are yet to emerge, but it is to be hoped that the new framework would restore a more even balance between the three branches of government, and thereby promote the principles of constitutional government for which the people of Sri Lanka clearly voted in January 2015.

This edited collection was originally intended to be published in 2013, on the 35th anniversary of the constitution. For a multiplicity of reasons including that our original funding partner, the Friedrich Naumann Stiftung für die Freiheit (FNF), was effectively expelled from the country by the Rajapaksa regime, that objective could not be met. Nonetheless, as we proceeded with the project while seeking funds elsewhere, the scheme of the collection as well as the contributions continued to be based on the political realities that obtained prior to January 2015. After the presidential election and especially the commencement of the reforms programme, however, a decision had to be made whether to undertake a major reorientation of the rationale of the book (together with the attendant revisions to individual contributions), or whether it would be more useful to publish the essays while the reform process was actually underway. We have decided upon the latter course as being the more useful contribution to the constitutional reform debate in Sri Lanka. We feel strongly that the essays in this collection provide fresh analytical insights in

understanding the presidential institution from multidisciplinary perspectives, suggest alternative institutional forms and principled rationales for its reform, provide comparative and theoretical elucidation towards informing the possibilities and pitfalls of reform, and finally, stand at least partial testimony to the excesses of presidentialism that we have recently witnessed in Sri Lanka. Seen in this light, the discussion in many chapters is prescient and at least some of the reform rationales canvassed by authors are currently at the heart of constitutional reform.

The chapters are grouped together under five themes. The first section deals with the institutional characteristics of the 1978 presidential constitution, with Chapter 1 by Radhika Coomaraswamy providing an overview of the institutional changes introduced by it in the light of what went before. Chapters 2 and 3 by Reeza Hameed and Nihal Jayawickrama explore the situation of Parliament and the courts in the context of the executive presidency. In Chapter 4, Sachintha Dias analyses the case law of the Supreme Court in the way it has defined the nature and powers of the presidency through constitutional interpretation. In Chapter 5, Niran Anketell discusses the issue of legal immunity from suit of the president, the comprehensive nature of which has been one of the most criticised aspects of the 1978 Constitution. The last three chapters in this section explore different dimensions of one of the most vexed problems that has plagued Sri Lanka for most of the currency of the present constitution: the extra-institutional political violence, perpetrated by insurrectionaries, secessionists, and the state in equal measure. In Chapter 6, Deepika Udagama analyses the constitutional and statutory regime for the exercise of emergency powers and the role of the executive presidency in a state of emergency. In Chapter 7, Laksiri Fernando looks at the problems we have had with the protection, promotion and enforcement of human rights under the 1978 Constitution. And in Chapter 8, Ambika Satkunanathan provides an account of the issue of securitisation and militarisation that became a central feature of Sri Lankan presidentialism after the war ended in 2009.

The second theme represents two of the basic rationales advanced in favour of presidentialism, *viz.*, that it would protect the interests of minorities and that it would promote economic development.

In Chapter 9, therefore, Luwie Ganeshathasan examines the President's role in the framework of devolution under the Thirteenth Amendment. In Chapters 10 and 11, Kumaravadivel Guruparan and A.M. Faaiz discuss the impact of presidentialism on, respectively, the Tamils and the Muslims, and the extent to which the form or system of government is relevant to the protection of minority interests in Sri Lanka's plural polity. In Chapter 12, Rajesh Venugopal interrogates the rationale that a strong executive is needed for economic development.

In any constitutional system, the manner in which power is exercised within, and indeed beyond, legal institutions is deeply influenced by cultural and historical factors that resonate with both power-wielders as well as the society which votes for them. As François Guizot said in *Essais sur l'histoire de France* (1836), "Depuis la fin du treizième siècle jusqu'à nos jours, toutes choses ont tendu, en France, vers le triomphe de la monarchie pure, en Angleterre, vers celui du gouvernement parlementaire … [C'est] le parlement qui a présidé aux destinées de la Grande-Bretagne comme la royauté à celle de la France." [Since the end of the thirteenth century until today, everything has tended, in France, towards the triumph of pure monarchy, and in England, towards that of parliamentary government … [It is] Parliament that has presided over the fate of Great Britain, as Royalty has over that of France.] In Sri Lanka, anthropologists and historians in particular have produced some fascinating insights into the way the modern presidential institution was conceived, and then how various presidents have seen their role in occupying office and exercising its powers, and in particular how ideas about the ancient Sinhala-Buddhist monarchy have influenced these choices. These themes are explored in Chapter 13, by Asanga Welikala, where the sources of the ancient Sinhala-Buddhist kingship are explored. In Chapters 14, 15, and 17, Roshan de Silva Wijeyeratne, Ananda Abeysekera, and Michael Roberts discuss the nature of presidencies of Presidents Jayewardene, Premadasa, and Rajapaksa, respectively. In Chapter 16, Kalana Senaratne provides an account of *Jathika Chinthanaya*, an intellectual school of nationalist thought that has been extremely influential in sustaining the social discourse in support of the monarchical presidency.

Comparative experiences are an important source of ideas for constitutional reform and in the chapters grouped together under the third section, the essays consider a range of applicable options. In Chapter 18, Suri Ratnapala sets out a theoretical framework based on the separation of powers along which the choice of the form of government might be determined if liberal democratic norms are to be realised. In Chapters 19 and 20, Mark Hager and Nikhil Narayan discuss the American experience, while in Chapter 21, Kamaya Jayatissa explores the French experience. In Chapter 22, Rehan Abeyratne undertakes a comparative analysis of the Indian and Sri Lankan experience of experimenting with forms of executive power.

In the final set of chapters, the essays turn to questions of alternatives and theoretical perspectives. In Chapter 23, Michael Roberts reflects on the deeper questions of ethnic pluralism that have denied Sri Lanka a stable constitutional settlement since the 1970s. In Chapter 24, Paikiasothy Saravanamuttu discusses the relationship between nation-building and the institutional form of the state. In Chapter 25, Harshan Kumarasingham reminds us of the development of the conventions relating to the exercise of executive power in the early independence years. In Chapter 26, Chandra de Silva returns to a theme developed over twenty-five years ago, when the concept of the 'overmighty executive' was first introduced by him into the Sri Lankan political lexicon. In Chapters 27 and 28, respectively, Jayampathy Wickramaratne argues the case for the abolition of the executive presidency from the perspective of the Left, while Rohan Edrisinha traces the liberal critique of presidentialism from the outset.

Last but not least, a word on the picture that features on the dust jacket cover and as the frontispiece of the book by Chandraguptha Thenuwara. Entitled '*Bala Vannama*', this original drawing done specifically for this book (and presented by the artist at the Edinburgh Festival in 2014), resoundingly captures the rampantly uncontrolled and politically immoral nature into which the institution of the executive presidency had evolved since of late. It is a telling reminder of the recent past, and an encouragement as we undertake the current constitutional reforms, about what we should avoid in the future.

I wish on behalf of the Centre for Policy Alternatives (CPA) to thank the Friedrich Naumann Stiftung für die Freiheit (FNF) for funding and co-hosting our first seminar in this project in 2012 in Colombo, the London School of Economics (LSE) and Dr Rajesh Venugopal for hosting a second seminar in relation to this project in 2013 in London, and finally, the Swiss Federal Department of Foreign Affairs for funding the book, the launch, and the website. Without the enthusiastic support of Davide Vignati in particular, this book would never have seen the light of day.

In addition to the contributors, who have been extremely considerate with their time and patience, my heartfelt personal thanks go as always to Shehara Athukorala, Sanjana Hattotuwa, Jagath Liyana Arachchi, and Paikiasothy Saravanamuttu.

Dr Asanga Welikala
Colombo
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Volume 1

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Bonapartism and the Anglo-American Constitutional Tradition in Sri Lanka: Reassessing the 1978 Constitution

Radhika Coomaraswamy

> I think you must trim your sails to your own country's needs and resources and forget about philosophies and theories.
>
> J.R. Jayewardene interviewed by *The New Internationalist*, November 1981

The elections of 1977 saw a nation-wide disillusionment with the 'idealism gone wrong' policies of the United Front (UF) that ruled Sri Lanka from 1970-1977. The comprehensive defeat of the government parties of that era gave the centrist-right United National Party (UNP) a three-fourths majority in Parliament.[1] Under the leadership of an iron-willed strategist such as J.R. Jayewardene, the UNP was fundamentally concerned with the realities of power and the need for rapid economic development – preferably Singapore style. Experimentation was to be based on tried formulas and *ad hoc* responses to the crises of underdevelopment. There was a deliberate antagonism to the romantic visionary aspects of the old government that had, towards the later years, led to excuses for the abuse of power.

The realism that guided Jayewardene and his advisors was animated by two concerns: the need for political stability and the push for rapid modernisation. They were admires of the 'hard-headed' policies followed by Lee Kwan Yew in Singapore and General Park in South Korea – policies which had led to 10 per cent growth rates and rapid industrialisation. As Jayewardene had been an active participant in the parliamentary process since the early 1930s, he initially wished to be faithful to the concepts and practices of representative democracy, though midway through his regime he seemed to lose all those concerns. The use of a referendum to bypass general elections was an example of this excess. As a member of the privileged elite and a supporter of rapid economic growth, he was also preoccupied with the need for stability in a developing society.[2] He saw the basic mission of the 1978 Constitution as an attempt to move beyond the apparent contradiction between popular participation and stability for national development.

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[1] The UNP received 83.3 per cent of the parliamentary seats.
[2] J.R. Jayewardene, Inauguration Speech, Proceedings of Seminar on Parliamentary Processes, July 1980 (Colombo: Marga).

Despite the fact that the 1978 Constitution was not born of revolutionary exuberance, it was to radically alter the structure of government. The concern with stability was to find expression in the introduction of a presidential system of government[3] and an electoral scheme of proportional representation.[4] Jayewardene had always stated that the proper balance between democratic participation and stability for the implementation of development projects would be best realised in a presidential system of government. It was his belief that once the voters had made their choice, a strong executive that would have maximum leeway to implement its programme for development should characterise the period between elections. The president would ensure continuity in executive implementation, despite the fate of parliamentary politics and coalitions.[5] In addition, presidential elections would be based on a national electorate so that the head of state would have to appeal to all constituencies throughout the island to be elected.

Many Sri Lankan political scientists initially lauded this radical departure from the Westminster model of government. Professor A.J. Wilson in his analysis of what he termed the 'Gaullist' constitution argues that this system is the last obstacle to dictatorship in a developing society. Though it contained the 'harbinger' of authoritarianism, he claimed that it may be the only recourse to developing countries that wish to retain a semblance of democracy while uniting for growth and development.[6] The fundamental 'realist' belief that developing societies require stability and a measure of benevolent authoritarianism would naturally sanction a greater weightage of power to be granted to the political executive and a minimisation of the structures of accountability. Even in 2014 this argument was being forwarded with an insistence that an executive presidency provides for stability, continuity, and a greater ability to respond to threats to national security.

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[3] The 1978 Constitution: Articles 30-41.
[4] The 1978 Constitution: Article 99.
[5] Jayewardene (1980).
[6] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka (1978)*** (London: Macmillan): pp.xvi, xvii, 1-9, 36-41.

Time has proven Wilson to be terribly wrong. Historical experience has shown us that in developing societies, the presidential system is not so much the last stance of democracy but the first step toward dictatorship.[7] It was Wilson's belief that the first executive president Jayewardene was a committed parliamentarian and a strong democrat.[8] He believed that Jayewardene would mould the office to embody the highest ideals, and that future presidents would be bound by the practices that he would perpetuate.[9] In fact the opposite happened. Jayewardene set the example by using the presidency to maximise his political power and the political power of the party. In a cultural context that still venerates kings, the president soon believed he could behave like a monarch with all the trappings and symbols of executive power. This led to the arbitrary and irresponsible use of state power, including for personal gain. President Rajapaksa took it to a new level with songs and programmes on national television referring to him as King Mahinda.

Custom and convention in Sri Lanka proved to be fragile defences against arbitrary acts by presidents and their coteries.[10] The concentration of power in a highly exalted office, especially in a developing society, has had disturbing consequences. The balance between stability and democratic participation that Jayewardene wanted to achieve ended as a sham. Instead of stable executive power, over time we have seen the erosion of the rule of law and governance by the whims of one man/woman/family and their followers. Though a parliamentary executive with a two-thirds majority in parliament may be tyrannical, the inherent accountability of a parliamentary executive to the collective institution of parliament as well as to backbenchers of the party is a better safeguard against too much concentration of power. In fact the recent crossover by Maithripala Sirisena in December 2014 points to the check that a parliamentary system has that an executive presidency does not. There is also an intuitive political belief that concentration of power in an institution consisting of

[7] Pakistan for e.g. chose the presidential system. After the death of Jinnah the system headed toward authoritarianism.
[8] Wilson (1980): p.50.
[9] Ibid.
[10] See chapter by Harshan Kumarasingham in this book.

many members is still more conducive to democracy than the concentration of power in the hands of a single individual. History has proven that the hopes expressed by such theorists as A.J. Wilson have been completely trumped by the fears of some of the more vocal critics of the presidential system.[11] Many, including this author, believed that as the presidential election is based on a national electorate, we would have an executive that represents all the people of the country. However, that too has not been the case. President Rajapaksa did the exact opposite – completely ignored the minorities and solidified his support among the majority Sinhala population. Given the complete abuse of this system and some of its grotesque manifestations, by 2013, an increasing number of people were convinced that the presidential system should be abolished. By the end of 2014, abolishing the presidency or greatly trimming its powers had become the main platform of a common opposition.

The second aspect of the 'stability' philosophy put forward by the 1978 Constitution is the system of proportional representation. While the rest of the democratic world appeared to be searching for dynamic devices that would help them escape the stalemate of centrist coalitions, the 1978 Sri Lankan Constitution was deliberately concerned with placing a brake on an electoral system that had resulted in a 'pendulum-swing' of governments and policies. It was felt that such extremities of choice were not conducive to rational long-term polices for economic development.

In introducing proportional representation, the drafters were under the belief that the instability resulting from pendulum swings was particularly disturbing because it was not representative of political opinion. The Report of the Select committee which drafted the 1978 Constitution points to the fact that in the 1970 general election, the Sri Lankan Freedom Party (SLFP) was able to secure 60.3 per cent of the total number of seats in Parliament with 36.9 of the total popular vote. The UNP

[11] See for e.g., N.M. Perera, '*Second Amendment to the Constitution*', ***Socialist Nation***, 21st October 1977; and also see C.R. de Silva, '*The Constitution of the Second Republic of Sri Lanka (1978) and its Significance*' (1979) ***Journal of Commonwealth and Comparative Politics*** 17(2): pp.192-209. See also the chapter by Jayampathy Wickramaratne in this book.

with 37.9 per cent of the total vote was only able to secure 11.3 per cent of the seats in Parliament. In 1977, the UNP with 50.9 per cent of the total popular vote received 83.3 per cent of the seats in Parliament, while the SLFP with 29.7 per cent of the total popular vote secured only 4.8 per cent of the total seats.[12] The electoral demarcations coupled with a system of first-past-the-post electoral votes had resulted in this large discrepancy.

Proportional representation would ensure that at least on the district level political parties would receive seats in parliament in proportion to the number of votes they collect at any given election. Judging from the past elections and past statistics, the drafters concluded that under this scheme a party would not get the two-third majority in Parliament needed for arbitrary policy-making. With a stroke of the pen, the dynamics that had characterised Sri Lankan political life for over a decade had been rendered insignificant. This radical alteration of the system of representation taken together with an executive president ensured immediate transformation of the quality of decision-making and the style of democratic participation.

With time the proportional representation system began to show its flaws. It broke the bond between the MP and his electorate. In the past the MP knew practically every person in his electorate and cultivated its growth. Now they must campaign on a district basis. An element of intra-party competition was later brought in through an amendment that allowed for preferences to be given among those contending for one party. This complicated the election process and ended up with internecine warfare, which was often worse than inter-party violence. Voters also became quite confused resulting in a large number of spoilt votes.

Jayewardene's main reason to introduce proportional representation was to stop a two-thirds majority to amend the constitution easily or to adopt drastic laws. He wanted his constitution to become a permanent one. For most of the thirty years after the adoption of his constitution, this was true. Only with the Rajapaksa presidency did a party get enough votes to get a two-thirds majority, and as the drafters feared, the first thing he

[12] See Parliament of Sri Lanka, Report of the Select Committee on the Revision of the Constitution, June 1978 (Colombo): p.90.

did was to dramatically alter the nature of the constitution. It is therefore clear that whether under a parliamentary system of government or a presidential system, the easy ability to get a two-thirds majority by a single party is a dangerous thing. The Rajapaksas for example used the two-thirds majority to introduce the Eighteenth Amendment that did away with term limits for the president as well as neutralised the independence of important public service commissions and the higher judiciary. For these reasons, an ideal electoral system for Sri Lanka would be a hybrid one that combines proportional representation with the first-past-the-post system; one that is more in touch with the people than a proportional representation system, but which does not result in easy two-thirds majorities and pendulum swings.

The 1978 Constitution was dramatically different from both the Soulbury Constitution and the 1972 Constitution for the following reasons. Firstly, the focus of 'decisional mobility' under the 1978 Constitution has been removed from a parliamentary executive enjoying a large majority in parliament to an executive president with a base of support independent of the legislature. The president is head of government, head of cabinet,[13] commander-in-chief, and is endowed with emergency powers under the Public Security Ordinance.[14] In addition, he has inherent powers that make him appear even more formidable. If through proportional representation the legislature can no longer command vast majorities, losing its definitive character by reflecting pluralistic elements in society, then it will be the president as head of the cabinet of ministers who will determine the priorities of development. He would emerge as the central figure of decision-making often facing a divided and perhaps impotent legislature. This is why in the end, the reality of political power under the 1978 Constitution eventually centred on the personality of one individual.

It has been argued theoretically that the introduction of an executive president does not enhance 'decisional mobility' but actually puts a brake on quick decisions as it brings with it an inherent system of checks and balances. There is a potential of

[13] The 1978 Constitution: Article 33.
[14] Ibid: Article 155.

deadlock and stalemate between the president and parliament, and because of the proportional representation system, deadlock and stalemate within parliament. However, the 1978 Constitution gives considerable power to the president to resolve a stalemate in his favour – he has the power of dissolution within a given period[15] and the right to defeat the Appropriation Bill.[16] He also has a right to assign ministries to himself. Yet, a stalemate could still eventuate as law-making is still vested in Parliament[17] without a presidential power to veto. In addition, parliament remains in control of appropriations and without appropriation a government cannot govern. Finally, the cabinet of ministers who guide the president must be drawn from the members of parliament who command the majority.[18]

A.J. Wilson, among the others, asserted that this possibility of stalemate is a positive factor in a society that is so divided and politicised. He saw the strategy as one that would force parties to engage in consensus politics.[19] Others have argued that the bitterness and rivalry surrounding party politics in Sri Lanka will lead to deadlock not consensus, and the confrontation between parliament and president may result in a president arrogating greater powers to himself, thus tipping the balance of government towards a greater measure of partisan authoritarianism. Though the 1978 Constitution may appear to provide a system of checks and balances that may lead to stalemate or deadlock, the strength of the executive presidency under the constitution has in fact counteracted these tendencies.

Any constitutional debate must of course be tested by the realities of power and its actual exercise within a given set of conditions. Theoretically speaking, the 1978 Constitution is superior in style, structure, and technique to the constitutions that preceded it. However, its operation in the reality of Sri Lankan politics must be analysed from a different frame of reference. It is in this light that the presidential elections and the nation-wide referendum of 1982 were of concern to those interested in constitutional law.

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[15] Ibid: Article 70, see also Article 150.
[16] Ibid: Article 150(3).
[17] Ibid: Articles 75 and 76.
[18] Ibid: Article 43.
[19] Wilson (1980): p.47.

The exercise of the franchise in 1982 provides us with an insight into the precedents and customs that eventually clothed the skeletal outlines of the 1978 Constitution.

The 1982 presidential campaign was in many ways a 'hybrid' between parliamentary politics and the presidential style. Most of the opposition candidates concentrated on party programmes and criticism of present government policy. Theirs was the style of speech that had collected votes on platforms where the 'political party' and a coalition of political parties still remained the most important aspect of political life. President Jayewardene however, introduced the new style of the 'personalised president' asking the electorate to choose the 'best leader' irrespective of political ideology. The personal qualities of the leader, his schooling, his experience, etc., were accentuated over abstract principles and party programmes. The electorate was called upon to judge the 'better man' and not the better policies.

Personality undoubtedly has played an important role in Sri Lankan politics since independence but it has done so despite the constitutional system. The 1978 Constitution, on the other hand, has made personality the most important aspect of the franchise since the election of the executive president will greatly depend of the type of image he wishes to project to the public. It could be argued, especially by those who do not accept the role of ideology in history, that this is an improvement in the style of politics as it calls for integrity and leadership ability. But experience in the U.S. has proven that the manipulation of the media and the development of 'cult' figures may obscure the important substantive political issues that are before the people

Constitutionally speaking this emphasis on personality has had an effect on the entire political culture as well as the role and importance of parliament. A president's independent base of support with its emphasis on primordial feelings of personal loyalty has always been more powerful than the legislature's base of support. The defused nature of parliamentary politics with its parochial enclaves and multiple personalities were not be able to withstand any confrontation with a strong executive president. This was in fact what happened with regard to the referendum of 1982 to extend the life of the present parliament without holding

general elections. Loyalty to Jayewardene proved to be far more important than the abstract commitment to the integrity of a constitutional body. Unlike the U.S. President, the Sri Lankan executive armed with the referendum can bypass the legislature by constant appeal to his loyal base of personal support. Though the technical structure of the constitution is not concerned with this end-result, actual experience in Sri Lanka has already proven that the entrenchment of an executive president will greatly accentuate the politics of personality and not the politics of principle. The points of concern are that while principles may be debated, evaluated, and disproved, the judgement of personality is an enterprise deeply rooted in the myths and symbols of a given civilization. As research in psychoanalysis has repeatedly taught us, these symbols are easily exploited by manipulation of words and the media.

Despite the increase of power in a presidential executive, the 1978 Constitution did envision greater curbs on certain aspects of government action that, over time, have been superseded by arbitrary action or a need to fight an insurgency. For example, the Public Security Ordinance that was part of the 1972 Constitution conferred complete power on the executive to rule by decree in a state of emergency. The 1978 Constitution added a new safeguard requiring that such broad powers be subject to legislative approval every month. As amended, the new Public Security Ordinance is more benign than its predecessor. Though judicial review plays no part, the legislature is given the unique power of checking the president. Of course, if the president's party commands a two-third majority in parliament, the requirement of legislative approval may not be an adequate safeguard.[20] At the time it was drafted the 1978 Constitution cast in a 'realist' frame of reference, and did show awareness of the need to remedy history where the Public Security Ordinance had often been the excuse for the abuse of power by successive governments. However, the restrictions placed on the police and armed forces by such measures was immediately counteracted by the government adopting the Prevention of Terrorism Act. Unlike an emergency, the PTA is permanently in the statute book and denies citizens some of the basic fundamental rights regarding

[20] The situation in Sri Lanka after 1977 elections.

arrest, detention, and trial generally recognised by the common law and international human rights. A generation of Sri Lankans both Sinhala (the JVP insurrection) and Tamil (Northern insurgency) have felt the weight of this Act.

Under the 1978 Constitution, the liberal concept of checks and balances also reappeared in the form of a strengthened judiciary. The Constitutional Court was discarded and the Supreme Court is left with exclusive jurisdiction over constitutional matters.[21] An independent Judicial Service Commission was expected to depoliticise the judiciary and grant it a measure of independence and autonomy.[22] Finally, for the first time in Sri Lanka the constitution ensured judicial review of executive action.[23] Yet, the constitution did not give the judiciary the supreme place in the constitutional structure it occupied prior to 1972. The judiciary is still at the mercy of the legislature.[24] It is parliament that exercises judicial power through the courts, denying the latter full independence. This element would be understood in full force when Chief Justice Shirani Bandaranayake was removed from office in 2013. In addition there are strange anomalies. Bills that, in the view of the cabinet of ministers, are 'urgent in the national interest' must be scrutinised by the judiciary within 24 hours,[25] not giving the judiciary time to hear different points of view to make a sound decision. Existing laws that are inconsistent with the constitution are allowed to stand.[26] This is meant to cover the system of personal, family, and religious law that existed before, and which feminists have often challenged, asking for a Uniform Civil Code in line with the Convention on the Elimination of Discrimination Against Women. Finally, there is no judicial review of *enacted* legislation and the constitution envisions only proscriptive annulment.[27] This means that the Court is not given the opportunity to evaluate a law in terms of what happens in practice when it is implemented. This positivist approach to law

[21] The 1978 Constitution: Article 120 and 125.
[22] Ibid: Article 112.
[23] Ibid: Article 126
[24] See H.W. Tambiah, '*The Independence of the Judiciary*' (1979) ***Journal of Historical and Social Studies*** 7(2): p. 68.
[25] The 1978 Constitution: Article 122.
[26] Ibid: Article 84.
[27] Ibid: Article 124.

in the European tradition has always been anathema to realist scholars who like Justice Oliver Wendell Holmes believe that we must look at the law as it is actually implemented and practised – from the point of view of the Bad Man and what he can get away with.

The 1978 Constitution like the 1972 Constitution displays in its text an unusual fear of a fully independent judiciary as a co-equal arm of government. Professor A.J. Wilson who shared the same suspicion writes, "The line between independence and non-responsibility or not being answerable ... is a thin one. It is a relevant question in politics as to whether the judiciary should be allowed to be so compartmentalised as to become a third chamber of government."[28]

This fear of the judiciary that was prevalent among policy-makers and scholars in developing societies in the 1960s and 1970s was based on past experience with regard to the right to property. There was a widespread belief that the judiciary in those times would protect vested interests and obstruct national development. Even with the right to property removed from the text of the constitution, the fear of an obstructionist Supreme Court lingered on. In fact, the fear of such a judiciary is far greater than the fear of a strong executive or an errant legislature. Strangely, the public interest movements throughout the world in the 1970s and 1980s where marginalised groups and minorities were given special protection by apex courts transformed some of the earlier negative views of the judiciary – but the fear still remains. This is in sharp contrast to Indian nationalists such as Nehru and Ambedkar – the drafters of the Indian Constitution – who made a powerful judiciary an essential element of the Indian Constitution as far back as 1948. The fact that India was a federal system may have also warranted such a role for the judiciary.

The refusal of both conservative and socialist governments to give the judiciary a prominent role in the constitution of Sri Lanka also hindered the development of a positive, activist tradition protective of fundamental rights and freedoms, which requires a self-confident, strong judiciary. The bill of rights under the 1978 Constitution, based on the International Covenant on Civil and

[28] Wilson (1980): p.125.

Political Rights (ICCPR) is far stronger than what was available under the previous constitution. Freedom from torture and freedom of belief have been made absolute.[29] The rights and restrictions are clearly enumerated and though there is a general restriction of fundamental rights based on the 'general welfare' of a democratic society, it is a recognised restriction under the ICCPR and the European Convention of Human Rights.[30]

Yet, despite the fanfare over these improvements, the bill of rights is limited in scope and application. For example there is no right to life and dignity, a provision the Indian courts have used to protect vulnerable groups in their society. The bill of rights provisions only protect the rights of criminal defendants as provided 'by law' and not by a higher 'due process' principle.[31] This has allowed for the enactment of such legislation as the Prevention of Terrorism Act[32] with draconian provisions that are akin to those provided in the old South African anti-terrorist legislation.[33] Even the Code of Criminal Procedure contains provisions that would be abhorrent to liberal lawyers trained in the Anglo-American legal tradition. The Code denies bail for a vast array of criminal arrests including arrests for the crime of 'belonging to a wandering gang of thieves.'[34] Freedom of speech is also restricted by enumerated terms in the constitution. Speech may be curtailed for such justifications as racial or religious harmony, parliamentary privilege, contempt of court, defamation, incitement, national security, public order and public health.[35] Parliament is now given the right to try and convict individuals who may have by their speech offended its integrity.[36] This process does not carry with it the safeguards of judicial rules of evidence.

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[29] The 1978 Constitution: Article 10.
[30] See for a description, C. Morrison (1978) ***The Developing European Law of Human Rights*** (Leyden: A.W. Sijthoff).
[31] The 1978 Constitution: Article 13.
[32] Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.
[33] See V. Leary (1981) ***Report on Ethnic Conflict in Sri Lanka*** (Geneva: International Commission of Jurists).
[34] See Criminal Procedure Act No. 15 of 1978.
[35] The 1978 Constitution: Article 1(1)(a)
[36] For a good account see S. Nadesan, '*Parliamentary Privilege: Striking the Right Balance*, ***The Sun***, 2nd February 1978: p.5.

The need to clearly enumerate restrictions as well as rights again displays the fear the drafters have of a potentially misguided judiciary. While in the United States and the United Kingdom, the evolution of restriction is reliant on case law, the drafters in both Sri Lanka and India were more resistant to case law processes. Again, there was a fear of placing too much decision-making in the hands of unelected, unaccountable judges.

Though the framework of the bill of rights under the 1978 Constitution did not satisfy civil rights advocates, in recent years there has emerged a 'rights consciousness' on the part of individuals supported by important civil society movements and groups. In the early days the Supreme Court did make some important decisions in the area of equal protection, and the right to vote.[37] In other areas such as the imposition of civic disabilities, freedom from torture, and the right to strike, they took a big step backward.[38] In the years that Justice A.R.B Amerasinghe and Justice Mark Fernando were on the Supreme Court, there were some very activist, rights supporting judgments, including in relation to environmental rights. These judgments in style and reasoning were on par with the judgments of any of the great common law judges. Nevertheless civil rights advocates have argued that the Court has not generally held with issues concerning human rights and under Chief Justices Sarath Silva and Mohan Peiris and the Rakapaksa regime, the apex court reached an all time low where the judges themselves blatantly engaged in flagrant, inappropriate behaviour. Rights litigation was made into a mockery though the Sri Lankan Bar and lawyers began to actively protest this state of affairs, becoming a distinct centre of agitation. The fact that judges can be given government appointments after they retire also lessens the possibility of truly independent judgments that hold government accountable. After all, as Ronald Dworkin has often noted, it could be argued that the effectiveness of any 'rights movement' will greatly depend on

[37] See for example: *Perera v. University Grants Commission*, S.C. Application No. 57/80, 4th August 1980. Also see *Thadchanamoorthi v. Attorney General*, S.C. Application 63/80, 14th August 1980. See *Wickremesinghe v. Attorney General*, S.C. Application 12/79, 27th April 1979; see also *Habeas Corpus Application*, No 12/81 judgment delivered, December 1981.

[38] See for e.g., Local Authorities (Imposition of Civic Disabilities) No. 2, Law No. 39 of 1978.

the judicial philosophy of personalities in the judiciary and particularly in the Supreme Court. Strangely it was President Jayewardene, accused of hiring thugs to throw stone at the houses of dissident judges, who said "You may have all the precautions to make a judiciary independent, but unless the men who man the judiciary are men of courage, men of wisdom, the judiciary will never be independent."[39]

Despite the drafters concern with modernisation, the 1978 Constitution was remarkably unconcerned with technological improvements, which would update the institutional processes of government. With the primacy of an executive president, fears that Parliament would become an impotent, merely rhetorical, arm of government have been largely realised. Party divisions in Sri Lanka are so bitter that the concept of 'parliamentary integrity' as a safeguard against executive abuse could not develop because there were no mechanisms for institutional cohesion. The constitution did not, for example, ensure that a sense of collective institutional responsibility is cultivated – a responsibility which requires that each Member of Parliament regardless of his party affiliation endeavours to make parliament an independent watchdog of the political executive. One strategy in which such responsibility may be cultivated would be to change the quality of parliamentary decision-making. Rhetorical one-upmanship may have to give away to a more systematic form of analysing data and receiving information.

The 1978 Constitution like the 1972 Constitution appears relatively unconcerned with the technical evaluations that must precede the enactment of legislation. Though the framework exists for the appointment of Select Committees to inquire into aspects of the bureaucracy and district administration,[40] and to hold the executive accountable, there are no clear directives as to the nature and the role of parliament in this aspect of decision-making. The Jayewardene government instituted a Select Committee on Appointments that could 'advise' the executive on the suitability of appointments to the high levels of the bureaucracy. However, in the early years, in one controversial

[39] Cited in Wilson (1980): p.125.
[40] Authority is drawn from the 1978 Constitution: Article 74(1).

case, the executive ignored the decision of the Select Committee against the flamboyant Chairman of the Free Trade Zone.[41] This sent a signal that the executive would not brook challenges to its judgment from parliamentary committees and would ignore them. In addition this same system was used to remove a sitting Chief Justice on frivolous charges because they were afraid of her independence. In the 1990s and early 2000s, the Select Committee process was used to harass and intimidate NGOs and civil society opposed to the government. Leading members of civil society were brought before committees that seemed to operate as kangaroo courts, the climax being the last sitting of the Select Committee looking into the conduct of the Chief Justice. In this sense, parliament, instead of being a watchdog of the executive, played the role of harassing those who the government felt were its enemies. The government has also instituted a framework of Consultative Committees. The aim of these committees was to the increase efficiency of the public service by establishing committees that could take a continuing interest in the execution of policy and.[42] However, for the most part, they are limited in function.

Except for these forays into a committee system, the nature of legislative scrutiny remained unchanged under the 1978 Constitution. Though Jayewardene envisaged that the select committee system would resemble the Congressional Committees in the United States,[43] such a system of scrutiny has yet to make an appearance in Sri Lanka. The concept of parliamentary hearings, with witnesses and systems for parliamentary data gathering, is still not recognised as being fundamental to the careful evaluation of legislation. Though such a system may take a longer process, if formulated with care, it may improve the quality of legislation. Such a policy would force parliament to base its decisions on empirical evidence and a careful consideration of the knowledge and evidence available in the field of discussion. Since parliament did not rise to the challenge of such an institutional role, it has been reduced to a 'talking shop' by a powerful,

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[41] The Chairman of the Free Trade Zone, Upali Wijeyawardene. See Parliament of Sri Lanka, *Report of the Select Committee on Appointments*, August 1980 (Colombo).
[42] W. Warnapala, '*Public Services and the New Constitution*' (1979) ***Ceylon Journal of Historical Studies*** 7(2): p.43.
[43] Ibid: p.43.

executive president. In addition the quality of the legislation being passed attests to the fact that parliament in many cases has not entered the 21st century where many of the issues being legislated upon have a large technical component.

A.J. Wilson in discussing the flaws of the 1978 Constitution, stated, "the higher civil service must be converted into a techno-structure for the Presidential system to come into its own ... Alternatively, the role of the Presidency might, in the hands of the uninitiated, be changed into something quite different from what it was intended to be."[44] As Wilson saw the constitution as having Gaullist origins, he was certain that its success would depend on the evolution of a French-style bureaucracy. The 1978 Constitution like its predecessor displays a fear of an independent public service as much as it fears an independent judiciary. The Public Service Commission is dependent for its power on cabinet delegation.[45] The need to move away from the 'elitist' civil service of the 1950s had led to the politicisation of the bureaucracy. Commentators have claimed that, "The Constitution of 1978 ... has established total political control over the bureaucracy."[46] Though the drafters of the 1978 Constitution are pledged to a platform of modernisation, neither parliament nor the bureaucracy have been granted the incentives to create processes that will meet the challenges of a modern nation-state.

Two decades into the 1978 Constitution as the overall framework of government made it abundantly clear that the integrity and independence of the judiciary and the public service, including the police and the newly formed Human Rights Commission was absolutely essential for the functioning of a modern democracy. As a result all parties, including smaller parties such as the Janatha Vimukthi Peramuna (JVP), acted on the recommendation of the Youth Commission and united in the 1990s to bring in the Seventeenth Amendment to the Constitution. This amendment set up a 'Constitutional Council' made up of representatives receiving the approval of all parties in Parliament. This Council that would have the trust of everyone would make the appointments to the Public Service Commission, the Human

[44] Wilson (1980): p.150.
[45] The 1978 Constitution: Article 59.
[46] Warnapala (1979): p.50.

Rights Commission, the Police Commission, as well as the higher judiciary. During the few years of existence when this system was allowed to operate it seemed to do quite well. Commentators have pointed out that during the time of an independent police commission there was very little electoral violence. However, the Constitutional Council took important power away from the executive and when President Rajapaksa came into power he scrapped the whole system returning us to the days of a highly politicised bureaucracy, police, and judiciary.

The 1978 Constitution, like its predecessors, accepted the institutions of representative democracy as the only realistic model for participation. However, the actual structures of democratic participation were fundamentally transformed. The introduction of proportional representation was to sever the bond between the Member of Parliament and his constituents. The individual personality was to be replaced by the party programme. As the choice was to be among parties and not individuals, the structure and hierarchy of the party system would become the determining factor in the quality of participation. And yet, the constitution is unconcerned with the elements of the party system. Dr Neelan Tiruchelvam argued that a democratisation process within the political party itself must precede a system of proportional representation. [47] This seemed particularly important in considering the fact that the constitution initially did not allow for Members of Parliament to crossover to other parties. However, judicial interpretation in favour of governments has now made this a common phenomenon. President Jayewardene initially envisioned a system where loyalty to the party was guaranteed unless a member wishes to resign.[48] As a result he was known to have secured undated letters of resignation.

At present political parties appear to have an organisational structure in which decision-making is concentrated in the higher echelons of the leadership. Without the democratisation of the party structure, proportional representation further alienates the voter from the electoral system. Though the introduction of

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[47] N. Tiruchelvam, '*The Making and Unmaking of Constitutions: Some Reflections on the Process*' (1979) ***Ceylon Journal of Historical and Social Studies*** 7: p.24.
[48] The 1978 Constitution: Article 99.

'preferences' in voter lists was an attempt to rebuild this bond, the system of preferences also led to a great deal of internecine conflict within parties that further obscures the issue at hand. The electoral system that Sri Lanka needs in the end is a hybrid system that takes the best of the proportional representation system and the first-past-the-post system. This should be combined with some broad principles with regard to party democracy. Without party democracy, the bond of patron-client may be replaced by the pervasive influence of party chiefs and party bureaucrats whose primary concern would be the instrumental use of political power. However it would be best if the parties are persuaded to adopt these principles on their own without state interference because there are many liberal scholars that argue that freedom of association means that those who want to create a party without internal democracy should be have the freedom to do so and it is ultimately up to the people to decide.

A unique aspect of the 1978 Constitution was the introduction of the referendum. For generations trained in the Westminster model of parliamentary democracy, the referendum is a troubling reminder of unnecessary populism or what political scientists call 'Bonapartism.' Under the 1978 Constitution, certain types of Ccnstitutional amendments with regard to religion, language, and the franchise have to be submitted to the people at a referendum. Otherwise, the president, in his discretion, may submit constitutional amendments or questions of national importance to the electors.[49] To those who have been brought up to believe that 'liberty' implies the protection of parliament, the referendum process carries invidious aspects of revolutionary despotism where the president, using his charisma will unite the people to bypass the legislature.[50] President Jayewardene using the referendum to bypass a general election in 1982 is a reminder of where this populist provision could take us.

Reacting strongly to the centralised policies of socialist administrations as well as the demand from Tamil parties in the North and East who had in 1976 adopted the Vaddukoddai resolution proposing a separate state, the policy-makers behind

[49] The 1978 Constitution: Article 85-86.
[50] Wilson (1980): p.47.

the 1978 Constitution also appeared eager to institute a scheme of decentralised participation. It was initially expected that the constitution would embody such a scheme. However, the concept of a unitary state had become a highly charged political issue. It had become a polemical aspect of the debate between the two ethnic communities. With the Tamils demanding a separate state, any scheme of decentralisation was seen by the Sinhalese mainstream as being a concession. Therefore, the constitution as enacted did not contain any structures for participation at the local levels. By 1980, mounting tension and violence between the two major ethnic groups appeared to require some type of reconciliation. Decentralisation at the constitutional level was politically infeasible for Sinhalese leaders but legislation for decentralised participation that would meet some of the demands of the Tamil minority was a possibility. Such a settlement based on District Development Councils was negotiated and instituted by the end of 1981. Because of the importance attached to it by all parties, the settlement did carry an aura of a constitutional consensus, even though, in actual fact, an Act of Parliament initiated the scheme.

The scheme reproduced the national government at the local level, but maintained strict control by the national executive and parliament. In many ways it does not appear to be a scheme that allowed for much autonomy at the local level. But, if one considers the fact that prior to 1977,[51] decentralisation was a non-negotiable political issue, the scheme does appear to be an initial foray in the direction of direct local level participation. This acceptance allowed for a period of co-operation between the leaders of the two ethnic communities resulting in the creation of the 'High-level Committee' to safeguard against the outbreak of communal violence. But the promises were broken and the elections prompted by the scheme resulted in large-scale destruction and violence including the burning of the Jaffna library. Most of the population of Jaffna continue to believe that the violence was instigated by ministers in the Jayewardene cabinet.

[51] The UF government did introduce a Political Authority but he was purely a representative of the executive, see Warnapala (1979): p. 44-47.

Though this scheme was adopted in 1981, the 1983 riots in Colombo which many again felt were instigated by the government itself and a growing militant Tamil insurgency using acts of terror with the subtle support of India soon led to all out war with devolution and decentralisation at the centre of the debate. In 1989, the provincial council system was added to the 1978 Constitution in terms of the Thirteenth Amendment pursuant to the Indo Lanka Accord and the active participation of India. The system involved the creation of provincial councils in all the provinces and the creation of lists – the reserved list where the central government had primacy of planning and the provincial council list where the provincial government had primacy. Certain powers were administered jointly – this involved land, police and finance. However, the amendment maintained the state's unitary character by allowing the centre to make national policy in all the areas and by providing for extensive provision for intervention by the centre in a situation of emergency.

In the 1990s, as the war continued unabated and Tamil demands became more strident, President Chandrika Kumaratunga working with Dr Neelan Tiruchelvam presented a set of proposals for the political resolution of the ethnic conflict which involved extensive devolution. However due to political competition between the UNP and the SLFP it was not adopted. The Thirteenth Amendment remained in place. And yet, this amendment for many years was not operational in the area for which it was created – the North and the East – because of security reasons. Today, councils in those areas exist but constant complaints about finance and administrative matters prevent them from functioning properly. Today the issues concerning the Thirteenth Amendment are still up in the air. The re-emergence of militant forms of Sinhala Buddhist nationalism after the end of the war in 2009 and the brutish behaviour of provincial councillors have resulted in many powerful voices calling for the repeal of the Thirteenth Amendment. Others, including members of the international community, remind the government that at the conclusion of the war they promised full implementation of the Thirteenth Amendment plus some further powers to be granted to the provinces. The voices of the Tamil diaspora and their local counterparts are asking for a complete re-negotiation

along the lines of a confederacy and the more extreme of the diaspora are now asking for a Scottish-style referendum. All this points to the fact that though there has been a military solution to the ethnic conflict in 2009 there has been no political solution and the 1978 Constitution therefore really remains incomplete.

The 1978 Constitution, like its predecessor, set out guidelines or Directive Principles of State Policy along with Fundamental Duties of Citizens.[52] Neither of the above is justiciable in a court of law, so most constitutional lawyers just turn the page, though some use it as persuasive with regard to certain kinds of argument. Though the constitution states that these are 'democratic socialist' principles,[53] the text leaves out the overt socialist principles found under the 1972 Constitution such as the 'creation of collective forms of property.' To a great extent the directives of state policy resemble the second chapter of the Universal Declaration of Human Rights that is concerned with economic and social issues and the International Covenant on Economic, Social and Cultural Rights. Both these instruments speak to the social welfare of the population.

Despite this pledge to create an effective social welfare system, the reality of government programmes aimed at modernisation have never really fitted the spirit of the chapter of the Directives of State Policy. The acceptance of a democratic socialist ideology is in sharp contrast to the actual projects undertaken by many of the governments since 1977. Only Article 17(2) (d), which pledges the government towards 'rapid development,' appears to capture the tenor of present and past governments' policy and programmes. Despite the realist frame of reference, the drafters of the 1978 Constitution could not move beyond a national ideology committed to socialism and democracy. Their only recourse was to institute concrete development projects that could fulfil their realist aims, despite the ideological implications of constitutional language. This gap between theory and practice has been fertile ground for much of the criticism levied against present government policy.

[52] The 1978 Constitution: Article 24-28.
[53] The 1978 Constitution: Article 27(2).

With his famous remark of 'Let the Robber Barons in'[54] J.R. Jayewardene pledged the country to full-scale development projects including the creation of a Free Trade Zone to draw in foreign investment. In some ways this was the first such foray in the South Asian region and it would become the norm throughout Asia including China. Strangely those who believe in neo-liberal economic policies would argue that Sri Lanka was the pioneer in this regard in South Asia and that India and others followed suit only much later. In such a context the Directive Principles of State Policy that still remain in the constitution seem like an anachronisms pointing to the ideology of a different era.

The drafters of the 1978 Constitution were not greatly concerned with the process that should be set up that would lead to the drafting of a socially inclusive constitution. There was no South African-style national information gathering process built on consensus and political bargaining where every citizen felt they had ownership. Unlike the 1972 Constitution, there was not even a Constituent Assembly that helped draft the 1978 Constitution. Instead there was a Select Committee of Parliament that collectively considered the text. In the end, all the opposition parties had declared their dissatisfaction with the final structure of the constitution. The new constitution was therefore adopted with only the approval of the government majority in parliament. In that sense the 1978 Constitution was not really the 'social contract' of the society where all segments had a sense of ownership. Dr Neelan Tiruchelvam argued that the 1978 Constitution like the 1972 Constitution is 'instrumental' in nature, serving the government, and is not a product of a national consensus.[55]

The 1978 Constitution, born of disillusionment with socialist dreams and pushed forward by an urgency to get things done, is in many ways unique in its combination of a variety of systems. Yet, one cannot quarrel with Professor Wilson's assertion that with regard to the role of the executive, the Fifth French Republic is a major source of inspiration. Like the Fifth French Republic, the 1978 Constitution was supposed to usher in a period of peace,

[54] The 1978 Constitution: Article 157 gives treaties on investment and agreements constitutional protection.
[55] Tiruchelvam (1979): p.18.

prosperity, and international prestige. It did not. Vincent Wright in his book on the Fifth French Republic reflects on the flaws that characterised political life under the Gaullist regime:

> "There are certainly some black spots: it has a judiciary which can be disquietingly susceptible to political pressure … it has created a radio and television network which is politically disgracefully biased; it has occasionally displayed a crass insensitivity to the aspirations of the provinces: it has tolerated property speculation of the most outrageous (and often illegal) sort; it as condoned tax evasion and avoidance by groups considered vital to its electoral survival, and it has done little to modify a tax system which is the least progressive in the Common Market; its leaders have sometimes shown a disconcerting disregard for the Constitution, and they have frequently been contemptuous of the rights of the opposition; it has allowed too much public squalor in the midst of often indecent affluence."[56]

[56] V. Wright (1978) ***The Government and Politics of France*** (London: Hutchinson): p.233.

2

Parliament in a Presidential System

Reeza Hameed

The most significant innovation introduced by the 1978 Constitution is that of the President who does not owe his office either to the Prime Minister or the legislature but is elected directly by the people for a fixed term. It represents a radical departure from the pre-1978 post-independence constitutions, which were designed adopting the Westminster model having a popularly elected legislature as its dominant characteristic, and the head of the executive acting as a ceremonial figure with no real power to exercise.

This chapter will focus on the transformation of the Parliament as it functioned within the Westminster system to that of the Presidential system and examine Parliament's position and role within the latter system.

The Soulbury Constitution

The Order-in-Council of 1946, otherwise known as the Soulbury Constitution, the first post-independence constitution, was the culmination of the process of constitutional reform initiated by the British colonial government with a view to transferring power to the Ceylonese. In 1943, His Majesty's Government issued a Declaration[1] on the question of constitutional reform in the island and invited the Ceylonese Ministers to draft a constitutional scheme for consideration by the British Government. The Soulbury Commission which was subsequently appointed to visit the island and report on constitutional reform gave its

[1] The Declaration of 1943 in *The Report of the Commission on Constitutional Reform*, Cmnd.7667 (1945) (HMSO) (hereafter "*The Soulbury Commission Report*"): para.83. The Declaration set out the principles to which the proposed constitution of Ceylon was expected to fully conform. It identified some subjects as falling within a category reserved for Governor's assent. They included any measure that would "have evoked serious opposition by any racial or religious community which in the Governor's opinion are likely to involve oppression or unfairness to any community".
The proposed constitution would need to be approved by three-quarters of all members of the State Council of Ceylon, excluding the officers of State and the Speaker or other presiding officer. This would have required the support of the minorities for any constitution to gain approval.

consideration to the Minister's Draft,[2] treated it as the main basis of its work,[3] and substantially adopted the contents of that draft in its recommendations.[4] The Soulbury Constitution may have had its formal origins in the United Kingdom, was British in its

[2] See *The Soulbury Commission Report*: paras.7 & 99. *The Soulbury Constitution* was largely based on the Minister's Draft Constitution of 1944 prepared at D.S. Senanayake's initiative with Sir Ivor Jennings' assistance. D.S. Senanayake dominated the final phase of the transfer of power to the Ceylonese. He had hoped that the British Government would examine immediately and accept the scheme he had proposed. Instead, the British Government appointed a commission to visit Ceylon whose terms of reference included the consultation of various interests, including the minority communities concerned with the subject of constitutional reform in Ceylon. The widening of the terms of reference was the result of criticisms from minority representatives about not being consulted in the preparation of the Minister's draft. See K.M. de Silva, '*A Tale of Three Constitutions*' (1977) ***The Ceylon Journal of Historical and Social Studies*, New Series** VII, 6. In the Ceylonese Ministers' view, the Commission's terms of references went beyond the scope of the 1943 Declaration and the condition that the constitution needed approval by three quarters of all members of the State Council afforded sufficient protection to the minorities.
The Ministers decided to boycott the Commission officially but D.S. Senanayake, although he did not give evidence before the Commissioners in any of its public sessions, gave them the benefit of his views in a series of private meetings with them. See *Soulbury Commission Report*: para.7 & Appendix 2 (list of witnesses).
The Commissioners met Senanayake and the Ministers unofficially and socially and D.S. Senanayake personally took the Commissioners on an extensive tour of the country. See on this C. Jeffries (1962) ***Ceylon - The Path to Independence*** (London: Pall Mall Press); See also D.T. Aponso-Sariffodeen, '*From 'half a loaf' to Independence*' ***The Sunday Times***, 4th February 2011; D.B. Dhanapala (1962) ***Among Those Present*** (Colombo: MD Gunasena): pp.30-31 refers to the boycott as 'the strangest kind known in history. Officially the Ministers did not make representations to the Commission. But no commission that came out East ever had such lionizing. They were wined and dined entertained and mused in a series of unofficial private functions that left them exhausted.' According to Dhanapala, each Commissioner in turn was promised the Governor-Generalship if the Commission would recommend dominion status for the country.
[3] See on this A.Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How Procedural Entrenchment led to Constitutional Revolution*' in A. Welikala (Ed.) (2013) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): p.155.
[4] See Jennings (1951) ***The commonwealth in Asia*** (OUP): p.74: "the constitution of 1947 is fundamentally the Minister's scheme of 1944 with a weak Senate added and the restrictions of self-government deleted."; See also Welikala (2013): p.157.

context and texture, and operated on the basis of British constitutional principles; but in all its essentials it was a Ceylonese product.[5]

The Soulbury Constitution conferred legislative power on a bicameral Parliament.[6] A cabinet of ministers headed by the Prime Minister situated within Parliament was charged with the general direction and control of the government and was collectively responsible to Parliament.[7] The Governor General represented the British sovereign as the nominal head of the executive[8] but was appointed on the advice of the Prime Minister and by convention acted only on the latter's advice,[9] although in exceptional circumstances the Governor General had a margin of discretion based on his independent judgment.[10] Parliament's

[5] Jennings (1947) ***Comments on the Constitution*** (Colombo: Lake House): p.1 states: "The precedents were taken not merely from the United Kingdom, but also from Northern Ireland, Eire, Australia, South Africa, India and Burma. It is an adaptation of the British system of government … but the adaptation was done in Ceylon."

[6] The Donoughmore Commissioners had considered the creation of an upper house with a view to ensuring representation to minority communities but rejected the idea saying it would be a potential source of friction. They thought it would be impracticable to invest the upper house with powers over measures dealing with finance and taxation, and they doubted whether an upper house without those powers would placate the minority communities, whose chief concerns related to financial favouritism or discrimination. See *Donoughmore Commission Report*, at p 40. Such reservations did not deter the Soulbury Commissioners who were in favour of having a second chamber to act as a check against hasty and ill-considered legislation to which a unicameral legislature would be prone; it would be easier to provide representation to minority communities in a second chamber. See *The Soulbury Commission Report*, Ch.XIV.

[7] *The Soulbury Constitution*, section 46.

[8] Section 45 provided: 'The executive power shall continue vested in Her Majesty and may be exercised on her behalf by the Governor General in accordance with the provisions of this Order in Council and of any other law for the time being in force.'

[9] See section 4(2): "All powers, authorities and functions vested in Her Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty".

[10] See A.J. Wilson, 'The Governor-General and the two dissolutions of parliament' (1960) The Ceylon Journal of Historical and Social Studies 187.

power to make laws was defined in the widest possible terms,[11] but it was also limited[12] to the extent that it could not enact legislation that was discriminatory against minorities.[13]

The Soulbury Constitution met with opposition right from its inception. Critics of the Soulbury Constitution made jibes at it, calling it a 'fake', and referred to its alien origins.[14] Many including Colvin R. de Silva were critical of the Soulbury Constitution from the time of its introduction, in particular of its entrenchment clause (Section 29) and the power of the courts to review legislation. They had advanced the idea that the Soulbury Constitution was an alien model foisted on the people of Sri Lanka by the British, and that once elected to power, they would devise a constitution that would be 'home grown' or

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[11] "Section 29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island." The phrase 'peace, order and good government' was adopted from the constitutions of other dominions. See Jennings ***The Constitution of Ceylon*** (OUP): p.20; ibid.: p.72, explained the phrase as the lawyer's way of stating complete or absolute power but it had to be read subject to the limitations in the Order in Council of 1946.

[12] Section 29 (2) provided as follows:

"S 29 (2) No such law shall-

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable: or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) …"

[13] Section 29 was taken from section 8 of the Minister's Draft which was inserted at D.S. Senanayake's initiative as a gesture of 'generosity and re-assurance to the minorities'. See K.M. de Silva, '*Sri Lanka in 1948*' (1974) ***The Ceylon Journal of Historical and Social Studies*** 2. See also Jennings (1951): p.80 to the effect that s 29 was based on the Minister's draft; To K.M. de Silva, '*The Constitution and Constitutional Reform since 1948*' in K.M. de Silva (Ed.) (1977) ***Sri Lanka: A Survey*** (London: Hurst): p.313 the rights of the minorities did not appear to have received adequate protection but the time of the transfer of power the constitution guarantees against discriminatory legislation seemed sufficiently reassuring to the minorities.

[14] See de Silva (1977): pp.312, 313; See also K.M. de Silva, **'***A Tale of Three Constitutions*' in (1977) ***The Ceylon Journal of Historical and Social Studies, New Series*** VII, 1 at 6.

autochthonous.[15] The idea of an autochthonous constitution[16] took shape seemingly as a reaction to certain statements made by the Privy Council doubting the competence of the then Ceylon Parliament to alter the provision in the Soulbury Constitution giving minorities their protection, and Parliament's authority to replace the British Crown as the source of legal authority.[17] In reality, the comments made by the Privy Council on Section 29 of the constitution and its effect on Parliament's ability to legislate without hindrance merely gave impetus to its critics to put their long desired programme of constitutional change into effect.

The Privy Council on the Constitution

In *Ranasinghe v. The Bribery Commissioner*, Lord Pearce said, *obiter*, that,

> "… religious and racial matters shall not be the subject of legislation. They represent the solemn balance between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution."[18]

The principal issues that arose in *Ranasinghe* concerned the extent to which the plenary power of the legislature was compatible with

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[15] The idea of establishing a constituent assembly to draft a new constitution was first put forward by the LSSP. The SLFP and the UNP were also in favour of revising the Constitution. During the Prime Ministership of SWRD Bandaranaike, a Joint Parliamentary Select Committee was set up to prepare the basis of a new constitution. See K.M. de Silva, **'***Constitution and Constitutional Reform Since 1948*' in de Silva (1977): p.312 et seq.

[16] On autochthony see K.C.Wheare (1960) ***The Constitutional Structure of the Commonwealth*** (OUP): Ch.4.

[17] See J. Wickremaratne, '*The 1972 Constitution in Retrospect*' in T. Jayatilleke (Ed.) (2010) ***Sirimavo*** (Colombo: Bandaranaike Museum Committee)**.**

[18] *The Bribery Commissioner v Ranasinghe* (1964) 66 NLR 73, 78. See also *Ibralebbe v The Queen* (1963) 65 NLR 433, 450 per Viscount Radcliffe: "By section 29 there is conferred upon Parliament power to make laws for the peace, order and good government of Ceylon subject to certain protective reservations for the exercise of religion and the freedom of religious bodies". Geoffrey Marshall identified the judgement in *Ranasinghe* as "one of a handful of decisions which helped to make clearer what was left obscure in Dicey's exposition of Parliamentary Sovereignty." See G. Marshall, '*Parliamentary Sovereignty: A Recent Development*' (1966-67) ***McGill LJ*** 12, 523.

the 'manner and form' prescription imposed on the exercise of such power. The Supreme Court quashed the finding of guilt for bribery made by a tribunal because the legislation under which the appointment to the tribunal had been made was inconsistent with the constitution. The state's position was that even if such inconsistency existed, Parliament as the sovereign body must be held to have amended the constitution to the extent of such inconsistency. Lord Pearce stated that the English rule that the courts may not look behind the Speaker's certificate applied to a situation where there was no instrument prescribing the law-making powers and the manner in which they were to be exercised. Lord Pearce followed the view expressed by the Board in *Trethowan*[19] that "where a legislative power is given subject to certain manner and form that power does not exist unless and until the manner and form is complied with."[20]

Having regarded a 'manner and form' restriction to the legislature's power to make laws as not affecting its sovereignty, Lord Pearce went further and declared *obiter* that the restrictions in Section 29 (2) of the constitution as laying down "matters which shall not be the subject of legislation". Lord Pearce's *dictum* was construed as implying that the limitations envisaged by Section 29 (2) were not merely procedural but also substantive in character, which in effect meant that what Parliament could do was subject to the limitations spelt out in Section 29 (2). Following *Ranasinghe*, C.F Amerasinghe[21] read the words in Section 29 (namely "in the exercise of its powers under this section") as implying that Parliament under the Soulbury Constitution had to legislate in the capacity set out in Section 29 as it stood, and that Parliament had no power to give itself a capacity that was not intended by that section.

Geoffrey Marshall[22] disagreed with Amerasinghe's view, arguing that the powers of Parliament under the particular section included the power to amend by the appropriate majority all the provisions in the constitution. If it was intended that this power

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[19] *AG for NSW v Trethowan* [1964] 2 All ER 785.
[20] ibid.: p.1312.
[21] C.F. Amerasinghe, '*The Legal Sovereignty of the Ceylon Parliament*' [1966] ***Public Law*** 65, 74.
[22] See Marshall (1966-67).

did not include the power to amend Section 29 (2), then it could have been made obvious by the addition of the words "except for the matters included in s 29(2)".

H.L de Silva expressed a view similar to that adumbrated by Marshall. In de Silva's opinion, the absence of a clause in Section 29 (4) to save Section 29 (2) implied that the words in the former provision that Parliament "may amend or repeal any of the provisions of this Order" meant just what they said. In any event, Parliament would have been free to amend Section 29 (2) or pass legislation repugnant to it by first exercising its powers of amendment to Section 29 (1) by the deletion of the opening words "Subject to the provisions of this order".[23]

Although Section 29 (2) did not impose an absolute impediment on Parliament's legislative power,[24] the 'opportunistic elites' regarded it as standing in the way of 'naked majoritarianism' and advanced the need for change. People with different political motivations came together to promote a political executive with unimpeded power to implement their respective agendas.[25] The justification for a legal revolution was based on erroneous legal premises, both with regard to the interpretation of the Privy Council decisions and the legitimacy of the electoral mandate[26]

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[23] See H.L. de Silva, '*Some Reflections on the Interpretation of the Constitution of Ceylon and its amendment*' (1970) ***The Journal of Ceylon Law*** 233, 250-251.

[24] See on this A. Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How Procedural Entrenchment led to Constitutional Revolution*' in A. Welikala (Ed.) (2013) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives).

[25] See on this Welikala (2013). See also The Constitutional Court decision on the *Sri Lanka Press Council Bill* (1973) ***Decisions of the Constitutional Court of Sri Lanka*** Vol.1, p.4 in which the Court echoed some of these views: 'Although we saw the sunset of foreign domination nevertheless its twilight remained, and although we were independent we still continued to owe allegiance to a foreign sovereign… We were also not sure whether our legislature was supreme, because time and again the legislature was told that it had not the right to enact certain laws'. They continued: 'Experience therefore showed that in many fields of governmental activity the Constitution itself was an obstacle to solving the problems of the people"'

[26] The Constitution produced by the Constituent Assembly was based on the proposals of the ruling party, the ULF, which had at its disposal an overall majority in Parliament. As was pointed out by S. Nadesan Q.C., a mandate for

for change, but that did not stop Colvin R de Silva and others desiring constitutional change to seize upon the pronouncements of the Privy Council to embark on a course leading to constitutional change.

The critics of the Soulbury Constitution blurred the distinction between external and internal sovereignty. As was observed by Neelan Tiruchelvam, the decision in *Ranasinghe* was interpreted as a restriction on the external sovereignty of the state by those desiring to change the constitution.[27] The provision in question was incorporated to protect the minorities, but politicians were affronted that the Privy Council, seated many miles away, should dictate to the Ceylon Parliament what it could and could not do. Their response to *Ranasinghe* also meant that the " idea of restrictions on the legislative sovereignty of parliament based on the sovereignty of people themselves, through a concept of individual human rights, was not conceivable to those imbued in the Westminster tradition."[28]

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changing the constitution had not been sought by the other parties; therefore, the mandate would have been given only for the MPs elected on the UF manifesto. The House consisted also of six members who were appointed subsequent to the elections and no mandate was given to the appointed members to engage in the task of constitution making. Nevertheless, the opposition was too weak to oppose and despite the strong reservations it had about the necessity for change and the process enacted at Navarangahala, it participated tamely in that project. Public support for the process was lukewarm, even if it was supposedly undertaken in the name of the people.
When the draft basic resolutions were published, Dr Colvin R de Silva had stated that the resolutions were those of the Government and had been approved by the Cabinet of Ministers, and that they were in accordance with the United Front Manifesto and any amendment must not be contrary to its manifesto. This approach to drafting the constitution was criticised as one that made it in effect a party matter, as it meant that members of the United Front, while being members of the Assembly, would function as members of the party. In the event, it would have been unrealistic to have expected those outside the party to rise above their party affiliations. See S. Nadesan (1971) ***Some Comments on the Constituent Assembly and the Draft Basic Resolutions*** (Colombo: Lake House): p.8.

[27] See N. Tiruchelvam, '*Constitutional Reform: Principal Themes*' in C.Amaratunga (Ed.) (2007) ***Ideas for Constitutional Reform*** (Colombo: IBH Publisher).

[28] ibid.: p.20.

The First Republican Constitution

H.L. de Silva had suggested that, "a future Constitution of Ceylon which is not the lineal descendant of the 1946 Order need not contain the constitutional limitations of section 29(2)."[29] The 1972 Constitution was no lineal descendant of the Soulbury Constitution. As Colvin R. de Silva, the architect of the First Republican Constitution, said:

> "This is not a matter of tinkering with some Constitution. Nor is it a matter of constructing a new superstructure on an existing foundation. We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy."[30]

The end result was a constitutional structure with a powerful executive located in the legislature. Its dominant feature was the 'National State Assembly', which combined in itself all three aspects of governmental power. The powers of government were fused in the hands of the National State Assembly as the supreme instrument of state power.[31] In addition to exercising the legislative power of the people, the National State Assembly exercised executive power "through the President and the Cabinet of Ministers".[32] The Prime Minister appointed the President who, as the nominal head of the executive, held a ceremonial office in which he was required to act on the advice of the Prime Minister.[33] Henceforth, the courts would only interpret the laws. The Supreme Court's power to pass judgement on the

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[29] de Silva (1970).

[30] Cited by the Constitutional Court, *Sri Lanka Press Council Bill*, Decisions of the Constitutional Court of Sri Lanka, (1973) Vol.1 at p.5. See also *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221 SC; *Visvalingam v Liyanage* (1983) 2 Sri L R 311, 351 SC per Soza J: "The first Republican Constitution was a truly autochthonous Constitution rooted entirely in Sri Lanka's own native soil. In the enactment of the Constitution, the legal and constitutional link with the past was completely severed though Westminster traditions are still being drawn on as background material. The 1972 Constitution effected a break in legal continuity, a legal revolution as it has been called."

[31] *1972 Constitution*, section 5: "The National State Assembly is the supreme instrument of State power of the Republic."

[32] *1972 Constitution*, section 5(b).

[33] *1972 Constitution*, section 27 (1).

validity of legislation was replaced with a form of pre-legislative scrutiny: a 'Constitutional Court' was established with a limited power to review bills before they were passed by Parliament.

Under the first republican constitution the legislature provided the cabinet of ministers and the cabinet continued in office so long as it commanded the legislature's confidence. The Prime Minister determined the composition of the cabinet of ministers at any given time and assigned to ministers their subjects and functions.[34] As before, the cabinet of ministers was charged with the direction and control of the government and was collectively responsible and answerable to the National State Assembly.[35] The Prime Minister was *primus inter pares* and the real head of the government.

The Senate and the provision barring discriminatory legislation, both of which were intended to safeguard minorities, were not retained in the new constitution.[36] Critics of the Senate[37] pointed out that it had failed to satisfactorily perform its function of scrutinising bills in a non-partisan manner, that it acted as a brake to progressive legislation, and that Senators tended to serve party interests. The government in power was able to command the support of the majority in the Senate by virtue of the fact that they were appointed on the recommendation of the Prime Minister or selections through the House of Representatives. The desire to command a government majority in the Senate led to Senators being appointed principally on the basis of their affiliation to a particular party.

Despite its shortcomings, the idea of having a second chamber that would examine and revise legislation in an atmosphere free of

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[34] *1972 Constitution*, section 94(1).
[35] *1972 Constitution*, section 92 (1).
[36] The Senate was abolished by the *Ceylon (Constitution and Independence) Amendment Act, No. 36 of 1971* without any specific reference being made in the Act to abolish it. The Soulbury Commission made a case in favour of the establishment of a second chamber which would perform the following among other functions: (i) to provide adequate representation to minority communities (ii) to act a check against hasty legislation by the Lower House (iii) to facilitate controversial or inflammatory issues to be dealt with in a cooler environment.
[37] L.J.M. Cooray (1971) ***Reflections on the Constitution and Constituent Assembly*** (Colombo: Hansa) has recapitulated the arguments that were advanced at the time in favour of abolition.

party politics was a salutary one. Some important legislative measures had originated in the Senate, and important events and measures were dispassionately debated by that body.[38] J.A.L. Cooray made a case for reforming the Senate before a decision was taken to amputate it from Parliament.[39] The framers of the 1972 Constitution took a bludgeon to it instead of the scalpel. No consideration was given to reforming the Senate.

Cynics may argue that the real intention of the government in abolishing it was to remove what it considered was an inconvenient irritant that could have become an obstacle to the framing of a new constitution. The Senate did not endear itself to the government at the time by rejecting the controversial 'Ellawala Amendment.' The government had introduced the constitutional amendment to ensure that Nanda Ellawala, a government MP who had been convicted for a crime, would not lose his seat in Parliament, but the upper house rejected the Bill. It was passed eventually but its rejection sounded the death knell of the Senate.[40] If the Senate had remained, in all probability it would have debated the draft resolutions and made its own proposals quite different to those put forward by the government, and perhaps even opposed the latter. The drafters of the new constitution could not wait until the new constitution came into force to abolish the Senate.

The indefatigable C. Suntharalingam applied to the Supreme Court for an injunction to restrain the Clerk of the House from presenting the Bill for the Governor General's assent, but the court rejected it on the ground that a *prima facie* case had not been made out. Three Senators brought separate actions in the District Court against the Speaker of the House for a declaration that the Bill was *ultra vires* the constitution, and for an injunction restraining the Speaker from presenting the Bill to the Governor General for his assent. The District Judge refused the interim

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[38] For example, the *Muslim Mosques and Charitable Trusts Act* began its life in the Senate.
[39] J.A.L. Cooray, '*Revision of the Constitution*', Sir James Peiris Centenary Lecture (1957): pp.9-12.
[40] See N. Jayawickrama, '*Colvin and Constitution-Making - A Postscript*' ***The Sunday Island***, 15th July 2007.

injunction but, accepting the plaint, issued notice on the Speaker, who did not answer the summons.[41]

The Bill for the Senate's abolition was passed by the House of Representatives in contravention of the provisions in the constitution. Under the Soulbury Constitution, Parliament was defined to include the House of Representatives, the Senate, and the Governor General. For a Bill to have become law all three constituent elements of Parliament had to be involved for its approval. Even if both houses of Parliament had approved a Bill it would become law only upon the assent given to it by the Governor General. The Bill was never presented to the Senate for its approval and the House of Representatives acting together with the Governor General reconstituted and redefined Parliament in a manner contrary to what was contemplated by the constitution. The Senate was not allowed to take up the Bill to debate and decide on the Bill, as was required by Section 34 of the Soulbury Constitution. [42]

In the final analysis, despite the high-sounding rhetoric about creating a home-grown constitution, the Soulbury Constitution the 1972 Constitution was to a large extent an imitation of the British system as embodied in the Soulbury Constitution, to which

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[41] L.J.M. Cooray, '*Amputation of a Limb of Parliament*' (1971) ***The Journal of Ceylon Law*** 253, 263.

[42] C.F. Amerasinghe had expressed a view to this effect in '*The Legal Sovereignty of the Ceylon Parliament*' (1966) ***Public Law*** 65 in connection with the decision of *Bribery Commissioner v. Ranasinghe*. Cooray (1971), argued the case for the Act's validity and expressed the view that because the House could in certain circumstances pass a Bill into law only without the concurrence of the Senate, the Act merely carried this a step further and provided that in all circumstances legislation will be passed by the house with its concurrence. In his view, the Senate was not even an essential or integral part of Parliament. He argued further that s 29(4) did not require an amendment to the Constitution to be approved by the Senate. In his view L.J.M. Cooray all that s 34 required was for the Bill to be sent to the senate and not that it need not have been taken up for debate or passed by the Senate. For this view he relies on Jennings who had contemplated the possibility that a Bill may be sent for Royal Assent if the Bill were to "lie on the table" for the period specified by the Order in council. However, Cooray seems to have read too much into Jennings words. The point of the matter was that the Senate was not allowed to vote on the Bill. In any event, these views were never tested out in a court of law and not much interest appears to have been shown by constitutional scholars to discuss the issue or test its constitutionality in the Courts after its enactment.

its architect had read its last rites, declaring that it had been thrown in to 'the dustbin of history'.[43] It adopted a parliamentary system modelled on Westminster *sans* a second chamber, elected on the basis of the first-past-the-post system, and a nominal figurehead of an executive. Real executive power lay in the hands of the Prime Minister as head of the Cabinet of Ministers situated in Parliament. The Supreme Court could no longer scrutinise parliamentary legislation for constitutionality. In fact, the 1972 Constitution resembled the Soulbury Constitution "in little more than a formal way."[44]

The first act of the Parliament of the new republic was to give its members an extension beyond the five year term for which they were elected,[45] a move that led to the erosion of its credibility as an institution and loss of the remaining goodwill from the rest of the opposition, effectively rendering constitution-making a party affair, with the UNP voting against the adoption of the new constitution.[46]

The Second Republican Constitution

Even before the 1978 Constitution was enacted, by the Second Amendment, [47] changes were made hastily to the 1972

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[43] See C.R de Silva, '*The right to rule till 1977*' ***Ceylon Daily News***, 22nd May 1974. As a matter of fact, parts of the Soulbury Constitution managed to survive, for in *Dahanayake v de Silva* the Supreme Court held that s 75 of the *1972 Constitution* kept alive s 13 (3) (c) of the *Soulbury Constitution* which provided that a person shall be disqualified from being elected as a member of the NSA by reason of a contract between him and the State.

[44] See de Silva (1977) supra n 2 at p.9 for the view that the new constitution resembled the *Soulbury Constitution* and, through it, the draft constitution of 1944. See also A.J.Wilson, '*The Future of Parliamentary Government*' (1974) **The *Ceylon Journal of Historical and Social Studies*** 40, 42-43.

[45] See C.R de Silva, '*The right to rule till 1977*' ***Ceylon Daily News***, 22nd May 1974 justifying the extension.

[46] The NSA would carry on for a term of five years from the time the new constitution was adopted.

[47] *The Second Amendment to the 1972 Constitution*. The Second Amendment Bill was introduced as a measure urgent in the national interest and hurried through the NSA. The Bill was endorsed by the Constitutional Court as in conformity with the then constitution and most of the MPs became aware of its contents only after it was presented to the NSA. The Bill was passed by the NSA

Constitution for the introduction of an elected President who would be separated from Parliament and who held office for a fixed term.[48]

The Second Amendment abandoned the notion of the legislature as the supreme instrument of state power and made the executive and the legislature coordinate branches of government.[49] The President was not only the head of state but was also the head of government. The changes introduced by the Second Amendment [50] were transposed into the 1978 Constitution together with other important changes. The President was no longer required to 'act on the advice of the Prime Minister.'

A hybrid system

Unlike its predecessor, the 1978 Constitution did not engineer a legal revolution,[51] but the system of government that it introduced

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with the required majority but was brought into operation more than three months after.

[48] See *1972 Constitution*, section 26 as amended by section 9 of the Second Amendment.

[49] The sovereignty of the people would be exercised henceforth by the NSA and a President to be elected by the People, and both the NSA and the President were declared as "supreme instruments of State power", and executive power was exercised by the President.

[50] The Select Committee on the Constitution heard evidence from the public on reforming the Constitution after the changes introduced by the Second Amendment had become a fait accompli.

[51] In *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221 Colvin R de Silva argued that the changes effected by the *1978 Constitution* were so radical that there was in fact a revolution and that the repeal of the *1972 Constitution* terminated the legal order it embodied and the new Constitution began a new legal order. Justice Thamotheram, speaking for the majority, rejected this argument because, if accepted, it would cause confusion in the legal sphere. He held that the legal order under any Constitution does not change so long as the Constitution is changed or replaced by a new Constitution in accordance with the provisions of the old Constitution. It is only when the new Constitution is brought into operation in a way not provided for in the old Constitution that there occurs a break in all the norms under the old basic nor. According to Kelsen the 'validity of legal norms may be limited in time, and the end as well as the beginning of the validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.'

represented a radical departure from the Westminster model of parliamentary government that obtained under the two previous constitutions.

A principal feature of the parliamentary system is that the executive is located within the legislature and is dependant on, and answerable to, the legislature. In the presidential system, the executive is directly elected for a specified term and is not dependant on the legislature to remain in office for the duration of the term. The Second Republican Constitution followed the example of the French constitution, which has a hybrid system, with an executive combining features of the British and American systems.

The French political scientist Maurice Duverger introduced into the political discourse the idea of semi-presidentialism as a system distinct from the 'purely' parliamentary and presidential systems.[52] According to Duverger, the defining features of the semi-presidential political regime are:

- The head of state is directly elected by the people;
- He possessed considerable powers; and
- The government consisted of a prime minister and a cabinet of ministers who can be voted out by parliament.[53]

A semi-presidential system is a hybrid system, in which features borrowed from the presidential and parliamentary systems of government are forged together. Duverger viewed the constitution of the Fourth Republic as an example of the semi-presidentialism system. Duverger identified considerable differences within this model of government.[54]

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[52] See M. Duverger, '*A New Political System Model: Semi-Presidential Government*' in (1980) ***European Journal of Political Research*** 165-187; M. Duverger, '*A new Political system model: semi- presidential government*' in A. Lijphart (Ed.) (1992) ***Parliamentary versus Presidential Government*** (OUP).
[53] ibid. Duverger's definition of semi-presidentialism was criticised and also refined by various scholars, prominent among them being G. Sartori (1997) ***Comparative Constitutional Engineering*** (NY University): p.131.
[54] In a study Duverger undertook of seven countries having this system he identified three of them (Austria, Ireland and Iceland) as having figurehead

A defining feature of a semi-presidential system is that the President is independent of Parliament, but he is not entitled to govern alone, and therefore his will must be conveyed through Parliament. The executive headed by a prime minister will continue in office so long as it commands the legislature's confidence.

The semi-presidential systems or something akin to it were introduced mostly in countries that were coming out of authoritarian systems as the example of Latin American as well as Eastern and Central European countries would suggest.[55] The latter countries chose the semi-presidential system with a strong executive to manage the transition from authoritarian to democratic regimes and to ensure political stability on the assumption that only a powerful president would be able to unite the nation on divisive political issues.

In the Weimar Constitution of 1919-1939, drafted at the end of the First World War when there was domestic revolt and foreign threat, it was considered necessary to have a strong executive reflecting a mixture of the then French Republican and American constitutions. The authors of the Weimar Constitution intended to have a president who, as the people's representative, would intervene to prevent parliamentary absolutism and facilitate government decision-making.[56]

The Second Republican Constitution may be a hybrid model but, arguably, it was not made exactly in the semi-presidential mould as described by Duverger. Given a dominant executive and a Parliament subordinated to the President, it exhibits features which are more presidential than parliamentary. A.J. Wilson described the Second Republican Constitution as a Gaullist constitution.[57] According to Wilson, the essential criteria of this

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presidents, one (France) as having an all-powerful president and three (Weimar Republic, Finland and Portugal) as having a balanced presidency and government.

[55] See Y. Shen, '*The Anomaly of the Weimar Republic's Semi-Presidential Constitution*' (2009) ***Journal of Politics and Law*** 35.

[56] On the Weimar Constitution, see Skach (2005) ***Borrowing Constitutional Designs*** (Princeton)

[57] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka (1978)*** (London: Macmillan): p.xvi.

model are: (i) the adoption of a powerful and independent executive, (ii) the continuation of parliament in an attenuated form and in a subordinate capacity, and (iii) there must be citizen participation with the chief executive engaging in a dialogue with them through the instrument of a referendum. In Wilson's view, the 1978 Constitution conformed to this model.

Even though the Gaullist constitution was described by Duverger as a semi-presidential constitution, the Wilson's description of the Sri Lankan constitution as a Gaullist system does not make the Sri Lankan version semi-presidential as conceptualised by Duverger. The Duverger model, and indeed the French constitution, provides for an executive headed by a Prime Minister who is the head of government and is answerable to Parliament. The rejection by the Sri Lankan Parliament of the statement of government policy or a vote of no confidence in the government would result only in a change in the players without a change in the team itself. The cabinet of ministers shall 'stand dissolved' and the President shall appoint a new Prime Minister and Cabinet Ministers but the President himself would remain in power. It did not matter that the cabinet was chosen by the President and implemented his policies. Even in the reconstituted cabinet, many of the same ministers may appear.

Undoubtedly, the Second Republican Constitution gave birth to a powerful and independent executive, and Parliament was made subordinate to the executive in an attenuated form, but the participation of citizens with the chief executive through a referendum is a fallacy. Governments have shown a reluctance to engage the people in a dialogue through the mechanism of a referendum in fear that the people might reject measures presented for their approval. The referendum was actually employed for the first time to extend the life of the first Parliament and to facilitate the ruling party to continue in power without going to the polls. It was conducted in an atmosphere dominated by violence[58] and justified as an exercise in democracy. It could

[58] See Priya Samarakone (Manel Fonseka), Sri Lanka's First Referendum: Its Conduct and Results, Bergen: CHR. Michelsen Institute: Programme of Human Rights Studies (Publication No. 6), 1988.

hardly have been described as an exercise in dialogue between the citizens and the chief executive.

The requirement of a referendum to enact certain measures into law has, on occasion, operated to prevent Parliament from over-reaching its powers as happened, for example, in the case of the Third Amendment Bill (or the 'Pilapitiya Amendment') the object of which was to seat a member of parliament who had been unseated following an election petition while a by-election was pending. The Supreme Court's decision that the Bill required a referendum forced the government to abandon the Bill.

The requirement that certain measures approved by Parliament to amend the constitution must be approved by the people at a referendum has enhanced the influence of the Supreme Court, which has the power to decide on whether a referendum would be required in respect of the measure in respect of which its opinion is sought. It has sometimes led the court on a collision course with the executive, especially when a decision unfavourable to the government has been given by the court.

The Rationale for the French Model

There is no doubt that the French Constitution served as a model for the drafting of the Second Republican Constitution. The framers of the constitution had before them the constitution of the Fifth French Republic, which provided for an elected executive president. The creation of a strong executive directly elected by the people for a fixed term was promoted as necessary to achieve stability to government and as a pre-requisite for economic growth.

J.R. Jayewardene, the principal architect of the constitution, first mooted the idea of an executive modelled on the French Constitution. To him, the Westminster model of choosing the executive from parliament produced unstable governments when it lost the support of the majority in parliament. Between 1947 and 1977, there had been 8 elections averaging one every three and a half years. There was constant competition for leadership of the party because it was the leader of the party who was

appointed as head of the executive.[59] The solution that he suggested was to have "a strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature."[60] To him, an executive unafraid to take unpopular measures was a necessary requirement for a developing country.

A similar rationale was advanced for the introduction of the French Constitution now in force. In the Third French Republic, the President, who was elected by the French Parliament for a seven-year term, played only a symbolic role. His main function was to propose a Prime Minister for election by the National Assembly before forming a Cabinet. The French President was a titular head of the executive, much like the British monarch. It was said that the fundamental premise of the French Constitution was for the President to hunt rabbits and not to govern.[61] Given the state of French politics, French cabinets did not last more than ten months on an average; from 1875 to 1925 there were more than fifty cabinets, largely due to the fact that the cabinets were coalitions, producing executive instability.[62]

The Fourth French Republic failed to bring about the desired stability that it was intended to promote. Under that constitution, the President designated the Prime Minister, who submitted to Parliament the cabinet that he proposed to form and also the policy that he would follow. The ministers were collectively responsible to Parliament and a no-confidence motion passed by Parliament would have resulted in their resignation.

The Fourth Republic was ill fated from its very beginning. It suffered from a lack of political consensus, and the presence of anti-democratic and anti-republican forces undermined effective government. Governments had short lives[63] and Prime Ministers

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[59] See J.R. Jayewardene (1996) ***Relived Memories*** (Navrang): p.15.
[60] ibid.: p.20.
[61] See J. Bell (1992) ***French Constitutional Law*** (OUP): p.14.
[62] A. Appadorai (1952) ***The Substance of Politics*** (OUP): p.296.
[63] Between 1946 and 1958, twenty governments were formed. Of the fifteen prime ministers who led them, only two survived more than a year. See E.N. Suleiman, '*Presidentialism and Political Stability in France*' in J. Linz & Valenzuela (Ed.) (1994) ***The Failure of Presidential Democracy***, Vol.I (John Hopkins): p.141.

were unable to embark on unpopular reforms. The unrest following the loss of Algeria and decolonisation speeded up the demise of the Fourth Republic. The system experienced considerable instability, made worse by the electoral system that made coalitions inevitable, and governing difficult. Thus, a major factor that led to the introduction of the hybrid system into the Fifth Republican Constitution was the distrust of political parties in France.[64]

De Gaulle's prescription to overcome parliamentary paralysis was to change the system of government and create a strong executive directly elected by the citizens[65] with powers to govern in consultation with a Prime Minister appointed by the President.[66] The President appointed the Prime Minister and on the latter's recommendation he appointed and dismissed ministers.

The Real Problem

The idea that the parliamentary system is inherently unstable is not a universal truth. The British and Indian parliamentary systems have operated without anyone calling them unstable, and the presidential system did not always produce stable governments.

The conditions that prevailed in Sri Lanka before the adoption of the 1978 Constitution were not comparable to those that obtained in the Third and Fourth French Republics. In fact, the Soulbury Constitution had worked well for over twenty-five years and the system was able to absorb the shocks produced by occasional disturbances and challenges.[67] Furthermore, radical social

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[64] See J. Linz, '*Presidential or Parliamentary Democracy*' in Linz & Valenzuela (1994): p.50.
[65] The president was initially elected by an electoral college, but in 1962 a change proposed by De Gaulle that the president be directly elected by the citizens was approved by a referendum.
[66] See Bell (1992): p.10-11.
[67] See A.J. Wilson, '*Politics and Political Development since 1948*' in K.M. de Silva (Ed.) (1977) ***Sri Lanka- A Survey*** (Colombo: Lake House): p.310.

changes were brought about within its framework.[68] The government that was elected in 1970 had an overwhelming majority in the National State Assembly and remained in power until 1977. The two elections held in 1960 were triggered by unusual circumstances.

The problem with the older Sri Lankan constitutional systems was not one of instability but of majoritarian excess[69] and inadequate protection of civil rights.[70] The absence of a legal barrier afforded by a fully enforceable bill of rights[71] in the Soulbury regime allowed Parliament to pass controversial legislation depriving a section of the population of their citizenship and making Sinhala the official language to enter the statute books.[72]

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[68] See L.J.M. Cooray, '*Constitutional Government in Ceylon*' ***Ceylon Daily News***, 5th September 1970. In the words of Dr Cooray 'the post 1956 revolution took place without the legal barriers which it would have had to face if a Bill of Fundamental Rights was in the constitution'.

[69] In a review of a felicitation volume on Mrs Bandaranaike, Asanga Welikala commented on the statist authoritarianism and a sectarian form of majoritarianism of her governments. He wrote: "Socialist and nationalist discourses, then enjoying their heyday in the states and societies of the emerging Third World and Non-Aligned Movement, were no doubt the essential mood music of her time at the top of Sri Lankan politics. But it seems too often to have been the case that these were eagerly embraced so as to lend a carapace of legitimacy to what were in reality parish-pump calculations of electoral advantage; and on the same impulse but with more deplorable consequences, the conscious abnegation of core democratic values including the freedom of the press, the liberty of the individual, the independence of the judiciary and civil service, and the protection of minorities." See A. Welikala, '*Shaping a post-colonial state and its constitutional evolution*' ***The Sunday Times***, 13th March 2011.

[70] See e.g. Civil Rights Movement, '*Working Paper on the Proposed Second Amendment to the Constitution*', 2nd October 1977.

[71] The Board of Ministers had wanted a bill of rights incorporated into the constitution but apparently Jennings, who held views which were antithetical to an enforceable bill of rights, opposed it. See J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Lake House): p.611; K.M. de Silva (1988) ***J.R. Jayewardene of Sri Lanka***, Vol.I (Anthony Blond): p.169.

[72] Colvin R de Silva himself queried rhetorically: '… [w]hat was the marvellous protection that s 29 purported to afford the minorities?' See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986**.** It must be noted that G.G. Ponnambalam and the Communist Party regarded the protection offered by s 29(2) as inadequate and

The effectiveness of Section 29 in the Soulbury Constitution came under scrutiny in a decision challenging the constitutionality of legislation which affected the population of Indian origin who were living largely in the plantation areas. They were represented in Parliament by seven members of the Ceylon Indian Congress, who had voted with the opposition against the D.S. Senanayake government. The Senanayake government reacted by enacting the Citizenship Act, No. 18 of 1948, which made citizenship depend on birth, thereby making a substantial segment of the people of Indian origin residing in the plantation areas stateless. The Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 was enacted to make the franchise dependent on citizenship. It was rather obvious that the objective of the legislation was to disenfranchise a segment of the population who had elected the seven members.

In *Mudanayake v Sivagnanasundaram*,[73] the Supreme Court had to decide whether Section 3(1)(a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, was void as offending against Section 29 of the constitution. Counsel S. Nadesan wished to introduce extraneous evidence to show that Section 29 was intended to protect the interests of minority communities.[74] The

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sought better protection for the minorities through a bill of rights. See B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.201.

[73] (1952) 53 NLR 25. On appeal, the Privy Council upheld the decision of the Supreme Court. See *Kodakan Pillai v Mudanayake* (1953) 54 NLR 433 PC. In that case, a person of Indian origin made a claim to have his name inserted in the register of electors alleging that he possessed the requisite residential qualification, that he was domiciled in Ceylon and that he was qualified to be an elector under the Ceylon (Parliamentary Elections) Order in Council, 1946. The Assistant Registering Officer who inquired into his claim decided that he was not entitled to have his name inserted in the register, as he was not a citizen of Ceylon within the meaning of the *Citizenship Act, No. 18 of 1948*. The revising officer, on appeal, decided that the *Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949*, which *prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship* Act, No. 18 of 1948, were invalid as offending against s. 29 (2) of the *Soulbury Constitution*. The Crown applied to the Supreme Court for certiorari to quash the decision of the revising officer alleging that he had acted in excess of his jurisdiction and had come to an erroneous decision on the law.

[74] Mr Nadesan moved to introduce the *Donoughmore Commission Report*, the *Soulbury Commission Report*, the Ministers' Memorandum, the Despatch of Sir

court refused to travel outside the language of the impugned enactments and to take evidence as to whether or not, in their ultimate effect, they are of a discriminatory character, and held that the legislation under challenge did not offend Section 29 of the constitution.

Colvin R. de Silva highlighted the chauvinism that underlined the enactment of the aforesaid legislation by the politicians of the majority community, who were not reluctant to use their voting strength against a minority. He subsequently adverted to the limited form of protection afforded by Section 29,[75] and boasted that his constitution, through the chapter on fundamental rights, offered greater protection than that given by Section 29, even though under his constitution the fundamental rights were not justiciable[76] and both Buddhism and Sinhala language were given constitutional status.

The incorporation in the 1972 Constitution of the doctrine of parliamentary supremacy without an effective system of checks and balances ensured the continuation of the politics of majoritarianism. Buddhism was conferred preferential status

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Herbert Stanley (Sessional Paper 34) (1929), and the Royal Instructions issued in consequence of the *Donoughmore Constitution Report*.

[75] C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986.

[76] The case of *Ariyapala Gunaratne v People's Bank* (1986) 1 SLR 338, argued by Colvin R de Silva many years after the *1972 Constitution* had been abrogated, offers an interesting exception. It involved the interpretation of s 18(1) (f) of the 1972 constitution. The plaintiff in that case was required to resign from membership of the Trade Union to which he belonged to qualify for promotion in the People's Bank, but he refused and filed a declaratory suit in the District Court. The Supreme Court held that the impugned clause in the proposed letter of employment was inconsistent with the guarantee of freedom of association contained in section 18(1) (f) of the *Constitution of 1972*. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. Fundamental rights are not infringed only by executive or administrative action but go beyond the provisions of Article 126. It is only a special and summary mode of relief in a particular kind of situation, namely violation of fundamental rights by executive or administrative action. Article 126 is therefore not exhaustive of the manner that courts could be approached for the violation of fundamental rights. The ambit of the fundamental rights has a much wider range.

requiring the state to protect and foster Buddhism.[77] Sinhala was made the official language. It has been said that the 1972 Constitution signalled the apotheosis of the Buddhist revolution set in motion in 1956 at the instigation of S.W.R.D. Bandaranaike and it became the vehicle of Sinhalese popular sovereignty.[78]

The 1978 Constitution adopted these features and perpetuated them.[79] Both the home-grown constitution and the one that was derived from it did nothing to curb the majoritarian tendencies that became a feature of politics during the period of the Soulbury Constitution.

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[77] See s 6 of the *1972 Constitution*: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18 (1) (d)."
As Colvin R de Silva himself said in his Marga Institute lecture, strictly speaking, giving Buddhism the foremost place should not mean that it was the religion of the state as s 6 required the state to give equal treatment to all religions. See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.24. In reality, though, it has been made the state religion.

[78] See R. de Silva Wijeyeratne, '*Republican Constitutionalism and Sinhalese Buddhist Nationalism in Sri Lanka: Towards an Ontological Account of the Sri Lankan State*' in Welikala (2013): p.402. According to Wijeyeratne, in the process of drafting the constitution, Colvin R de Silva was outmanoeuvred by Sinhala nationalists. See id at 424. See also generally in the same volume B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.201. Back in 1955 Colvin had warned the country of the dangers of making Sinhala the only official language. See J. Wickramaratne, '*Remembering Colvin and Abolishing the Executive Presidency*' ***Colombo Telegraph***, 27th February 2014. In his Marga Institute lecture, Colvin R de Silva gave a disingenuous explanation for making Sinhala the official language when he said that at the time the *1972 constitution* was made the Sinhala Only Act and the Reasonable Use of Tamil Act were in force. Therefore, the best thing the government could do was at least to ensure that the rights already assured were incorporated in the Constitution. Therefore, both these Acts were put into the Constitution: See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.20; B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.218 has suggested that Colvin would have preferred to have an entirely secular constitution but saw the religion clause as set out in s.6 as a compromise between secularism and Buddhist majoritarianism. Cynics might argue that when his desire for power came into conflict with his commitment to principle, Colvin allowed the former to prevail.

[79] See further H. Ludsin, '*Sovereignty and the 1972 Constitution*' in Welikala (2013): pp.295-299.

A Dominant Executive

Jayewardene fine-tuned the constitutional system that he had inherited and shifted the seat of executive away from the legislature, vesting in the President the powers which were hitherto exercised by the Prime Minister. The marriage of certain features of the French model with the Westminster model resulted in a divorce of Parliament from the executive. Nevertheless, the Jayewardene constitution is not a wholesale imitation but an adaptation of the presidential style of government to which some elements of the Westminster system were combined. In the process, Jayewardene craftily left out from his constitution some significant provisions from the French constitution, which would have qualified the President's powers. The re-configuration of the presidential powers created an office that is more powerful than that of the French President, thereby significantly altering the relationship between the President and Parliament.

The French President may appoint the Prime Minister and choose anyone he prefers for the post, but because the National Assembly can force the resignation of the government, the President is compelled to choose someone who will satisfy the parliamentary majority. The President's power to appoint a Prime Minster would be tempered by the need to carry the support of the Assembly for his nominee. He cannot dismiss the Prime Minister from office unless the latter presents the resignation of the government.[80] In the matter of appointment of the members of the government other than the Prime Minster and their termination, the President shall follow the recommendation of the Prime Minister.[81]

The Prime Minister is charged with directing the actions of the government, the responsibility for national defence, and the implementation of legislation. [82] The government shall be answerable to Parliament. [83] The Prime Minister, after deliberation by the Council of Ministers, may make the government's programme or possibly a general policy statement

[80] *1958 Constitution*, Article 8.
[81] ibid.
[82] *1958 Constitution*, Article 21.
[83] *1958 Constitution*, Article 20.

an issue of a vote of confidence before the National Assembly. The government is not obliged to present its programme to the National Assembly but if the programme is defeated when presented, it must resign. The National Assembly may pass a motion of censure or otherwise reject the programme or the statement of general policy of the government, and if that happens, the Prime Minister must resign.[84]

The Prime Minister may also, after consideration by the Council of Ministers, make the government's programme or a statement of general policy an issue of confidence in the legislature.[85] The Assembly's power to pass a motion of censure against a government in effect gives it the power of dismissal over the government, and acts as a check on the President's power to form a government. The President may dissolve the legislature in consultation with the Prime Minister.[86] There shall not be a further dissolution within a year of the elections following the dissolution.[87] Significantly, the French Prime Minister shall be responsible to Parliament and not to the President. A Prime Minister may stay in office so long as he and his government command the confidence of the Assembly.

Even if the French Constitution provided the design for a strong executive, the 1972 Constitution supplied its working model for the Second Republican Constitution in Sri Lanka. The dignified and the active parts of the executive power were combined in the hands of the President, without any thought to scaling down his powers and without sufficient checks on those powers.[88] One significant change that the 1978 Constitution introduced related to the position of the Prime Minister. His position is substantially different to that of the Prime Minister in France. In Sri Lanka, the

[84] *1958 Constitution*, Article 50
[85] *1958 Constitution*, Article 49.
[86] *1958 Constitution*, Article 12. The President is also required to consult the Presidents of the chambers.
[87] ibid.
[88] According to Article 30 of the SRC, the president is the head of the state, the head of the executive and of the government and the commander-in-chief of the armed forces.

President is the head of the government;[89] he is also the head of the Cabinet of Ministers.[90]

The President shall appoint as Prime Minister a Member of Parliament who in his opinion is most likely to command the confidence of Parliament.[91] The Prime Minister under the current constitution is appointed by the President and is dependant on the President to remain in office. The President shall appoint the ministers to the cabinet.[92] Unlike in the French Constitution, under which the members of the government are appointed and dismissed by the President on the recommendation of the Prime Minister, there is no obligation on the President of Sri Lanka to consult the Prime Minister in the appointment of his ministers. The President may determine the subjects and functions they are to be assigned,[93] and re-shuffle the cabinet at any time as well as change the assignment of subjects and functions of minister.[94]

At the core of the parliamentary system is the idea that the Prime Minister is answerable to Parliament and will continue to remain in power only so long as he is able to carry the parliamentary majority with him. A Prime Minister may be removed from office by the President.[95] Upon his removal, the cabinet shall stand dissolved and the President shall appoint another member as Prime Minister as well as other ministers.[96]

The President and his cabinet are answerable to Parliament,[97] but a motion of no-confidence in the Prime Minister or the cabinet of ministers will not result in the dismissal – or even the resignation – of the President. If Parliament were to reject the Statement of Government Policy or pass a vote of no-confidence in the government, it would result only in the dissolution of the cabinet of ministers, even though they are the President's nominees and

[89] Article 30 (1).
[90] Article 43 (2).
[91] Article 43 (3).
[92] Article 49 (2).
[93] Article 44 (1) (a) and (b).
[94] Article 44 (3).
[95] Article 47 (a). The French President has no formal power to dismiss the Prime Minister.
[96] Article 49 (1).
[97] Article 43 (1) and (2).

they may have been pursuing the policy formulated by the President. It would only result in the appointment of a new Prime Minister and a cabinet of ministers.

The Prime Minister and the cabinet of ministers are wholly dependent on the President for their survival and the President is under no obligation to consult the Prime Minister in the formation of the cabinet. The Prime Minister is no longer *primus inter pares*; he is just another minister wholly dispensable at the President's discretion.

Cohabitation or Conflict?

The balance of power between the President and French Parliament is said to depend on the support that the President can muster in Parliament. If the majority in Parliament and that which elected the President are the same, then it would make the President very powerful. Where the party to which the President belongs does not enjoy a majority in Parliament, then the President may face a hostile Parliament or come to terms with that majority resulting in the Prime Minister enjoying considerable influence. The French system promoted cohabitation between the President and the Assembly where they were political opponents. Where such cooperation exists, the Prime Minister's position and that of Parliament may come closer to the Westminster system. In 1986, President Mitterrand entered into an arrangement to cohabit with Jacques Chirac who he appointed as Prime Minister because the latter commanded the majority in Parliament.

In Sri Lanka, too, it was anticipated that a Sri Lankan President whose party does not enjoy the support of the majority in Parliament would similarly transform the office into Westminster mode and act on the Prime Minister's advice. According to Wilson, the framers anticipated the President to "function in the best democratic traditions" and when faced with a hostile parliamentary majority he would "either revert to the role of a

constitutional head of state or there will be a sharing of power…"[98]

The constitution was put to the test in this regard during the years 2001-2003 when President Chandrika Bandaranaike had to deal with Prime Minister Ranil Wickremesinghe who headed a United National Party led majority in Parliament. The President did not become reconciled to becoming a nominal head and allow the Prime Minister to function as the *de facto* head of government. In reality, this period was marked by conflict rather than cohabitation. The President took over three important cabinet portfolios after dismissing three of the ministers from their posts. She prorogued Parliament to pre-empt an impeachment motion against the then Chief Justice going ahead. What the President "wanted more than all else was a political showdown with the Prime Minister." Apparently, the President's show of power was perceived as a response to the Prime Minister bypassing her in key decision-making processes.[99]

In such situations, there is nothing in the constitution that expressly requires a President to act on the advice of the Prime Minister. The absence of a clear and express provision in the constitution to this effect is a "grave and inexcusable blunder" on the part of those who drafted the constitution.[100] The idea that a President would alter his status to that of a constitutional head and exercise executive powers on the advice of the Prime Minister is unrealistic.[101]

In any event, for cohabitation to work – and to work effectively – Parliament and the Prime Minister ought to be immune from

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[98] A.J. Wilson (1980) ***The Gaullist system in Asia: The Constitution of Sri Lanka (1978)*** (London: Macmillan): p.61.

[99] See G.H. Peiris, '*A Presidential Intervention*' ***The Island***, 18th November 2003.

[100] See H.L. de Silva, '*Constitutional non-provision of cohabitation: An inexcusable blunder*', Felix Dias Bandaranaike Memorial Lecture, ***Sunday Observer***, 13th July 2003.

[101] In August 1994 to November 1994 D.B. Wijetunge of the UNP was the Prime Minister with a UNP majority in Parliament while Chandrika Bandaranaike was the President. Between December 2011 and April 2004 Prime Minister Wickremasinghe and President Bandaranaike came from opposing parties and this period was marked by struggles rather than cohabitation. The President even took over three ministries from the Prime Minister's control.

dismissal by the President. In France, the President does not enjoy the same power to dismiss his Prime Minister as in Sri Lanka, in whose hands the power to summon, prorogue and dissolve Parliament is a very useful weapon to deal with a hostile Parliament.[102]

In so far as the President is concerned, it is virtually impossible to dislodge him from office. Not only is he immune from court proceedings, he is also immune from criticism in Parliament, as no discussion of the President is permissible under the Standing Orders except on a substantive motion. As will be seen below, periodic amendments to the constitution have further enhanced his position within the constitutional structure.

Immunity of the President from Suit

The President is immune from legal proceedings in respect of his official and personal acts as long as he is in office.[103] It has implications on the President's accountability to the courts and also to Parliament. The President was granted immunity on the basis that he would serve no more than two terms in office, but the ability of a President to serve more than two terms permitted by the Eighteenth Amendment in 2010 has disturbed the balance that was built into the 1978 Constitution when it was enacted and made a long serving President virtually unaccountable.

The 1972 Constitution granted immunity to the President,[104] which made sense given that he acted only on the advice of his Prime Minster, but it was retained in the 1978 Constitution to

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[102] The President may dissolve parliament acting under Article 70 (1). The only impediment to this power being exercised is the condition that 'when a General Election has been held consequent upon dissolution of Parliament by the President, he shall not dissolve Parliament until the expiration of a period of one year from the date of a general election'.

[103] *The Constitution*, Article 35.

[104] 23. '(1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.'

protect a President who not only acted on his own advice but wielded enormous power with a potential for abusing them.

In the Judges Case,[105] based on article 35 of the Constitution, the state raised a preliminary objection to the Court going into the actions of the President in relation to the appointment of the Judges. Justice Sharvananda, in his judgement, said that the actions of the executive are not above the law and certainly can be questioned in a Court of Law. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court in that he cannot be summoned to Court to justify his actions, but that is a far cry from saying that his acts cannot be examined by a court of law. 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 his acts are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.

The Supreme Court in *Mallikarachchi v Shiva Pasupathy*[106] explained that presidential immunity is essential to protect the holder of the office from being harassed by frivolous actions. Stating that the executive should be given immunity in the discharge of his functions Chief Justice Sharvananda said:

> "The process of election ensures in the holder of the office correct conduct and full sense of responsibility for discharging properly the functions entrusted to him. It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. 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

[105] Visuwalingam v. Liyanage (1983) 1 SLR 203.
[106] (1985) 1 Sri L R 74 SC.

> rationale for the immunity cover afforded for the President's actions, both official and private." [107]

Chief Justice Sharvananda observed further, rather unrealistically, that persons occupying such 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. In a judgement typical of the times, Chief Justice Sharvananda placed too much faith in the ability and willingness of the elected representatives of the people to hold the President responsible.

Impeachment of a President by Parliament is a virtually impossible prospect given the degree of control exercised by the President over Parliament.[108] The process involved in impeaching a President is so restrictive and qualified with conditions that are virtually impossible to achieve.[109] The broad interpretation given to presidential immunity would allow a President during his lifetime to avoid the consequences of the law in respect of his wrongful actions, even though they have nothing to do with his constitutional functions.

Justice Mark Fernando, in a couple of judgements, clarified the scope of this immunity. In *Karunatilleke v Dayananda Dissanayake, Commissioner of Elections*[110] ~~the Supreme Court~~ he clarified the scope of presidential immunity declaring that the immunity conferred by Article 35 is neither absolute nor perpetual.[111] Justice Fernando said:

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[107] ibid.: p.78.

[108] Koggala Wellala Bandula, (a pseudonym?) '*Unsuccessful impeachments and legal arguments*' ***Daily News***, 9th January 2013 recounts that extra-parliamentary measures, including the incarceration of parliamentarians in hotels, were taken by the President Premadasa camp to see off the impeachment motion against him.

[109] See Article 38(2) of *The Second Republican Constitution*. The process requires a notice of resolution signed by not less than two-thirds of the whole members of Parliament (or half of them if the Speaker is of the view that the allegations merit enquiry). The Supreme Court will have to inquire into and report on the allegations. The allegations must relate to the specific grounds enumerated in the Constitution.

[110] (2003) 1 Sri LR 157 per Mark Fernando J.

[111] The Court cited Art 35 (3) which excludes immunity altogether in respect of one category of acts and permitting the institution of proceedings against the

> "Immunity is a shield for the doer, not for the act … It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct."[112]

The nature of responsibility that the President owes to Parliament under the constitution is *political*.[113] The President is also responsible to act *legally* according to the constitution and the law.[114] Chief Justice Sharvananda failed to distinguish between the two types of responsibility; he resolved questions affecting the President's legal responsibility by relying on his political responsibility to Parliament.

In *Senasinghe v Karunatilleke*[115] Justice Mark Fernando touched upon the two aspects of the President's responsibility when he said:

> "The exercise of many powers, Constitutional and statutory, would have both legal and political aspects. While it is appropriate that the judicially should review only the legal aspects, the question arises whether the political aspects are reviewable at all, except by the People themselves at the next election. It appears to me that in that respect the role of Parliament – as the elected representatives of the People – has been recognised in Articles 42 and 43, which essentially ensure the

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President personally, and excluded partially in respect of another category of acts but the action in the second category shall be instituted against the Attorney General.

[112] In *Ramupillai v Festus Perera* (1991) 1 Sri L R 11 the acts of the Cabinet of Ministers including the President was reviewed. In *Wickremabahu v Herath* (1990) 2 Sri L R 348 and *Karunatilleke v Dissanayake* (1999) 1 Sri L R 157 the Presidents acts were reviewed.

[113] 'Article 42. 'The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.'

[114] Article (33)(f) empowers the President "to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do."

[115] [2003] 1 Sri LR 172.

> responsibility of the Executive to Parliament for the due exercise of all powers … questions of legality are for the Judiciary alone to determine, and political questions are left for the People and their elected representatives."[116]

Impeachment is a political solution to deal with a President who commits misconduct in office. It is a remedy of last resort. Impeachment might result in his removal but it will not remedy the wrongs committed by the President and leave unsatisfied those who may be aggrieved by his unlawful actions. It would take a very politically hostile parliament to carry an impeachment through and it is very unlikely to occur when the President and Parliament are from the same political party. The President's power to summon, prorogue and dissolve Parliament is a very useful weapon in his armoury to prevent a hostile Parliament from taking account of his conduct.

The personal immunity of the President from the normal legal process in respect of both official and private acts – however wrongful – is not in accord with the interests of justice or the rule of law, and has strengthened and consolidated his position in relation to Parliament and the courts. The principle of law that where there is a right there is a remedy (*ubi jus ibi remedium*) is an ancient one.[117] There is no legitimate reason as to why a President should be immunised from the normal legal process in respect of his private – or even official – actions.

The President was granted immunity on the basis that he would serve no more than two terms in office but the ability of a President to serve more than two terms permitted by the Eighteenth Amendment has disturbed this finely tuned balance that was built into the 1978 Constitution when it was enacted and has made a long serving President virtually unaccountable both to Parliament and to Courts.

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[116] ibid.: p.187.
[117] *Ashby v White* (1703) 92 ER 126 per Holt CJ.

The Limits on President's Term

Power when left in the same hands for far too long tends to be abused. It is this fear that provides the rationale for limiting the presidential term. The corollary of this principle is that a change of rulers is desirable for the survival of democratic institutions. Periodic elections are the essence of constitutional democracies and elections are meaningless if they do not facilitate change. Otherwise, the country would be saddled with an elected dictatorship.

The 1978 Constitution created the office of a directly elected President and invested this office with unprecedented powers. Significantly, the President was given immunity from suit for the duration of his term in office, his term was fixed and the period when a poll could be called for presidential elections was clearly specified.

The rationale for the introduction of an elected president was to insulate his tenure from the vagaries of changing majorities in the legislature and to make it stable. The six-year term and the two-term limit were important elements of the constitutional arrangement pertaining to the terms of his office.

The head of state enjoyed immunity of suit under the 1972 Constitution, too, but he exercised only nominal powers; the Prime Minister, who was the real head of the executive, enjoyed no such immunity. In order to minimise the potential for abuse, the 1978 Constitution provided that a person could serve a maximum of two six-year terms and disqualified him from seeking office thereafter.

The creation of a strong executive president divorced from Parliament with a fixed term was justified as necessary to achieve stability to that office, and as a prerequisite to achieving economic growth. J R Jayewardene himself had stated in Parliament thus:

"When we are elected for six years, we have no right to change that without the people giving us a mandate to change it … and we do not intend to change that provision by one day."

Suriya Wickremasinghe drew attention to the grave misgivings that were entertained by many people about the Executive Presidency when it was first introduced. According to her, some of these fears 'were slightly assuaged by the two term limit' which somewhat assured them that a President would enjoy immunity from suit for no more than twelve years. 'This is already long enough for an injured party to wait for redress, for memories to stay fresh, for witnesses to remain available and healthy.'[118]

It is quite clear that the term of office was intended as a central part of the President's package and the six year term was prescribed as a conscious choice.

The Third and Eighteenth Amendments interfered with this delicate arrangement. The Eighteenth Amendment entrenched the worst features of the presidential system of government by removing the two-term limit along with the Constitutional Council introduced by the Seventeenth Amendment, which were the only, albeit somewhat weak, checks left on the already powerful President.

The Third Amendment and the Presidential Term

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[118] See S. Wickremasinghe, Civil Rights Movement Statement on 18th Amendment to the Constitution 5th September 2010.

[119] Hansard, Col.1229 (23rd September 1977).

It is quite clear that the term of office was intended as a central part of the President's package and the six-year term was prescribed as a conscious choice.[120]

Within a few years of the Jayewardene constitution coming into effect, the fixed term presidency was one of the first casualties of the Jayewardene government. The Third Amendment to the Constitution permitted the incumbent President at his discretion to call for presidential elections after the expiration of four years from the commencement of his first term of office. The Civil Rights Movement (CRM) petitioned the Supreme Court for a ruling that the Third Amendment Bill required approval by the people at a referendum because it affected the sovereignty of the people, which by definition encompassed their powers of government. S. Nadesan, Q.C.,[121] argued that the six year term had been deliberately chosen by the people after careful consideration to assure the executive a stable and fixed period in office.

The government's argument was that the more elections there are the greater must be the sovereignty of the people. The Supreme Court decided that no referendum was required because the amendment did not seek to cut down the period of office of the President, but empowered him to appeal to the people for a mandate to hold office prior to the expiration of his term. There was no compulsion on the President to do so and it enabled him only to limit his term of office of his own choice.[122] The constitution required approval by the people only if it extended the term of office of the President to over six years and not if it restricted the term.[123]

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[120] Even the transitional provision in Article 160 prescribed that the first President shall hold office for six years from 4th February 1978.

[121] Suriya Wickremasinghe and the writer assisted Mr Nadesan in this case.

[122] The Court said: "It thus left to the discretion of the President who has been elected by the people to voluntarily cut short his period of office and seek a fresh mandate from the people." It must be noted that Parliament too is elected by the people for a fixed term but it has no discretion to dissolve itself to seek a fresh mandate from the people. The President can send Parliament home and trigger fresh Parliamentary elections at a time of his own choosing.

[123] See *In Re Third Amendment to the Constitution Bill SC* decided on 23rd August 1982.

The court rejected the petitioner's argument that the Bill gave the incumbent President seeking re-election an electoral advantage by giving him the discretion to choose the most opportune time for election. The instability of the executive that Jayewardene wished to avoid was caused precisely by the power of dissolution of parliament that Prime Ministers acting under the parliamentary system were able to exercise before its term ended. The court, oblivious to this truth, based its conclusion on the questionable premise that it was an accepted convention of any democratic government that the Prime Minister as an incident of his office was entitled to choose the date of parliamentary election; therefore the President could do the same.

The premise is questionable because the Prime Minister's right to dissolve Parliament under the parliamentary system did not go uncontested.[124] Thus, it was argued that the Governor General under the Soulbury Constitution was not always obliged to accede to a request by the Prime Minister to dissolve Parliament. The Governor General could have brought his own judgement to bear in exceptional circumstances, as when he had to consider a Prime Minister's request to dissolve Parliament or had to call upon the person who in his opinion had the confidence and backing of a majority of his colleagues in Parliament to form the government.

In 1959, Sir Oliver Goonetilleke was criticised for giving in to the advice of W. Dahanayake to dissolve Parliament after he had lost the confidence of his colleagues in the cabinet and his own parliamentary party. The proper course, it was submitted, would have been that Dahanayake should have tendered his resignation and left it to the Governor General to call upon some other person who commanded the confidence of the majority in Parliament to form the government. Sir Oliver was criticised once again for acting unconstitutionally when he dissolved Parliament on the advice of Dudley Senanayake following his defeat in Parliament, instead of calling upon the Sri Lanka Freedom Party led by C.P. de Silva to form the government.

The court's opinion failed to appreciate that the President himself was not given the discretion to alter the terms of his office except

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[124] See A.J. Wilson, '*The Governor-General and the two dissolutions of parliament*' (1960) ***The Ceylon Journal of Historical and Social Studies*** 187.

in very limited circumstances.[125] If Parliament can confer on the President the right to prematurely terminate his office without a referendum, then Parliament can confer the same right upon itself. It would also enable Parliament to curtail its own term to less than six years. One of the odd consequences of the Third Amendment is that there would be no election if an incumbent President dies or is removed from office, but there would be an election if the incumbent President in his discretion decides to have one.

Responsibility of President to Parliament

The constitutional system is constructed on the premise that the President and Parliament would work together and for the President to be responsible to Parliament. As explained by Justice Wanasundara, the fact that the President is actively involved in the parliamentary process, is responsible to Parliament for the discharge of his duties, and that he shall be a member of the cabinet of ministers underscores the intention of the framers that,

> " … the President is an integral part of the mechanism of government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution … It could even be said that the exercise of Executive power by the President is subject to this condition. The People have also decreed in the Constitution that the Executive power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system. This follows from the pattern of our Constitution modelled on the previous Constitution, which is a Parliamentary democracy with a Cabinet system. The provisions of the Constitution amply indicate that there cannot be a government without a Cabinet. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. To take any other view is to

[125] See *1978 Constitution*, Article 38 (1) (b), (c) and (d).

> sanction the possibility of establishing a dictatorship in our country, with a one man rule."[126]

Parliament's control over the executive may be considered by reference to its four main functions.

The Legislative Power of Parliament

Parliament is the law-making organ of the state and its power to enact legislation includes the power to either amend or repeal the constitution.[127] Parliament has surrendered this function to the executive because in reality proposals for legislation are presented to Parliament by the executive, usually by the Minister responsible for the subject matter of the Bill. Parliament is mainly concerned only with the broad outlines of legislation, leaving the details to be filled out by subordinate legislation, the contents of which hardly receive Parliament's attention.

By virtue of the control that the executive is able to wield over parliamentary business, its principal function has turned out to be one of giving assent to proposals made by the executive. In theory, Parliament can either accept or reject any proposal; or it can accept them after making improvements. In fact, legislation is enacted by Parliament to rubber stamp government policies and the passage of government proposals is secured by members voting along party lines.

The executive exercises considerable control over the business of the Parliament and the time Parliament spends on Government Business. Government Business shall be set down in such order as the government shall think fit. It is provided in the Standing Orders that government business shall have precedence every day expect the first Friday sitting of each month when Private Members' Business shall have precedence over Government Business, although precedence may be accorded to Government Business even on a Friday on a Minister's motion approved by

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[126] See Justice Wanasundara, *In Re the Thirteenth Amendment to the Constitution and Provincial Councils Bill* (1987) 2 Sri LR 312, 341.

[127] The proviso to s 75 limits the competence of parliament to suspend the operation of the constitution or any part of the constitution; it cannot also repeal the constitution as a whole without enacting a new constitution.

Parliament.[128] Government may also by motion have the Standing Orders suspended in order to carry through its business.[129] The main work of criticising the government will have to be borne by the opposition. The opposition has limited means at its disposal to exercise effective influence on the outcome of action taken by Parliament.

In the United Kingdom, backbencher revolt against unpopular bills is not unknown and Ministers have been compelled to give concessions to ensure the passage of bills into legislation. Bills have been withdrawn in the face of such opposition but such happenings have been rare; and they have been even rarer in Sri Lanka.

Control over Public Finance

Parliament is the guardian of the public purse and shall have full control over public finance. Parliament's functions in respect of public finance are essentially fourfold. Parliament shall determine the taxes that may be imposed to raise money. The principle that 'there shall be no taxation without representation' is enshrined by the provision prohibiting the imposition of tax, rate or any other levy by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.[130]

Parliament has to maintain the government and its administration and without its support government cannot function. Thus, Parliament shall make appropriations annually but, in actual fact, Parliament does not make appropriations save at the request of the government. It grants to the executive what the latter demands. The budget is prepared by the Treasury and is presented by the President or on his behalf. Many of the proposals are presented for its approval by Ministers.

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[128] See Standing Order 20 (3) of Sri Lanka Parliament.
[129] See *1978 Constitution*, Article 78 (2) and Standing Order 135 of Sri Lanka Parliament.
[130] *1978 Constitution*, Article 148.

The fact that Parliament holds the purse strings arguably gives it some leverage over the executive. In reality, Parliament lacks adequate institutional arrangements to effectively carry out its functions over public finance. Parliament does not possess the same resources as the executive; without adequate resources and manpower Parliament lacks sufficient capacity to exercise effective control.

D.E.W. Gunasekera, the chairman of Committee on Public Expenditure (COPE) and a government minister, has been lamenting Parliament's inability to investigate institutions other than those audited by the Auditor General. Even where corrupt practices and waste have been revealed, little or no follow-up action has been taken. [131] He admitted that the national economy was in a mess because of Parliament's failure to act.

> "Parliament has failed the country. In fact, the Opposition should raise the issue in parliament at least now. We are wasting time on some insignificant issues, whereas a matter of national importance is not touched."[132]

Holding Government to Account

Parliament has the responsibility of keeping the President and his government responsible and to hold them to account. Parliament does not govern but its role is to ensure that those who govern do so in accordance with its wishes. Parliament must keep the executive in check and ensure that principles of good governance are adhered to. Scrutiny of policy and administration is a part of its core functions. It is expected to exercise its functions critically. Its role is that of examination, criticism, and approval.

The cabinet of ministers appointed by the President are collectively responsible and answerable to Parliament. The

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[131] S. Ferdinando, '*DEW urges state sector TUs: act now to save economy*' ***The Island***, 9th May 2013; C. Kirinde, '*Corrupt officials, politicians exposed (COPE) but committee lacks power: DEW*' ***The Sunday Times***, 4th December 2011.

[132] S. Ferdinando, '*Parliament failed to act, says DEW*' ***The Island***, 27th April 2012.

President is responsible to Parliament for the due exercise of his functions,[133] including those which he might have retained, and those which he has delegated to his cabinet of ministers. The cabinet of ministers is his creation and they pursue his government's policies.

In order to effectively discharge these functions, Parliament needs to keep the executive at arm's length. Parliament ought to act as a counterweight to the vast powers that the executive has. It is to ensure that Parliament does not become an extension of the executive that it is institutionally kept separate from the executive. In practice Parliament is either incapable of holding the executive to account or is prevented from doing so because of the considerable influence that the executive has over Parliament. By Parliament's own Standing Orders questions affecting his conduct cannot be raised in Parliament except upon a substantive motion.[134]

Beginning from Jayewardene, the trend has been to have a large number of ministers, both within the cabinet and outside it. Cabinet portfolios give access to powers and privileges denied to ordinary Members of Parliament. Successive Presidents have used the power of appointment to the cabinet as a source of patronage to secure the loyalty of Members of Parliament to him. Ministers who are beholden to the President would be deterred from criticising him and they are likely to have a vested interest in the cabinet's continuation in office.

As Parliament is made up of the people's representatives, it is supposed to be sensitive to the electorate's interests and concerns but in a system characterised by a strong executive, the legislature is more sensitive to pressures from the executive. The representatives are answerable to the electors once in about five years only, but the executive is seated in Parliament and its influence will be exerted on the legislature every day.

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[133] Article 42 of the Constitution reads as follows: "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security."
[134] See Standing Order 78 of Sri Lanka Parliament.

In reality, Parliament has become a body whose main function is to facilitate majority rule. It is unrealistic to expect the majority party to be critical of the government. The imposition of discipline on party members to hold the party line has made it virtually incapacitated Parliament from performing its critical function. If at all, that function has to be discharged by the opposition, but a weak opposition which does not offer any prospect of forming an alternative government cannot perform this function effectively.

The Representative Function

Parliament is a forum in which representatives ventilate the grievances of their constituents in the expectation that they will be remedied and debate matters of public importance. Members keep ministers abreast of public opinion. Even those who were opposed to the policies of the government need to be heard and that is the rationale in having an opposition in Parliament. An important function of Parliament is to function as a forum for debating and discussing important political, economic, and social issues affecting the country.

There has been a continuous deterioration in the quality of men and women who represent the electorate in Parliament. It is a notorious fact that parliamentarians do not always follow parliamentary manners. Writing about the British parliament, the well-known parliamentarian and humourist A.P. Herbert said that, "when you see Parliament being spoken of in the papers, you can be fairly sure that it will be spoken of in a pretty insulting way."[135] Some Sri Lankan parliamentarians have demonstrated that they are not averse to acting in a manner that would invite opprobrium from the public.

A former Speaker of Parliament lamented at the fact that Members of Parliament lacked the expertise and information to participate in specialised policy-making. He expressed the need for the improvement of the quality of the men and women who entered Parliament, and suggested that prospective members

[135] A.P. Herbert (1947) ***The Point of Parliament*** (London: Methuen).

should satisfy a minimum standard of education and experience to qualify for election to Parliament.[136]

Jayewardene had Second Thoughts

When Jayewardene was no longer the President, he acknowledged in public the need for reform and to curtail the presidential powers, especially in three areas: (i) the term of office, which he suggested be reduced to four years, (ii) the President's responsibility to Parliament, and (iii) and his immunity.[137]

G.L. Peiris highlighted the concentration of power in the executive president as a major weakness of the constitution. He also criticised the Jayewardene rationale that a strong executive unhampered by the whims of the Parliament was needed to implement the economic and social policies of the government of the day. In Dr Peiris' view, a constitution "is not meant to be an instrument to facilitate a particular political or ideological objective, or indeed a facilitator of strong government. On the contrary, the primary function of a constitution, particularly in a modern third world where the State inevitably wields considerable discretionary power, is to create regularized restraint or checks and balances on the exercise of political power."[138]

Many years prior to making this acknowledgement, Jayewardene had agreed to allow a free discussion within the government parliamentary group on the question whether to permit the President of the country to be brought before court. His action was probably prompted by Sarath Muttetuwegama MP's attempt to introduce a private member's motion asking leave to introduce

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[136] Speech made by K.B. Ratnayake, former Speaker, at the 40th Commonwealth Parliamentary Conference, ***Daily News***, 15th October 1994.
[137] See T. Sabaratnam, '*1978 Constitution in focus at seminar*', ***The Daily News***, 21st October 1994. JR Jayewardene made these remarks at a seminar on constitutional reforms organised by All Ceylon Moors Association held at the BMICH. According to the report of the seminar, G.L. Peiris followed J.R.Jayewardene and had demolished the latter's contention that the 1978 constitution embodied within itself liberal and democratic values.
[138] G.L. Peiris, '*Proposals by the Government on the abolition of the Executive Presidency*' ***The Sunday Observer***, 20th November 1994.

a bill to amend the constitution to make the President liable to legal action. The Speaker disallowed the motion.[139]

Successive presidents have promised to end the executive presidency and revert to the parliamentary system only to renege on their promise once elected to power. Promises to abolish the presidential system and revert to the Westminster model were made by Chandrika Bandaranaike, and her draft Constitution of 2000 envisaged the abolition of the executive presidency. It was acknowledged by her Minister of Constitutional Affairs G.L. Peiris that a consensus was emerging across the political spectrum for the re-introduction of the parliamentary executive model, and that the then government had received "overwhelming mandates at both the Parliamentary and Presidential elections for the abolition of the Executive Presidency."[140] Mahinda Rajapaksa made a similar promise before the 2005 elections only to renege upon it.

Recently, politicians have sought to justify the continuance of the executive presidency on the basis that it helped the defeat of terrorism, the implication being that it would not have been possible to defeat terrorism if a parliamentary system had been in place. Among those who expressed this view is G.L. Peiris who, contrary to the position he had taken as a Minister under the Kumaratunga administration and even before, argued that to have a strong executive was "an absolutely essential condition" to accelerate the country's economic development. In his view, "terrorism could not have been eradicated without the executive presidency and the strength which that institution imparted to the body politic."[141] This *ex post facto* rationalisation of the benefit of having an executive presidency is somewhat dubious. The

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[139] See '*Presidential immunity for group debate*' ***Daily News***, 6th November 1985.
[140] ibid.
[141] '*GL on Constitutional Amendment*' ***The Island***, 31st August 2010; Cf. G. Usvatte-Aratchi, '*Eighteenth Amendment: A Rush to Elected Tyranny*' ***The Island***, 6th September 2010 for an economist's view in rebuttal of the Peiris thesis that a strong executive is essential for economic development. Usvatte-Aratchi cited, among others, Nyerere of Tanzania and Mugabe of Zimbabwe as examples of strong executives who ruled countries with stagnating economies. In his view, 'no economist worth his salt' will say that a strong executive is 'absolutely essential for development to accelerate'.

executive presidency did not prevent the rise of the Liberation Tigers of Tamil Eelam (LTTE), which took place at a time when the executive presidency was in place and Presidents who came before Mahinda Rajapaksa failed to bring an end to the civil war.

J.R. Jayewardene came to power with a massive majority and had the opportunity to tackle the Tamil problem, which he failed to do, probably because it would have been unpopular with the majority community. The infamous events of 'Black July' 1983 happened when he was President. Yet, he espoused the executive presidency as a desirable model on the ground that it would enable government to take unpopular measures.

Shifting the Balance Further

The prospect of trading an office with virtually plenary powers for one that may be less powerful is something that Presidents have been unwilling to face, especially when they have got used to enjoying the powers that go with the office. The promised abolition of the presidential system has not occurred. Instead, what we have witnessed in the recent past is an enhancement of the powers attached to the presidential office.

The Seventeenth Amendment to the Constitution was passed by Parliament when Chandrika Bandaranaike was President. The objective of the amendment was to ensure good governance and to rid political interference in the administration. This was to be achieved through independent commissions, which were set up to supervise and monitor key areas of governance such as the police and the public services. The independent commissions were to consist of members selected by a Constitutional Council, which would be selected by the government and the opposition acting in a bi-partisan manner. Unfortunately, appointments to the Constitutional Council were not made in the intended manner, thereby defeating the purpose for which it was established.

The arrangement adopted in the constitution in regard to the distribution of the powers of government and the terms on which they were to be exercised were disturbed further by the Eighteenth Amendment. By this amendment the constitutional bar against a person holding the office of the President for more

than two terms was removed. The Eighteenth Amendment further enabled President Rajapaksa to appoint key officials to important positions in the judiciary, the electoral administration, and the police.

The fear that power concentrated in the hands of a person for too long might be abused is the reason why in presidential regimes the term that a person could serve in that office is limited to one or two years.[142] By definition democracy requires periodic elections in order that the electorate is given an opportunity to change governments. Authoritarian rulers find term limits an obstacle to their desire to remain in power for as long as possible.[143]

Article 30(2) in its original form was intended as a safeguard against abuse of power. The Eighteenth Amendment removed this safeguard and also extended the period that a person enjoyed legal immunity. [144] The Eighteenth Amendment shifted the balance of power in favour of the executive even further, and as in the case of the Third Amendment, Parliament willingly cooperated with the government to push through this amendment.

When the Eighteenth Amendment Bill was referred to the Supreme Court for an opinion on its constitutionality, several persons petitioned the Supreme Court for a ruling that the Bill required approval at a referendum. They argued that the Bill required such approval because several of its provisions were inconsistent with basic provisions in the Constitution which engaged the referendum. It was argued in particular that the removal of the term limit would affect the manner in which the executive power of the people would have to be exercised.

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[142] See Linz, '*Presidential or Parliamentary Democracy: Does it make a difference*' in Linz & Valenzuela (1994): p.17.

[143] The South Korean strongman Syngman Rhee engineered an extension of his term by changing the Constitution to allow a direct popular vote for the presidency. To push through the revision he repressed all political activity by declaring martial law. The Assembly's vote for the constitutional revision was taken in the middle of the night. A second constitutional revision enabled Rhee to enjoy an unlimited term as president. Ultimately, Rhee's constitutional manipulations triggered a popular revolt resulting in his downfall.

144 See S. Wickremasinghe, *Civil Rights Movement Statement on 18th Amendment to the Constitution*.

As it had done with the Third Amendment, the Supreme Court presided over by Chief Justice Shirani Bandaranayake acknowledged that Articles 3 and 4 had to be read together but went on to hold that the removal of the two-term limit actually enhanced the franchise by giving the people a choice of candidates, including a person who has served two terms already. It is apparent from the Court's opinion that it had dealt with the petitioners' arguments in a cursory manner, making no attempt to identify in sufficient detail the arguments that were presented to it by the petitioners objecting to the Bill. The Court failed to appreciate the degree to which its interpretation would fundamentally undermine the terms subject to which the office of President had been created and to which vast powers had been delegated. The Court failed to consider the impact that the Amendment might have on the terms subject to which the people had delegated their powers of government to the President. The Court referred to the impact the Amendment had on Article 4(e) but did not give its mind to the impact it had on the powers of government mentioned in Article 4(b). The Court's misconceived and misplaced emphasis on Article 4(e) led it towards an erroneous interpretation.

If the Court's rationale were carried to its logical conclusion and elections are held every year, then the franchise rights of the people would be enhanced even further but that would lead to what mathematicians and logicians call a *reductio ad absurdum.* It ignored the people's wish that they did not want any enhancement of their franchise as stated by the Court, which they had indicated by insisting that no elections shall be called more than once in six years. They had even provided that if a vacancy were to occur in that office during the pendency of a President's term, as when he dies or is removed from office, then it shall be filled by a process other than election.

The Bandaranayake Court had an opportunity to correct the errors made by the Sharvananda Court but it proceeded to make the same errors because it adopted the same faulty reasoning and

logic as had been adopted by the latter.[145] The Eighteenth Amendment represented a multi-pronged attack on those Constitutional provisions which were designed to operate as a check on the enormous powers given to the Executive.

Asanga Welikala has noted[146] the indecent haste with which the Eighteenth Amendment Bill was rushed through the Court and Parliament as an urgent measure. It is impossible to understand the urgency behind the introduction of the Bill. The President had been re-elected only a few months before and there was no prospect of any election for about four more years; the people would have been tired of elections and the thought of elections would have been far from their minds.

Such haste had the effect of preventing a fully informed debate taking place on the Bill's merits. Indeed, the petitioners who intervened in Court were not provided with accurate copies of its text until after the Attorney General had commenced his submissions to Court. It is almost certain that no submissions were made on the Bill's effect on the president's immunity from suit. Both the Court and the lawyers who appeared before the Court were placed under severe constraints and had inadequate time to gain a proper insight into the Bill's purport and its ramifications. Consequently, the Court did not have the benefit of an informed discussion on the Bill. To compound the matter, the Court performed the extraordinary feat of pronouncing judgment on the Bill's constitutionality within a day.

Not much discussion took place in Parliament. Many members absented themselves from Parliament when it was taken up there and members who did attend must have had their minds occupied by other urgent matters affecting their electorates rendering them unable to make a careful study of its contents, to understand its consequences and to make meaningful contributions, especially with the three line whip hanging over them.

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[145] See further R. Hameed, *'Mahinda Rajapkse cannot succeed President Rajapakse'* ***Colombo Telegraph,*** 1st January 2015.

[146] 'Do we need an alternative approach to the third term question beyond text and intention?', ***Groundviews***, 21st October 2014

The Sovereignty of Parliament and the Separation of Powers

The idea is entertained and propagated by politicians that the Sri Lankan Parliament is sovereign. It is a fiction and a myth. Parliament is neither sovereign nor supreme.

The Soulbury Constitution operated under a system in which the powers of government were kept separate and parliamentary legislation was subject to legislative review.[147] The 1972 Constitution unified governmental powers in the National State Assembly,[148] declaring it as the supreme instrument of state power.[149] Nevertheless, even in the latter constitution it was explicitly declared that sovereignty was in the People and that it was inalienable.[150] It meant that the people could not give up their sovereignty over Sri Lanka even if they wanted to.[151]

The Second Amendment to the 1972 Constitution abandoned the notion of the legislature as the sole supreme instrument of state power and made the executive and the legislature coordinate branches of government. The Second Amendment made both the National State Assembly and the President supreme instruments of state power. The 1978 Constitution abandoned this provision altogether and with it the notion that either of these organs is supreme. Parliament is no longer a supreme instrument of state power; sovereignty continues to be reposed in the people and is inalienable.[152] The basic principles subject to which governmental power has been delegated to Parliament have been set out in the constitution. In Sri Lanka, there is a law higher than Parliament's and it is the constitution. The constitution is supreme and the

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[147] See *Liyanage v The Queen* (1965) 68 NLR 265; *Kariapper v Wijesinghe* (1967) 70 NLR 49.
[148] See *1972 Constitution*, section 4. See *Associated Newspapers of Ceylon Limited (Special provisions) Bill*, Decisions of the Constitutional Court 35, at 53: 'In our view, the doctrine of separation of powers has no place in our Constitution.'
[149] *1972 Constitution*, section 5.
[150] *1972 Constitution*, section 3.
[151] See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.2: '… even the people of Sri Lanka could not give up their sovereignty over Sri Lanka. It is inalienable by any procedure that you can think of.'
[152] *1978 Constitution*, Article 3.

people are sovereign. It also meant that the delegation of governmental powers by the people to their representatives meant only that the representatives were authorised to exercise those powers on their behalf; it did not result in a transfer of the sovereignty to their representatives.

The powers of government originate with the people and they are to be exercised by the organs of government as trustees.[153] They are to be exercised in good faith, according to law, and in the best interests of the people.[154] J.R. Jayewardene, who as Prime Minister chaired the Parliamentary Select Committee on the draft 1978 Constitution, remarked at one of its hearings:

> "We are practically a dictatorship today. There is nothing we cannot do in this House with a five-sixths majority. I am trying to avoid that".[155]

This intention is made clear by not giving the Sri Lanka Parliament the same powers as those of the British Parliament. In a speech he made on the constitution, Jayewardene emphasised that an independent judiciary, the powers of the legislature in relation to the President, which enabled it to act as a check on presidential power, and an independent press are the important elements of the checks and balances which made the constitution work democratically.[156] Parliament is expected to ensure that the President and the executive are held politically responsible while the judiciary is responsible for holding the executive legally responsible.[157]

It is for this reason that the powers of government have been kept separate and the independence of the judiciary and fundamental

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[153] *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga* SC (FR) No 352/2007 where the Court said that powers are entrusted 'only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People… To do otherwise would be to betray the trust reposed by the People …'

[154] *Vasudeva Nanayakkara v K.N. Choksy* SC (FR) App No. 158/2007 SC decided on 4.6.2009.

[155] *Report of the Parliamentary Select Committee of the National State Assembly*, Parliamentary Series No 14: p.214.

[156] See J.R. Jayewardene (1996) ***Relived Memories*** (New Delhi: Navrang): p.24.

[157] The focus of this chapter is on Parliament and not on the judiciary.

rights have been guaranteed. The system of government is underpinned by the theory of the separation of powers. The constitution embodies a system of checks and balances with a view to ensuring that no one branch of the government is able to assume over all control of government. The powers of the President are so extensive that, in the absence of an effective system of checks and balances, the Presidency can become an authoritarian institution.

Yet, it has not prevented parliamentarians and the executive from falsely claiming that Parliament is sovereign. It is to the executive's advantage to support Parliament's sovereignty as, being in control of Parliament, it would work for the benefit of the executive. The theory of parliamentary sovereignty is at odds with the principle of sovereignty of the people and separation of powers, which are basic features of the Sri Lankan constitution. The Supreme Court recognised that a balance has been struck in Article 4 of the constitution based on separation of powers between the three organs of government in relation to the power that is attributed to each such organ, reinforced by a system of checks and balances.[158]

Accordingly, the powers of government are not fused in the hands of a single organ of the state but are kept separate. The rationale behind their separation is that reposing all the powers of government in a single body is an invitation to tyranny and would lead to powers being abused; the separation of powers accompanied by a system of checks and balances would prevent abuse of power and facilitate good governance.

As was said by the Supreme Court in the matter relating to the Eighteenth Amendment to the Constitution Bill of 2002,[159] the constitution does not attribute any unfettered discretion or authority to any organ or body established under the constitution. Even the immunity of the President under Article 35 has been limited in relation to court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided

[158] *In Re the Nineteenth Amendment to the Constitution*.
[159] *In Re the Eighteenth to the Constitution Bill* (2002) 3 Sri LR 71.

the questions in relation to Emergency Regulations made by the President[160] and presidential appointments.[161]

The doctrine of parliamentary sovereignty has its roots in the legal theory developed by A.V. Dicey in relation to English constitutional law and it essentially deals with the relationship between the Parliament and the law under a system which has no codified constitution. It is a distinctively English principle which has no counterpart even in Scottish constitutional law.[162] In English constitutional law, the doctrine of sovereignty implies that there is no higher law to restrain Parliament from making – or unmaking – any law. There is no law which Parliament cannot change, and the courts will give effect to the laws passed by Parliament.

However, the Kings of England had delegated their judicial power to the courts, and as Blackstone observed many centuries ago:

> "In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power."[163]

In the absence of a written constitution in England, there was no fundamental rule to which Parliament is required to conform.[164] The principle of parliamentary sovereignty was developed by English constitutional lawyers to legitimise the power of Parliament and to validate what it does. It is a creation of the common law. In *Jackson v Attorney General*,[165] the then House of Lords considered the relationship between the rule of law and

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[160] *Joseph Perera v Attorney-General* (1992) 1 Sri LR. 199.
[161] *Silva v. Bandaranayake* (1997)1 Sri L.R. 92.
[162] *MacCormick v Lord Advocate* (1953) SC 396.
[163] W. Blackstone (1765) ***Commentaries on the Laws of England***: ch.7, p.258.
[164] Lord Hope in *Jackson v AG* [2005] UKHL 56 at para 126 said that 'the principle of parliamentary sovereignty … in the absence of higher authority, has been created by common law'.
[165] [2005] UKHL 56.

parliamentary sovereignty, and it was suggested by some of the Law Lords that the theory of parliamentary sovereignty has its limits and that courts would contradict Parliament if it were to enact legislation contrary to the rule of law. Even in England, parliamentary sovereignty is no longer absolute and some judges have argued that the ultimate norm of the English constitution is the rule of law.

In *Jackson*, Lord Hope spoke of the *supremacy of the law* and said:

> "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty."[166]

Lord Hope made similar remarks off the bench as well.[167] He characterised a statement made by the Master of Rolls that judges cannot go against Parliament's will as expressed through a statute as,

> "a dangerous doctrine, unless one can be absolutely confident that the increasingly powerful executive will not abuse the legislative authority of Parliament which, *ex hypothesi*, it controls because of the absolute majority that it enjoys in the House of Commons … The sovereignty of Parliament is in the hands of the executive … So when we think of the sovereignty of Parliament we should really be thinking of what this means about the power that this gives to the executive.'[168]

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[166] ibid.; para.107.

[167] See Hope, '*Sovereignty in Question- A view from the Bench*', lecture given at WG Hart Legal Workshop, 28th June 2011.

[168] In his lecture, Lord Hope also raised 'the very real question as to whether we can continue to rely on Parliament to control an abuse of its legislative authority by the executive. It is an uncomfortable fact that Parliamentary sovereignty and the rule of law are not entirely in harmony with each other.' He also stated that the principle of parliamentary sovereignty cannot be referred to a statute.

In Sri Lanka, the basic norm is the constitution.[169] The constitution has not anointed Parliament with a special status. As a creation of the constitution it cannot pretend to be superior to its creator. Parliament's occupation of the legislative field is not exclusive. If Parliament were to act in a manner not permitted by the constitution, then it would be acting illegally. Its illegal actions cannot be rendered legitimate by a meaningless claim that it is sitting on the highest echelon of democracy.

The President can override Parliament's will in matters affecting legislation; he can submit to the people a bill which has been rejected by Parliament for approval at a referendum.[170] This provision would allow a President to by-pass a hostile Parliament to get legislation enacted against the wishes of the majority in Parliament. Even if Article 4 of the constitution makes no reference to Parliament sharing its legislative power with the President, it is difficult to rationalise the existence of this provision with the principle of parliamentary sovereignty.[171]

Besides, not all actions of Parliament can attract force or finality. A resolution passed by Parliament has no legal effect.[172] Courts can strike down rules and regulations framed by persons or bodies created by Parliament exercising power delegated to them by Parliament. Some measures passed by Parliament have no force outside it unless they have been approved by the people at a referendum. It would be absurd to ascribe sovereignty to what Ministers might say inside Parliament. A Bill that has been approved at a referendum has to be certified by the President that it has been so approved by way of an endorsement in the prescribed form. Until then it does not become law.

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[169] *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221, 247 per Thamotharam J.

[170] See Article 85 (2) of the *Constitution*. The President cannot, however, submit under this provision a bill for the amendment, repeal or replacement of the constitution or an addition to it. He cannot also submit a bill which is inconsistent with any provision of the Constitution.

[171] Parliament could have the last word on such a law as it would have the power to repeal it.

[172] *Stockdale v Hansard* (1839) EWHC QB J21; *Bowles* v *Bank of England* [1913] I Ch. 57.

Legislation is proposed and initiated by the Cabinet headed by the President and chosen by him, and presented to Parliament for its approval. The Ministers double up as MPs and a large number of them hold ministerial portfolios, both within and outside Cabinet. It has enabled the executive to hold the Parliament by the snaffle and virtually neutralise its constitutional function to hold the executive to account. It is impossible to describe Parliament as either sovereign or supreme.

The notion that Parliament is sovereign has received uncritical approval for far too long; it has become a sort of *mantra* that is invoked by those who wish to invest Parliament with the charisma of a holy cow. It has been used to shield Parliament's actions and legislation from judicial scrutiny. The principal justification for the special status claimed by parliamentarians is that they are elected by the people as opposed to judges who are not. A former Speaker stated with a touch of arrogance and pomposity that three or four judges should not be allowed to sit in judgement over deliberations of Parliament after a Bill has been passed because they "do not know the social forces that brought about the legislation. They cannot understand the social concepts involved."[173] The idea that Members of Parliament are elevated to a special status because they are the elected representatives of the people is a false one. The President, too, is elected by the people, but that makes him neither sovereign nor supreme.

The people have preferred to have their representatives chosen by them at periodic elections because they want their representatives to account to them. Elections offer the people an opportunity to choose those candidates who are most suitable to govern them. As was observed by Justice Mark Fernando in *Karunathilaka v Commissioner of Elections*:[174]

> "A voter had the right to choose between [such] candidates, because in a democracy it is he who must select those who are to govern – or rather, to serve – him … A voter can therefore express his opinion about

173 Stanley Tillekeratne testifying before the Select Committee on Revision of the Constitution. See *Report of the Select Committee on the Revision of the Constitution*, Parliamentary Series No 14 (22nd June 1978): p.215.
174 (1999) 1 Sri L R 157.

> candidates, their past performance in office, and their suitability for office in the future. The verbal expression of such opinions, as, for instance, that the performance in office of one set of candidates was so bad that they ought not to be re-elected, or that another set deserved re-election – whether expressed directly to the candidates themselves, or to other voters – would clearly be within the scope of 'speech and expression'; and there is also no doubt that 'speech and expression' can take many forms besides the verbal. But although it is important for the average voter to be able to speak out in that way, that will not directly bring candidates into office or throw them out of office; and he may not be persuasive enough even to convince other voters. In contrast, the most effective manner in which a voter may give expression to his views, with minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth."[175]

The process by which representatives to Parliament are chosen does not warrant the attribution of special status to Parliament. Election campaigns are often marked by violence [176] and candidates have to engage in cutthroat competition for votes and make promises that are often difficult to deliver. In *Senasinghe v Karunatilleke*[177] Justice Mark Fernando described the electoral process of a referendum as,

> " … little different to any nation-wide election, in respect of the enormous expenditure of public funds and the disruption of day-to-day life involved – including danger to life and limb, and damage to property."

It would be undesirable in any event to require judges to engage in such unseemly competition as it would be inimical to the role that judges are expected to play. The roles of parliamentarians and judges are different and it is reflected in the different procedures adopted for their selection. Judges will have to

[175] ibid.: 173-174.
[176] See
[177] (2003) 1 Sri LR 157, 187

approach their task with detachment and rationality, free from extraneous influence including that of party politics.

Even if the sovereignty of Parliament is not acknowledged, great significance is attached to the fact that Members of Parliament are elected. For instance, in *Attorney General v. Bandaranayake*[178] Justice Marsoof speaking for the entire court regarded as significant that,

> " … legislative, executive and judicial power of the People is vested either on Parliament or the President, *both being elected by the people* so as to maintain accountability and transparency, and the courts … *which are not elected by the People*, are accountable and responsible to the People through Parliament …" (italics supplied).

Later, he returned to this theme and described the power of impeachment of superior court judges as a *sui generis* power that is vested jointly in Parliament and the President, noting that both are governmental organs, "*that are elected by the People*, and when they act in concurrence, they act in the name of the People of Sri Lanka."[179] (italics supplied).

If the *raison d'etre* for vesting the power to impeach a judge in these two organs is that they are both elected functionaries of the people, then the judges in *Attorney General v. Bandaranayake* failed to explain why the people have entrusted the power to impeach an elected President jointly to Parliament and an unelected Supreme Court, and when exercising this power, whether or not they would be acting in the name of the people.

The constitution has prescribed the limits within which Parliament must function and not left it to the good sense of parliamentarians to find those limits and act accordingly.[180] It is a measure of the distrust that the people have of their politicians. It would be illogical to assume that Parliament has unlimited powers because it is composed of members elected by the people. The

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[178] SC Appeal No 67/2013 decided on 21.02.2014 (unreported).
[179] ibid.
[180] Cf *A.G. v Bandaranayake* where the Supreme Court said that the Constitution has left it to Parliament's good sense to decide whether all matters relating to the impeachment of a superior court judge should be provided for by law or standing orders.

people have not given their representatives authority to act without limits. There is no constitutional basis for Parliament to have recourse to a theory of English constitutional law, which has no application to the Sri Lankan Parliament, which operates under a written constitution.[181]

The constitution enshrines the fundamental norm that sovereignty is in the people and that it is inalienable. The powers of government are only aspects but not the entirety of that sovereignty. The people have entrusted to Parliament the power to legislate but have retained the power to approve at a referendum measures that have been passed by Parliament by a special majority. It is evident that legislative power is not a monopoly of Parliament. It is not an inherent power of Parliament but a power conferred upon it subject to limits.

As was said by the Supreme Court in *Singarasa v AG*,[182] the principle of English constitutional law[183] that Parliament is supreme would not apply to the Sri Lanka Parliament, which exercises legislative power derived from the people whose sovereignty is inalienable. Likewise, the President does not exercise plenary executive power as his powers too are derived from the people.

Concluding Remarks

The presidential system combines contradictory objectives, of seeking to have a strong executive with extensive powers, combined with the need to have checks on his powers. A President elected by the people might be inclined to get carried away with the notion that he has a mandate of his own, making him insensitive to the demands of the parliamentary majority. A President who is elected by a majority vote might not feel obliged to satisfy the needs of the minorities to remain in power. There is

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[181] See further R. Hameed, '*Fundamental rights and fundamental values*' ***Colombo Telegraph***, 4th January 2013; R. Hameed, '*Parliament is not a law free zone*' ***Colombo Telegraph***, 13th January 2013; R. Hameed, '*Impeachment and the misconceived reliance on CJ Corona's case*' ***Colombo Telegraph***, 16th January 2013.

[182] *S.C. Spl (LA) No. 182/99* decided on 15.09.2006.

[183] See *Manuel vs A.G* (1982) 3 AER 786 at 795

potential for conflict between the President and Parliament, as both can claim to be legitimate choices of the electorate. Where the President and the parliamentary majority are from the same party, such conflict may not occur but if they are from different parties, there is potential for a gridlock. The President has the power to destabilise Parliament by either exercising or threatening to exercise his power of dissolution of Parliament.

The function of a constitution is to put in place an effective system of checks and balances to deter abuse of power. The constitution has failed to put in place effective checks and safeguards to prevent a President from abusing his powers. Short of impeachment, which is virtually unlikely, a President who is unpopular cannot be removed from office during his term.

The system of government is built on the premise that the President and Parliament would work together, and for the President to be responsible to Parliament. Parliament on its own has proved incapable of holding the executive responsible. A strong President wielding enormous power has prevented the effective functioning of Parliament, resulting in its failure to discharge its constitutional duty to hold the President and the executive to account. The powers that are at Parliament's disposal, such as the power of impeachment, have proved to be impotent against the President. On the other hand, Parliament and the President have together acted to rein in the judiciary, the only institution capable of acting as a check against the excesses of the executive.

The President has several means available to him to control Parliament. The President appoints the Prime Minister and the cabinet from Parliament. The grant of portfolios within and outside cabinet provides a useful tool for a president wishing to grant patronage to secure support from Members of Parliament. When a large number of its members become part of the executive, it is difficult for Parliament to discharge its function of making the executive answerable to Parliament. Parliament has virtually become an extension of the executive rather than function as a separate and independent branch of government. The practice of opposition members being lured into the

government's ranks encourages even members in the opposition to look for favours from the executive.

Regrettably, Parliament has turned out to be ineffective against an over-mighty executive President, playing to the President's tune. Parliament should speak softly and carry a big stick; instead, Parliament has been talking big while carrying a fiddle stick.[184]

[184] The author wishes to acknowledge the useful comments made by Dr H.J.F. Silva, former Principal of The Sri Lanka Law College, on a previous draft of this chapter.

3

The Judiciary under the 1978 Constitution

Nihal Jayawickrama

The judiciary under the 1978 Constitution has to be assessed by reference to the constitutional framework within which it functioned, the period that preceded it, and the contemporary international standards. This chapter focuses on the superior courts of Sri Lanka; in particular, the Supreme Court.

Judicial Independence

At the core of the concept of judicial independence is the theory of the separation of powers: the judiciary, one of three basic and equal pillars in the modern democratic State, should function independently of the other two, the executive and the legislature. This is necessary because of the judiciary's important role in relation to the other two branches. It ensures that the government and the administration are held to account for their actions. It ensures that laws are duly enacted by the legislature in conformity with the national constitution and, where appropriate, with regional and international treaties that form part of national law. To fulfil this role, and to ensure a completely free and unfettered exercise of its independent legal judgment, the judiciary must be free from inappropriate connections with, and influences by, the other two branches of government. Judicial independence thus serves as the guarantee of impartiality, and is a fundamental precondition for judicial integrity. It is, in essence, the right enjoyed by people when they invoke the jurisdiction of the courts seeking and expecting justice. It is a pre-requisite to the rule of law, and a fundamental guarantee of a fair trial. It is not a privilege accorded to the judiciary, or enjoyed by judges.

Judicial independence refers to the individual, as well as to the institutional, independence required for decision-making. On the one hand, judicial independence is a state of mind that enables a judge to decide a matter honestly and impartially on the basis of the law and the evidence, without external pressure or influence, and without fear of interference from anyone, including other judges. The concept of judicial independence is now complemented by the principle of judicial accountability

embodied in the Bangalore Principles of Judicial Conduct.[1] The Bangalore Principles are based on six core judicial values: Independence, Impartiality, Integrity, Propriety, Equality, and Competence and Diligence. The United Nations has requested member States to encourage their judiciaries to take into consideration the Bangalore Principles when developing rules with respect to the professional and ethical conduct of judges.[2] Judiciaries in many countries, on all the continents, have either done so, or are engaged in doing so; the Sri Lankan judiciary has not.[3]

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[1] This statement of judicial ethics to which all judges are required to conform was prepared under the auspices of the United Nations by the Judicial Integrity Group (a geographically representative group of Chief Justices) in consultation with the senior judges of over 75 countries of both common law and civil law systems. It is now the global standard. A 175-page commentary by the United Nations, '*Commentary on the Bangalore Principles of Judicial Conduct*' (September, 2007) has been translated into several languages by the United Nations as well as by national judiciaries and judicial training institutes; Another related document developed and adopted by the, Judicial Integrity Group '*Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*' (2010) <www.judicialintegritygroup.org>; See also United Nations Convention against Corruption, '*Article 11: Implementation Guide and Evaluative Framework*' (2013) (Vienna: UNODC). Article 11 requires States Parties to "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary". It adds that "such measures may include rules with respect to the conduct of members of the judiciary".

[2] ECOSOC Resolution 2006/23 of 27th July 2006. This resolution also endorsed the *Bangalore Principles of Judicial Conduct* as representing "a further development" and as "complementary to the *Basic Principles on the Independence of the Judiciary"*. Earlier, in Resolution 2003/43 of April 2003, which was also unanimously adopted, the UN Commission on Human Rights brought the *Bangalore Principles of Judicial Conduct* "to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration".

[3] Justice Thomas, in his pioneering work on *Judicial Ethics in Australia*, explained why compliance with standards of conduct is necessary: "We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not someday depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be

Judicial independence is also a set of institutional and operational arrangements which the State is required to establish to enable the judge to enjoy that state of mind. For example, the protection of the administration of justice from political influence or interference cannot be achieved by the judiciary alone. The Human Rights Committee established under the International Covenant on Civil and Political Rights (ICCPR) has identified some of the institutional and operational arrangements which the State is required to establish. These include (i) the procedure and qualifications for the appointment of judges; (ii) the guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist; (iii) the conditions governing promotion, transfer, suspension and cessation of their functions; and (iv) the actual independence of the judiciary from political interference by the executive branch and legislature. [4]

The relationship between these two aspects of judicial independence is that an individual judge may possess the required state of mind, but if the court over which he or she presides is not independent of the other two branches of government in what is essential to its functions, the court cannot be said to be independent. Therefore, it is the responsibility of the State to establish the institutional and operational arrangements that would underpin and secure the independence of the judicial system.

Constitutional framework

The 1978 Constitution declares that Judges of the Supreme Court and of the Court of Appeal are appointed by the President; that they hold office during good behaviour until they reach the age of 65 and 63 years respectively; that they are not removable except by order of the President upon an address of Parliament presented

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standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations."

[4] General Comment No.32 (2007), HRI/GEN/1/Rev.9 Vol.1, 27 May 2008, pp.248-268.

for such removal on the ground of proved misbehaviour or incapacity (all matters relating to the presentation of such an address, including the procedure for the passing of a resolution for such presentation, and the investigation and proof of the alleged misbehaviour or incapacity, being provided by law or by standing orders of Parliament); and that their salaries are determined by Parliament and are not reducible.[5] Judges of the High Court, the highest court of first instance exercising criminal jurisdiction, are appointed by the President, and are removable and are subject to disciplinary control by the President on the recommendation of the Judicial Service Commission consisting of the Chief Justice and two Judges of the Supreme Court appointed by the President.[6] The appointment, transfer, dismissal and disciplinary control of judicial officers (i.e. judges, presiding officers and members of subordinate courts of first instance and of tribunals or institutions created and established for the administration of justice or for the adjudication of any labour or other dispute) are vested in the Judicial Service Commission.[7]

The 1978 Constitution effected a fundamental change in the relationship that had existed since Independence between the three branches of government. This change resulted when the offices of Head of State and Head of Government were combined, and the powers of both offices were vested in a single individual, the President.[8] The President is elected for a fixed term of six years, and is irremovable except under a complex and labyrinthine procedure that requires the acquiescence of the Speaker, the Supreme Court and two-thirds of all the Members of Parliament expressed on two separate occasions.[9] The President does not sit in Parliament and therefore may not be questioned in that institution on the exercise of his powers. No proceedings

[5] Articles 107 & 108.
[6] Article 111.
[7] Article 112.
[8] This change was, in fact, initially effected by *The Second Amendment to the 1972 Constitution*. A Bill for that amendment was passed by the National State Assembly (NSA) on 20th October 1977, after having been presented as an "urgent Bill in the national interest" under section 55 of that Constitution. The Constitutional Court examined and reported on it within 24 hours. However, the Second Amendment was not brought into operation until several months later, on 4 February 1978.
[9] Article 38.

may be instituted 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.[10] He appoints, on his own initiative, the Judges of the Supreme Court and the Court of Appeal, as well as ambassadors, all high officials of the Government including the Attorney General, and the Judicial Service Commission and other commissions established under the Constitution. If the political party of which he is the leader commands a majority in Parliament, he has control of the legislative process as well. In essence, the President enjoys virtually unlimited power, more extensive than that possessed by a Head of State in any other democratic country. He or she is also the supreme source of patronage in the Republic.

The power and authority of the President is in sharp contrast to that of the Prime Minister under the 1946 and 1972 Constitutions. The Prime Minister, as Head of Government, held that office only for as long as he or she enjoyed the confidence of a majority of members of the House of Representatives or the National State Assembly, as the case may be, and indeed the support of his or her own political party.[11] The Prime Minister sat in the legislature and was answerable to it for his or her actions or omissions, often on a daily basis. The Prime Minister was also subject to the law and the jurisdiction of the courts. While it was the duty of the Prime Minister to recommend to the Governor-General or the President, as the case may be, suitable persons for appointment as judges of superior courts, it was the invariable practice for the Prime Minister to seek a recommendation from the Minister of Justice, and for the latter to make such recommendation after consulting the Chief Justice, the Attorney General and senior members of the unofficial Bar. Unlike the

[10] Article 35. However, this immunity does 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 when allocating such subjects and functions to the Cabinet of Ministers. Nor does it apply to proceedings relating to the election of the President or for the removal of the President from office.

[11] For example, In March 1960, Prime Minister Dudley Senanayake dissolved Parliament when the Speech from the Throne presented by his minority government was rejected by the House of Representatives. In December 1964, Prime Minister Sirima Bandaranaike dissolved Parliament when the Press Council Bill was defeated by one vote in the House of Representatives.

President, who today personally administers the oath of office to Judges of the Supreme Court and the Court of Appeal, the Prime Minister had no direct contact with new judges since their oaths were administered either by the Chief Justice or other senior Judge.[12] Prime Ministerial tenure was also relatively short: D.S. Senanayake (3 years), Dudley Senanayake (3 years), Sir John Kotelawela (2 years), S.W.R.D. Bandaranaike (3 years), W. Dahanayake (6 months), Dudley Senanayake (4 months), Sirima Bandaranaike (4 years), Dudley Senanayake (5 years), and Sirima Bandaranaike (5+2 years). Prime Ministerial patronage, therefore, would have been short-lived and counter-productive, especially since the electorate changed the government at every general election. It would have been a very naive and short-sighted judge who attempted to nail his colours to the mast of a politician or a party in power.

The offices of Governor-General under the 1946 Constitution and of the President under the 1972 Constitution were also significantly different from that of the President under the 1978 Constitution. Both were required by the respective Constitutions to act on the advice of the Prime Minister.[13] On occasion, the Prime Minister would be requested to reconsider that advice, but ultimately it was the Prime Minister's advice that prevailed. However, the role of the constitutional Head of State (or representative of the Head of State, in the case of the Governor-General) was not merely ceremonial. He symbolized the State, and served as the essential and fundamental unifying factor in a multi-ethnic, multi-religious, and multi-party democracy. There were numerous occasions when opposition political parties appealed to the Governor-General on matters of serious concern to them. So did the judiciary. In 1972, at the height of the Constitutional Court crisis on the question whether the constitutional requirement that the Court should communicate its decision on a Bill to the Speaker within 14 days of the reference

[12] *The Court of Appeal Act 1971* and the *Administration of Justice Law 1973* provided for the judicial oath to be administered by the constitutional Head of State.

[13] *The 1972 Constitution*, Article 27. *The 1946 Constitution*, Article 4 required the Governor-General to exercise his powers, authorities and functions "as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers in the United Kingdom by His Majesty".

was directory (as the Court understood), or mandatory (as the Government and the Speaker vehemently argued), the Minister of Justice attempted to speak with the President of the Court in an effort to diffuse the crisis, but the Judge refused to discuss the matter with the Minister. The Government then decided "to invoke the President of the Republic of Sri Lanka as the ultimate authority to try and help to solve this matter, to try to find a solution which we have not been able to find ourselves".[14] In 1976, when the Minister of Justice invited the Judges of the Supreme Court to the ministry conference room for tea, in an attempt to restore relations between the two institutions that had begun to deteriorate from about two years earlier, the Chief Justice and the other Judges drove to President's House to complain of what they perceived to be an attempt to interfere with the judiciary![15] For the Supreme Court, the constitutional Head of State was the channel of communication with the Government of the day.

1962

I was admitted to the Bar as an Advocate of the Supreme Court on 20 August 1962. Fourteen years after Independence, a strong

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[14] Felix R. Dias Bandaranaike- Minister of Justice, *National State Assembly Debates* (8th December 1972). Accordingly, the President invited the Members of the Constitutional Court to President's House "to discuss an important matter". When they arrived, the Speaker and the Ministers of Justice and of Constitutional Affairs were already with the President. After five and a half hours of discussion, "the deliberations concluded in a deadlock".

[15] The first "conflict" arose in January 1974 when the Minister sent out invitations to a "ceremonial sitting" of the Supreme Court to mark the inauguration of the new judicial structure under the Administration of Justice Law. The "conflict" exacerbated when the Ministry requested the Registrar of the Supreme Court to furnish information on compliance with provisions of the new law relating to the listing of appeals and time limits on oral arguments. Relations virtually broke down in July 1975 when, at a ceremonial sitting of the Supreme Court held to pay tribute to the late Sir Alan Rose, the Chief Justice directed the Permanent Secretary to the Ministry of Justice (a lawyer who had been formally invited by the Supreme Court to attend the ceremony) to vacate his seat at the Bar Table and to sit elsewhere. This matter was raised in the National State Assembly, where the Minister defended the action of the Permanent Secretary and explained the circumstances in which both he and the Permanent Secretary had occupied seats at the Bar Table.

tradition of integrity underpinned the judiciary at every level. At a time of immense political and social change, the judiciary remained constant in its commitment to equal justice under the law. This was exemplified in January of that year when senior officers of the Armed Forces and the Police allegedly conspired to overthrow the lawfully elected Government. The Head of that Government was Prime Minister Sirimavo Bandaranaike, the leader of the Sri Lanka Freedom Party (SLFP) which had secured a majority of seats in the 95-member House of Representatives at the general election of July 1960. Fortuitous circumstances enabled that attempt to be aborted and the alleged conspirators to be arrested. In the following month, a traumatized Government secured the enactment of a retroactive law that introduced special provisions for the trial of the accused persons.[16] Among these was one which conferred on the Minister of Justice the power to nominate three judges from among the Judges of the Supreme Court to try the accused persons without a jury. The Act declared that the constitution and jurisdiction of the Court so nominated by the Minister "shall not be called in question in any Court, whether by way of writ or otherwise".

In July 1962, the Trial-at-Bar of 24 persons charged under the Act commenced before the three Judges handpicked by the Minister of Justice.[17] Among them was one Judge who had been appointed to the Supreme Court barely a month earlier under a provision of the same Act that had increased the composition of the Supreme Court from nine to eleven.[18] When called upon to plead, the defendants refused to do so, and counsel appearing for them argued as a preliminary issue that the provision of the Act that conferred on the Minister the power of nomination of judges was *ultra vires* the Constitution inasmuch as it interfered with the exercise of the judicial function. The 1946 Constitution did not contain a chapter on fundamental rights; nor did it specifically provide for the separation of powers or functions. However, after several days of argument, the Court unanimously held that the

[16] *The Criminal Law (Special Provisions) Act No.1 of 1962*.
[17] The Judges nominated by the Minister were Justice T.S. Fernando QC, Justice L.B. de Silva and Justice P. Sri Skanda Rajah.
[18] In terms of the Act, two new Judges were appointed. They were G.P.A. Silva, Permanent Secretary to the Ministry of Justice, and P. Sri Skanda Rajah, District Judge and Commissioner of Assize.

power to nominate judges, although it might have had the appearance of an administrative power, was so inextricably bound up with the exercise of strictly judicial power or the essence of judicial power that it was itself part of the judicial power. Accordingly, in its judgment delivered on 3 October 1962, the three Judges nominated by the Minister held that they had no jurisdiction to proceed with the trial for the very reason that they had been so nominated. They further held that even if the view were taken that the power of nomination was *intra vires* the Constitution, the nomination would have offended against the cardinal principle that justice must not only be done but must appear to have been done, and they would have been compelled to give way to that principle which had become ingrained in the administration of common justice in the country. In applying this principle, the Court made the following observation:

> *"A Court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this Court on enquiry as to whether the ordinary or reasonable man would feel that this Court itself may be biased. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of judges? Will he not be justified in asking himself, 'Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the judges whereas the other party to the cause has no say whatever in a selection? Have not the ordinary canons of justice and fairplay been violated?' Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?"*

Commenting on this judgment, the International Commission of Jurists, which had been represented at the trial by an observer, noted that "that the attempt of the Executive to interfere with judicial independence in Ceylon was unsuccessful is a fact that redounds to the credit of the Supreme Court of Ceylon." It added:

> *"In these days when the cardinal principles of the Rule of Law are being violated with impunity in so many countries, it is certainly*

> *refreshing to all those who subscribe to the Rule of Law and fight for its establishment and preservation to find delivered by the judges of a newly-independent country a vital judgment, which will always be regarded as an outstanding contribution towards the development of the connected principles of the separation of powers and the independence of the judiciary."*

The Government did not appeal the judgment to the Judicial Committee of the Privy Council. Instead, it introduced amending legislation to restore the power of the Chief Justice to nominate the Court. All three Judges continued to serve on the Supreme Court until they reached the age of retirement. In 1971, three years after his retirement, one of the Judges was appointed, on the recommendation of the same Prime Minister (who had been re-elected to office in 1970 after five years as Leader of the Opposition) to the office of President of the Court of Appeal which replaced the Judicial Committee of the Privy Council as Ceylon's court of final appeal.

2012

Fast forward fifty years to 2012. Ceylon was now the Democratic Socialist Republic of Sri Lanka. President Mahinda Rajapakse was Head of the State, Head of the Executive and of the Government, Head of the Cabinet of Ministers, and Commander-in-Chief of the Armed Forces.[19] He also retained several ministerial portfolios including those of Defence and Finance. The Attorney-General's Department also functioned directly under him. He commanded the support of over two-thirds of the 225-member Parliament. That number included over 60 members who had been elected from opposition parties but had chosen, from time to time, to cross the floor to bolster the ruling Sri Lanka Freedom Party, now reinvented as the United Peoples Freedom Alliance (UPFA), and be rewarded with immediate ministerial appointments. There were 67 cabinet ministers, 30 deputy ministers, 2 project ministers, and numerous ministry "monitors", presidential advisers and coordinating secretaries. In fact, nearly every member of the government

[19] *The 1978 Constitution*, Articles 30 and 43.

parliamentary party was a salaried member of the executive. The legislature was in the firm grip of the executive.

On 10 August 2012, a controversial legislative measure known as the Divineguma Bill was presented in Parliament by the President's younger brother, Basil Rajapakse, Minister of Economic Development.[20] The constitutionality of the Bill was challenged in the Supreme Court before a three-judge Bench chaired by the Chief Justice, Shirani Bandaranayake.[21] While the matter was being argued, the Chief Justice's husband, who had been appointed by the President to the office of Chairman of the National Savings Bank, was summoned by the Bribery Commission and a statement recorded in regard to certain investments made by the Bank. On 13 September, the Secretary to the President telephoned the Chief Justice and informed her that the President had directed that a meeting be arranged with her and the other two members of the Judicial Service Commission, both of whom were Judges of the Supreme Court. The Chief Justice insisted that the request be made in writing. When a letter was received intimating that a meeting had been fixed for 17 September (without providing any indication of the purpose of the meeting), the Chief Justice replied that it would not be proper for the Commissioners (two of whom were members of the Court reviewing the impugned Bill) to attend such a meeting since it would erode public confidence in the independence of the judiciary.

On 17 September, while a large crowd demonstrated outside Parliament and shouted slogans against the Chief Justice and the

[20] The Bill sought to extend central control over the provinces in several ways and expand the regulatory powers of the Minister, who would thereby assume control over very substantial financial resources.

[21] In November 2011, six months after her appointment as Chief Justice, a Bench chaired by her had held that an apparently innocuous Bill, the *Town and Country Planning (Amendment) Bill*, could become law only with the approval of all the Provincial Councils. If enacted, that law would have enabled the Government to acquire land in municipal and other areas by the simple device of declaring it to be a "sacred area". Two Provincial Councils failed to approve the Bill, and the Government withdrew it in April 2012. An easy, quick attempt at acquiring private land by the simple device of a gazette notification had been thwarted.

Supreme Court, Speaker Chamal Rajapakse, the elder brother of the President, announced that the Supreme Court had determined that the Divineguma Bill could not be passed by Parliament until it had been approved by every Provincial Council since it sought to take away powers conferred by the Constitution on Provincial Councils. On 10 October, Minister Basil Rajapakse again tabled the Divineguma Bill in Parliament and reported that eight of the nine Provincial Councils had approved it and that, in the absence of a Provincial Council in the (predominantly Tamil) Northern Province, the Governor of the Province had approved it. On the same day, the constitutionality of the Bill was again challenged in the Supreme Court on the ground that the Governor was not authorized to approve it in the absence of an elected Provincial Council. The matter was listed for argument before the same Bench chaired by the Chief Justice. The sequence of events that followed is set out below. What it reveals is a diabolical attempt to exert undue influence, coerce, threaten, and finally punish the Chief Justice.

On 26 September, it was reported that the President had discussed with a cabinet committee and a team of lawyers, what "strong measures" could be taken to deal with the situation that had arisen. On 4 October, It was reported that legal experts were "studying various options available to the executive should any situation demand precipitate action" against the judiciary. The measures being considered "ranged from a milder course of action to a more confrontational resolution in Parliament where, it was pointed out, only a simple majority would be sufficient". On 25 October, the Bribery Commission filed a report in the Colombo Magistrate's Court alleging that the Chief Justice's husband in his capacity as Chairman of the National Savings Bank "had attempted to cause a monetary loss of Rs.391 million to the Government by the unlawful purchase by the Bank of The Finance Company shares." The Magistrate noticed him to appear in court on 28 February 2013.

On 1 November, the Supreme Court submitted to President Rajapakse and to Speaker Rajapakse its determination that the Divineguma Bill required not only a two-third majority in Parliament (since the Governor of the Northern Province could not approve the Bill in the absence of an elected Provincial

Council), but also approval at a referendum (because of certain other contraventions of the Constitution). On the same day, 117 members of the government parliamentary group, purporting to act under Article 107(2) of the Constitution,[22] submitted a resolution to Speaker Rajapakse for the presentation of an Address to President Rajapakse for the removal from office of the Chief Justice.[23] The resolution contained 14 charges, and alleged that the Chief Justice "has plunged the entire Supreme Court and specially the office of Chief Justice into disrepute".[24] On 6 November, the resolution was placed on the Order Paper of Parliament. On 14 November, Speaker Rajapakse appointed a select committee of eleven Members of Parliament (seven cabinet ministers and four members from among the opposition parties)

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[22] The relevant paragraphs of *The Constitution*, Article 107 read as follows:

> (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:
>
> 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 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.

[23] The only member of the government parliamentary group who declined to sign the resolution publicly declared that one reason for his refusal to do so was that he had been presented with a blank sheet of paper that contained no charges.

[24] For the text, see '*7th Parliament of the Democratic Socialist Republic of Sri Lanka*', Parliamentary Series No.187, pp.181-187.

to investigate and report to Parliament on the allegations set out in the resolution.[25] On the same day, the select committee caused

[25] The Speaker purported to act under the following standing order, which had been made by Parliament in 1984 when the then Government proposed to commence impeachment proceedings against the then Chief Justice:

78A (1) Notwithstanding anything to the contrary in the Standing Orders, where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament, but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under paragraph (2) of this Order has reported to Parliament.

(2) Where a resolution referred to in paragraph (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution.

(3) A Select Committee appointed under paragraph (2) of this Order shall transmit to the Judge whose alleged incapacity or misbehaviour is the subject of investigation, a copy of the allegations of misbehaviour or incapacity made against such Judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it.

(4) The Select Committee appointed under paragraph (2) of this Order shall have power to send for persons, papers and records.

(5) The Judge whose alleged misbehaviour or incapacity is the subject of the investigation by a Select Committee appointed under paragraph (2) of this Order shall have the right to appear before it and to be heard by such Committee in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

(6) At the conclusion of the investigation made by it, a Select Committee appointed under paragraph (2) of this Order shall within one month from the commencement of the sittings of such Select

the resolution to be delivered to the Chief Justice, and required her to respond by 22 November to the charges contained in it. A request for further time was refused. On 20 November, the Chief Justice requested relevant further information to enable her to respond to the allegations. That was not provided. The select committee was repeatedly requested by the Chief Justice to formulate the procedure it intended to follow. There was no response to that either.

Meanwhile, on 20 November, applications for writs of prohibition were filed in the Court of Appeal by several individuals, challenging the constitutionality of the standing order under which the select committee was established. Two applications sought to disqualify two government members of the committee on the ground of bias. The issue of constitutionality was referred by the Court of Appeal to the Supreme Court in terms of Article 125 of the Constitution.[26] On 22 November, the Supreme Court

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Committee, report its findings together with the minutes of evidence taken before it to Parliament ad may make a special report of any matters which it may think fit to bring to the notice of Parliament: Provided however, if the Select Committee is unable to report its findings to Parliament within the time limit stipulated herein the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reasons therefore, and Parliament may grant such extension of time as it may consider necessary.

(7) Where a resolution for the presentation of an address to the President for the removal of a Judge from office for proved misbehaviour or incapacity is passed by Parliament, the Speaker shall present such address to the President on behalf of Parliament.

(8) All proceedings connected with the investigation by the Select Committee appointed under paragraph (2) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.

[26] Article 125(1): The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi judicial functions, such question shall forthwith

"recommended" to the members of the select committee that, "based on the mutual understanding and trust that existed between the Judiciary and Parliament", they consider deferring its proceedings until the Court had made its determination. That recommendation was ignored.

On 23 November, when the Chief Justice appeared before the select committee, she was directed to submit her "statement of defence" by 30 November, and present herself for the inquiry on 6 December. A list of witnesses and a list of documents relied upon in support of the allegations, though requested, were not provided. When the Chief Justice objected to two government members continuing to serve on the select committee because she had recently heard and determined cases in which they were involved, these two members responded that the rule against bias did not apply to Members of Parliament.

On 4 December, the first day of inquiry, large placard-carrying crowds, believed to have been transported there by certain members of the government parliamentary group, shouted abusive, derogatory and defamatory slogans against the Chief Justice outside the premises of Parliament. Once more, counsel for the Chief Justice requested a list of witnesses and documents, but these were not given. On that day and thereafter, the government controlled media and members of the government parliamentary group continuously subjected the Chief Justice and Judges of the Supreme Court and the Court of Appeal to virulent verbal attacks.

On 6 December, the second day of inquiry, the chairman of the select committee, without consulting the opposition members on the committee, announced that the objection of bias was overruled. When counsel raised the question of procedure, the chairman stated that no evidence would be led to establish the allegations and, consequently, an opportunity to cross-examine witnesses did not arise. Nevertheless, at about 4 p.m. on that day,

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be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

a bundle of over 80 documents, which contained over 1000 pages, was handed over to counsel, and the Chief Justice was informed that the inquiry into charges 1 and 2 would commence on the next day, 7 December, at 1.30 p.m. Counsel's request for more time to study the documents was rejected. When the issue of natural justice was raised, the government members responded that rules of natural justice applied to the "people", but not to "the people's representatives".

Meanwhile, at various stages of the proceedings, two members of the select committee, both of whom were cabinet ministers, hurled abuse and obscene remarks at the Chief Justice and her lawyers, and addressed her in a humiliating and insulting manner. The Chief Justice's requests that secrecy provisions be waived, and that an open and public inquiry be conducted, were refused. Her request that independent observers be permitted to watch the proceedings was also refused by the government majority in the committee. In these circumstances, on 6 December, counsel for the Chief Justice stated that it was not possible to continue to accept the legitimacy of a body steeped in partiality and hostility towards the head of the judiciary. The Chief Justice and her counsel then withdrew. She did so reiterating that she was willing to face any impartial and lawful tribunal similar to one in other Commonwealth countries, and as had been proposed in a draft constitution presented to Parliament (but not passed) in August 2000.[27]

On the same day, 6 December, the four members from the opposition parties also withdrew from the select committee, citing conduct demeaning the Chief Justice and callous disregard for the rules of natural justice on the part of the majority of members of the committee, all of whom were subject to the government whip.[28] On 7 December, without any notice to, and in the

[27] That draft constitution, presented by President Kumaratunge's Government, provided for such an inquiry to be conducted by a tribunal consisting of senior judges of Commonwealth countries.

[28] In a three-page letter to Speaker Rajapaksa, they stated that they had raised five issues in the select committee:

- The absence of a clear direction regarding the procedure to be followed by the select committee.

absence of, the Chief Justice and her lawyers, the remaining seven government members summoned 16 witnesses and elicited their evidence.[29] Thereafter, at 8.50 pm, they adjourned. Less than twelve hours later, on 8 December at 8.30 am, the seven members reassembled and, according to the record of the proceedings,

> *"The Committee considered the draft Report submitted by the Chairman and agreed to the Report. The Committee also decided that the Report be presented to Parliament today."*

- Whether documents were to be made available to the Chief Justice and her lawyers.
- The standard of proof that would be required.
- The need to arrive at a definition of "misbehaviour".
- Whether sufficient time would be made available to the Chief Justice and her lawyers to study the documents.

None of these had been addressed. They added:
"We also requested a direction that the Chief Justice and her lawyers would be given an opportunity to cross-examine the several complainants who had made the charges against her. It was also our position that if, and only if, a prima facie case had first been made out against the Chief Justice that she could be asked to respond. None of these matters were addressed by your Committee. We also find that we are groping in the dark and proceeding on an ad hoc basis. . . . The lawyers appearing for the Chief Justice asked for time to study the documents. This was refused. Apart from the Chief Justice, we the Members of the Select Committee ourselves need sufficient time to study these documents. Furthermore the Chief Justice had not been provided with either a List of Documents or a List of Witnesses. . . . We also regrettably note that during these proceedings, the treatment meted out to the Chief Justice was insulting and intimidatory and the remarks made were clearly indicative of preconceived findings of guilt. We are therefore of the view that the Committee should, before proceeding any further, lay down the procedure that the Committee intends to follow in this inquiry; give adequate time to both the Members of the Committee and the Chief Justice and her lawyers to study and review the documents that had been tabled and afford the Chief Justice privileges necessary to uphold the dignity of the Office of the Chief Justice while attending proceedings of the Committee. If these matters are attended to, we feel that the Chief Justice should be invited to continue her participation in these proceedings. However, if the Committee is not agreeable to these proposals of ours we will be compelled to withdraw from the Committee."

[29] One of the witnesses was Justice Shiranee Tilakawardane. It was later revealed that her evidence on oath, based on her recollection ("if I remember right"; "I may not be able to remember it with exactitude"), was inconsistent with a contemporaneous minute she had made on the case file. Neither she, nor the select committee, examined the case file. The select committee acted on her oral evidence. 26th August 2013 <www.colombotelegraph.com>.

That meeting lasted ten minutes. The Report that was ostensibly prepared overnight contained 25 pages. The seven members held that the Chief Justice was guilty of three of the 14 charges. They considered it unnecessary to investigate the other charges.

On 19 December, the Chief Justice applied to the Court of Appeal for mandates in the nature of writs of *certiorari* and prohibition to quash the decision of the Select Committee for, inter alia, (i) failure to adhere to the rule of law; (ii) breach of the rules of natural justice; (iii) acting unreasonably and/or capriciously and/or arbitrarily; and (iv) prejudging the issue. Of the eleven members of the select committee who were issued notice, only two opposition members appeared in Court. The matter was argued on three days, with the Attorney General appearing as *amicus curiae*.[30] The Court of Appeal sought the determination of the Supreme Court on the issue of the constitutionality of Standing Order 78A.

On 3 January 2013, the Supreme Court[31] announced its determination on the constitutional reference made to it by the Court of Appeal. Having heard counsel for seven petitioners, seven intervenients and the Attorney General, it held that:

> *"It is mandatory under Article 107(3) of the Constitution for Parliament to provide by* ***law*** *the matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof, and the standard of proof of any alleged misbehaviour or incapacity, and the Judge's right to appear and to be heard in person or by representative, in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."*

The Supreme Court explained that without a definite finding that the allegations had been proved, no address of Parliament could

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[30] Article 140 of *The Constitution* states that:
"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo, mandamus* and *quo warranto* against the Judge of any Court of First Instance or tribunal or other institution or any other person."

[31] Justice Gamini Amaratunge, Justice K. Siripavan, and Justice Priyasath Dep.

be made for the removal of a judge. Therefore, the "investigation" referred to in Article 107(3) of the Constitution was an indispensable step in the process for the removal of a judge of the Supreme Court or of the Court of Appeal. The investigation leads to a finding whether the allegations made against the judge had been proved or not. A finding, after the investigation contemplated in Article 107(3), that the allegations against the judge had been proved, was a final decision which directly affected the constitutional right of the judge to continue in office.

> *"In a State ruled by a Constitution based on the rule of law, no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision. Such legal power can be conferred on such court, tribunal or body only by an Act of Parliament, which is "law", and not by Standing Orders, which are not law but are rules made for the regulation of the orderly conduct and the affairs of Parliament. The Standing Orders are not "law" within the meaning of Article 170 of the Constitution which defines what is meant by "law"."*

> *"A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore, a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a judge against whom the allegations made in the resolution moved under the proviso to Article 107(3) is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or a body only by law, and by law alone."*

The Court noted, however, that matters relating to the presentation of an address and the procedure for the passing of such resolution were matters which could be stipulated by standing orders, although there was nothing to prevent Parliament from providing for such matters by law as well. It followed, therefore, that standing order 78A and the proceedings held before the select committee, were void *ab initio.*

On 7 January, the Court of Appeal[32] delivered its judgment. The Court made no findings on the matters that had been argued before it. Instead, it held that, in view of the determination of the Supreme Court on the constitutional issue referred to it, the select committee appointed under standing order 78A had no legal power or authority to make a finding affecting the legal rights of the judge against whom the allegations were made in the resolution presented in Parliament. Accordingly, a writ of *certiorari* was issued quashing the decision of the select committee. The Court stated that, in the circumstances, it was unnecessary to consider the other grounds urged by the petitioner.

On Tuesday 7 January, with full knowledge of the determination of the Supreme Court and the judgment of the Court of Appeal, the Speaker announced that he would proceed with the impeachment motion. On Thursday 9 January, in Parliament, Professor G.L. Peiris, Minister of External Affairs, argued that the determination of the Supreme Court was wrong. In his view, it was "constitutional heresy"; it was "replete with errors"; it was "absolutely flawed"; it was "demonstrably flawed"; it was "incurably flawed"; and it was "not worth the paper it is written on".[33] Meanwhile, lawyers throughout the country were on strike, and in Colombo they commenced a protest march to Parliament from Hulftsdorp, the seat of the judiciary. Within minutes, they were confronted by a mob armed with clubs and stones who were believed to have been transported there in government vehicles. In other parts of the city, other protest marches organized by opposition political parties, trade unions and university teachers were similarly attacked, while police looked on. None of them reached Parliament where hundreds of government supporters had already assembled and, under police protection, were shouting slogans and waving banners against the Chief Justice.

At 7.00 p.m. on Friday 10 January, Parliament passed by a two-third majority the motion to remove the Chief Justice from office.

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[32] Justice S. Sriskandarajah (President), Justice Anil Gooneratne, and Justice A.W.A. Salam.

[33] *Parliamentary proceedings* (10th January 2013) Col.443-456.

As the result was announced by the Speaker, crackers were lit all around the parliamentary complex. Shortly thereafter, Speaker Chamal Rajapakse, Minister Basil Rajapakse, Defence Secretary Gotabaya Rajapakse and several cabinet ministers reportedly proceeded to the balcony of the parliament building to watch a special fireworks display provided by the Sri Lanka Navy to celebrate the event. Other ministers, including those who had served on the select committee, proceeded to another event that was taking place outside the Chief Justice's official residence. There, for nearly four days, a large crowd of people, estimated to be in the region of several hundreds, had been allowed by the police to pitch tents and shout slogans demanding the Chief Justice's resignation. As soon as the motion was passed, a fireworks display commenced, and milk-rice (a celebratory meal) was cooked and served to everyone. A short while later, this mob (alleged to be members of the civil defence force in civilian clothes), were joined by several ministers, including those who had served on the select committee. They addressed on loud hailers and shouted out to the Chief Justice to leave. Some of them also joined the mob in singing and dancing to loud music, while fireworks lit up the night sky. The Chief Justice remained inside with her husband and young son.

On Saturday 12 January, the President summoned the ten other Judges of the Supreme Court to the presidential secretariat. He was reported to have addressed them and declared that there was still time for the Chief Justice to tender her resignation, in which event he would allow her to retire with full pension rights. It was also reported that during the 90-minute meeting, the Judges had neither raised any issues, nor made any comments. On Sunday 13 January, an order signed by the President purporting to remove her from office was served on the Chief Justice at her official residence, and the security unit assigned to her was withdrawn.

On Monday 14 January, which was a public holiday, the Secretary to the President and a Deputy Inspector-General of Police instructed the Registrar of the Supreme Court to pack all the belongings of the Chief Justice and send them to her residence. He was also informed that the new "Chief Justice" would arrive on the next day, and that the chambers should be

cleared and be ready for him. That night, a large contingent of military personnel occupied the Supreme Court Complex. From the early hours of the morning of Tuesday 15 January, the Supreme Court was cordoned off, and riot squads, barricades and water cannon put in place. Lawyers' vehicles were stopped and searched, including the luggage compartments, to ensure that the Chief Justice was not in one of them. At about 9.45 a.m., the road leading to the Judges' entrance was sealed off and the gates were locked. As each Judge arrived, his or her car was searched, before being allowed to drive in. At about 10.30 a.m., about two hundred persons, accompanied by government politicians, were allowed by the police to enter the cordoned off area and shout slogans in praise of the President and the new "Chief Justice". At noon, a large number of lawyers came out of the complex and commenced a daylight vigil, each holding a candle, "to symbolize the onset of darkness".

At 12.30 pm, Mohan Peiris was sworn in as "Chief Justice" before the President. At the time of his purported appointment, he was Chairman of the Seylan Bank, Director of Lanka Logistics (the arms purchasing unit of the Ministry of Defence), Director of Rakna Lanka Security (a security company established by Defence Secretary Gotabhaya Rajapakse), and Legal Adviser to the Cabinet of Ministers. He had previously served as Legal Adviser in the Ministry of Defence, Attorney General and as the Government spokesperson before the UN Human Rights Council refuting allegations of war crimes. At about 2.30 pm., when it was learnt that the new "Chief Justice" had been driven into the courts complex through its "exit", and had entered the Chief Justice's Chambers, the security measures were relaxed.

Meanwhile, a fundamental rights petition challenging the purported appointment of Peiris was filed in the Registry of the Supreme Court that morning, to be supported by M.A. Sumanthiran, M.P., Attorney-at-Law. According to a newspaper report,

> *"Counsel Sumanthiran said that after filing the case in the morning, he and two other counsel had met six Supreme Court Judges personally and pointed out the necessity for the petition to be taken up on that day due to its urgency. "The Supreme Court Judges agreed*

to this and told us to tell the Supreme Court Registrar to send the file to them", he said. "But it did not come up in any of the three courts that sat'", Sumanthiran said. "Ordinarily, when there is an urgent matter you have to speak to the Judges and seek an early date", Sumanthiran said. He had asked for three days – January 15, 16 and 17, and urged that it be taken up on the first day, 15 January. However, it was not listed for support on any of the other days either."

From early that morning, the Chief Justice's official residence was cordoned off, and police officers were seen even within the premises. The Chief Justice was informed by these police officers that she was prohibited from speaking to the media since she was no longer the Chief Justice. Media personnel who had gathered outside the residence for nearly three hours were ordered by the police to leave, but they resisted, reminding the police that hundreds had been allowed to even camp out there for days. At about 5.30 pm., when the Chief Justice, her husband and son, drove out of her official residence in their private car, she was prevented from speaking to the media by police officers who reminded her that she was now a private citizen. Senior police officers were heard and seen using verbal force on her son who was driving, and ordering him to move on. While driving away, she was heard to say, 'They didn't even give me a chance to thank my staff'.

The Bar Association, which did not recognize the purported appointment of Peiris, did not request a ceremonial sitting of the court to accord the new "Chief Justice" the traditional welcome. Nevertheless, a ceremonial sitting of the Supreme Court was held on Wednesday 24 January. The gates of the Supreme Court were locked to prevent both local and international media from entering the premises, and heavy police and military units were deployed outside. One photograph of the new "Chief Justice" with some Judges of the Supreme Court was released by the government information department. It was also reported that a lawyer who had recently been appointed by the President as the Chairman of the state-owned Bank of Ceylon had spoken on behalf of the Unofficial Bar, while the Attorney General had spoken on behalf of the Official Bar. There was no further information on the attendance, except that Defence Secretary

Gotabaya Rajapakse, the Governor of the Central Bank Nivard Cabraal and the Secretary to the President Lalith Weeratunge (none of whom was a lawyer) were present.

Statements condemning the removal of the Chief Justice and calling for her reinstatement were made by the Governments of Canada, United States and the United Kingdom. Similar statements were also made, among others, by the UN Special Rapporteur on the Independence of Judges and Lawyers, the International Commission of Jurists, the International Bar Association, the International Crisis Group, the Law Council of Australia, the Canadian Bar Association, the Bar Human Rights Committee of England and Wales, the Law Society of South Africa, the Commonwealth Judges and Magistrates Association, the Commonwealth Law Association, and the Commonwealth Legal Education Association. The Secretary-General of the Commonwealth expressed "the Commonwealth's profound collective concern" at what "could be perceived to constitute violations of core Commonwealth values and principles". 45 Judges from all the continents addressed a letter to President Rajapakse and Speaker Rajapakse condemning the removal of the Chief Justice.

> *"We are gravely concerned that recent actions to remove the Chief Justice have been taken in contravention of the Constitution, international human rights law and standards, including the right to a fair hearing, and the rule of law."*

They urged the President and the Speaker to act immediately to restore the independence of the judiciary by reinstating the legal Chief Justice.[34] The United Nations High Commissioner for Human Rights, Navaneethan Pillay, described the removal of the Chief Justice "through a flawed process" as a "gross interference with the independence of the judiciary and a calamitous setback for the rule of law in Sri Lanka". She observed that

> *"The jurist sworn in by the President as the new Chief Justice, the former Attorney-General and Legal Adviser to the Cabinet, Mr Mohan Peiris, has been in the forefront of a number of Government*

[34] Letter, 23rd January 2013.

> *delegations to Geneva in recent years to vigorously defend the Sri Lanka Government's position before the Human Rights Council and other human rights mechanisms. This raises obvious concerns about his independence and impartiality, especially when handling allegations of serious human rights violations by the authorities."*[35]

All these were ignored by the President and the Government. In fact, it was even alleged that these were instigated by Tamil terrorist organizations that were seeking to destabilize the country. Within the country, the President rejected appeals made to him by the heads of the four main religions to respect the judgment of the Supreme Court.

From the commencement of proceedings to remove the Chief Justice from office, the country was subjected to a virulent campaign of disinformation through the state media and other state organs. It did not seem to matter that the exercise was both unlawful and unconstitutional, or that it would destroy the foundations of democratic governance. The Chief Justice had to go, and the load of gibberish gratuitously offered by state media and cabinet ministers was intended to lull the people into complacency. Law professors and political columnists were commissioned to delve into the history of "impeachment"[36] across

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[35] Statement issued on 18th January 2013. For a very incisive critique of the Report of the Select Committee, see Geoffrey Robertson QC, Head of Doughty Street Chambers and former President of the War Crimes Court in Sierra Leone, *Report prepared for the Human Rights Committee of the Bar of England and Wales* (27th February 2013). The Commonwealth Secretary-General, Kamalesh Sharma, commissioned two independent expert opinions on the constitutional issues. These were from: (a) Justice Pius N. Langa, former Chief Justice of the Republic of South Africa (5th March 2013); (b) Sir Jeffrey Jowell QC, Emeritus Professor of Public Law and Dean of the Faculty of Law, University College London, and Head of Blackstone Chambers, Middle Temple, London (28th February 2013). However, on receipt, he withheld them. Leaked copies of both Opinions were published in <www.colombotelegraph.com> on 9th September 2013 and 29th October 2013 respectively. See also: A report of the International Bar Association's Human Rights Institute, *A Crisis of Legitimacy; The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law* (written by Justice M.L. Uwais, former Chief Justice of the Federal Republic of Nigeria, Dato Param Cumarasamy, the first UN Special Rapporteur on the Independence of Judges and Lawyers, Sadakat Kadri, Barrister and mission rapporteur, and Shane Keenan, IBAHRI Programme Lawyer).

[36] There is no reference to "impeachment" in the Constitution; the reference is to "removal from office". That term was introduced into the Sri Lankan political

the globe (a term that was alien to the Constitution) so that Ministers could argue that no court could interfere with that process. Even members of the Government began to believe the mumbo jumbo. One cabinet minister, a lawyer, was so swayed by the Government's own propaganda that, in Parliament, he shouted out to the Supreme Court to "go to hell".

Validating the illegalities

Predictably, on 30 April 2013, on the application of the Attorney General, the Supreme Court granted special leave to appeal against the judgment of the Court of Appeal referred to above on two questions of "public or general importance". These concerned the ambit of the writ jurisdiction of the Court of Appeal. The appeal was argued on 28 November before five Judges of the Supreme Court nominated by "Chief Justice" Mohan Peiris.[37] Of them, one was the most junior member of the Court, having been appointed very recently from the Court of Appeal, superseding the President of that Court who had delivered the impugned judgment. On 21 February 2014, the Court delivered its judgment holding that the Court of Appeal "possessed no jurisdiction to review a report of a select committee of Parliament, or to grant and issue an order in the nature of a writ of certiorari purporting to quash the report and findings of the parliamentary select committee on the basis that it was not properly constituted". Justice Marsoof also ventured into an area

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lexicon as the process to remove the Chief Justice began. It was a term that came with the weight of history. Foreign diplomats were summoned to the Ministry of External Affairs and lectured on a case from the United States, where one Robert Nixon, a district judge and convicted perjurer in an obscure region of Mississippi, had attempted unsuccessfully to have his impeachment by the Senate reviewed by the Supreme Court, on the ground that he should have been tried in the first instance, not by the House of Representatives, but by the Senate. The impeachment procedure prescribed under *The 1787 Constitution* of the United States of America was of no relevance to Sri Lanka. The term "impeachment" was obviously introduced into the public domain so that the baggage that it carried from the United States, Philippines and elsewhere could be employed to challenge the constitutional right of the Judiciary to subject to judicial review any decision that adversely affects a judge's legal rights.

[37] Justice Saleem Marsoof, Justice Chandra Ekanayake, Justice Sathya Hettige, Justice Eva Wanasundera and Justice Rohini Marasinghe.

that was beyond and outside the two questions of "public or general importance" that had been referred to the Court:

> *"It is my considered opinion that the determination of this Court in SC Reference No.3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this court in SC Reference No.3/2012."*

Incredibly, the reason for this sweeping condemnation of a previous Supreme Court determination in intemperate language so uncharacteristically injudicious, was simply that

> *"The words "by law or by Standing Orders" clearly conferred the discretion for Parliament to decide whether the matters required to be provided for by that article should be provided for by law or by Standing Orders."*

The fact that the determination had very succinctly distinguished the separate functions of "law" and "standing orders" was conveniently ignored by Marsoof as he enthusiastically echoed the equally simplistic assertion made in Parliament by Minister G. L. Peiris that "when the Constitution states 'by law or by standing orders', the Court has to recognize that there are two options; the Court cannot exclude one option".[38]

On 24 March 2014, the same Bench of five judges of the Supreme Court dismissed a fundamental rights application filed by the Centre for Policy Alternatives and its Director in January 2013 that sought to restrain Mohan Peiris from being appointed to the office of Chief Justice or from functioning in that office unless and until Chief Justice Shirani Bandaranayake retired or was found guilty by a competent court, tribunal or institution established by law. The same Bench also dismissed three other fundamental

[38] *Parliamentary Proceedings* (10 January 2013) Cols.445-446.

rights applications that challenged the competence of a select committee of Parliament to inquire into the conduct of the Chief Justice. The process of legitimizing the impugned acts of the parliamentary select committee, of Parliament, and of the President had been duly performed by the five judges nominated by the individual whose own legitimacy was the central issue.

The events referred to above have been described in some detail since they marked the lowest depth in the downward spiral of the Sri Lankan judiciary. The process began on the day on which the 1978 Constitution came into force, and it gathered momentum as successive Presidents made their own unique contribution towards the objective of creating a docile, deferential and subservient judiciary, thereby enhancing the reach of the enormous powers already vested in the President by the Constitution. The most critical and debilitating impact of presidential interference was experienced in respect of judicial appointments, judicial tenure, judicial authority, judicial conduct and performance and, above all, judicial integrity.

Abuse of the appointment process

Under the 1946 and 1972 Constitutions, the power of appointment of judges of the superior courts (including that of the Chief Justice) was vested in the constitutional Head of State, who acted on the advice of the Prime Minister. It was a method that had worked well in the older democracies where the executive was restrained by legal culture and tradition and by a strong media. Recent international, regional and national initiatives indicate a strong preference for the appointment of judges to be made by an independent body, such as a Council for the Judiciary or a Judicial Service Commission, with the formal intervention of the Head of State in respect of higher appointments.[39] In such a body, members of the judiciary and members of the community may each play appropriately defined roles in the selection of

[39] *United Nations Convention Against Corruption*, Article 11: *Implementation Guide* (2013). See also Consultative Council of European Judges, *Opinion No.10*; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010).

candidates for judicial office. The composition of such a body should be such as to guarantee its independence and enable it to carry out its functions effectively. Its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism. A mixed composition avoids the perception of self-interest, self-protection and cronyism, and reflects the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. The composition of the body should reflect, as far as possible, the diversity in society.

Judges of Superior Courts

Between 1948 and 1977, the Prime Minister invariably looked to the traditional sources when recommending persons for appointment to the Supreme Court. In the pool of selection were the most senior member of the Judicial Service who was usually the District Judge of Colombo, the Attorney-General and the Solicitor-General, and the Permanent Secretary to the Ministry of Justice (who was usually a senior judicial or legal officer[40]). The twin principles of seniority and merit were the determining factors in their selection for high judicial office.[41] The average age of the appointees during this period was 54 years; somewhat higher in the case of a judicial officer and lower in the case of a legal officer. Therefore, a judge of that Court usually brought with him to the Bench at least 25 years experience of judicial work in the original courts in different parts of the country, or of intimate involvement

[40] Among those who took this path to the Supreme Court were Justice E.H.T. Gunasekera, Justice V.L. St. Clair Swan, Justice L.B. de Silva and Justice G.P.A. Silva.

[41] Only one Solicitor-General, R.R. Crossette-Thambiah KC, was denied appointment to the Supreme Court. Instead, he functioned as a Commissioner of Assize until he reached retirement age. The acting Solicitor-General at the time, H.W.R. Weerasuriya, was appointed as a Judge of the Supreme Court.

as a lawyer in the Attorney-General's Department.[42] It was not a tradition of the Bar in Ceylon for its leaders to make themselves available for permanent judicial office.[43] The wide disparity between incomes at the Bar and judicial salaries, the prohibition of private practice after retirement from the Court at the age of 62, and the increasing involvement of lawyers in political activity, were the probable reasons. The appointment process was open, transparent, and perceived to be fair. The appointees, with perhaps very few exceptions, enjoyed the confidence of the Bar and of the people generally.[44]

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[42] In 1953, the Government responded favourably when the Legal Draftsman, H.N.G. Fernando, indicated his interest in being considered for appointment to the Supreme Court when the next vacancy occurred. However, the Attorney-General, H.H. Basnayake KC, objected on the ground that the Legal Draftsman was neither a judicial officer nor a member of the Bar. Thereupon, by mutual arrangement, the Solicitor-General, T.S. Fernando QC (who would ordinarily have been appointed to that vacancy) was granted three months leave to visit the United States, on the invitation of the US Government, "to observe the working of the judicial system" of that country, and H.N.G. Fernando was appointed acting Solicitor-General, an office that made him eligible for appointment to the Supreme Court. However, when that vacancy did occur three months later, Prime Minister Dudley Senanayake had been succeeded by Sir John Kotelawela, and Minister of Justice Sir Lalitha Rajapakse had been replaced by E.B. Wikramanayake KC. The vacancy was filled by the appointment of M.C. Sansoni, District Judge of Colombo. When the permanent Solicitor-General resumed his duties, H.N.G. Fernando was appointed a Commissioner of Assize, and served in that capacity until the next vacancy on the Court occurred 18 months later. On that occasion, Justice H.N.G. Fernando was welcomed on behalf of the Bar by the Attorney-General, T.S. Fernando QC. Several years later, H.N.G. Fernando's successor as Legal Draftsman, A.W.H. Abeysundera, was appointed to the Supreme Court after a short spell as acting Attorney-General; and in 1974 the Public Trustee, B.S.C. Ratwatte, who had previously been a judicial officer, was appointed to the Court after a short spell as acting Permanent Secretary to the Ministry of Justice.

[43] In 1954, three senior members of the unofficial criminal Bar (G.E. Chitty QC, A.H.C. de Silva QC, and C.S. Barr Kumarakulasinghe) agreed to serve for a limited period as Commissioners of Assize. N.K. Choksy QC served briefly as an acting Judge of the Supreme Court. In 1974, several senior members of the Bar, including Eric Amerasinghe, N.T.D. Samarakone, G.F. Setukavalar and H.L. de Silva were unwilling to abandon the profession to serve on the Supreme Court.

[44] Some of the appointments of successful middle-rung practitioners were initially received with some scepticism; in particular, the appointments in 1965 of 39-year old C.G. Weeramantry as a Commissioner of Assize shortly after having served as the counting agent of Prime Minister Dudley Senanayake at the general election that year (he was appointed a Judge of the Supreme Court in the

The first blow against the judiciary was struck by the 1978 Constitution itself when it replaced the existing 21-member Supreme Court with two new superior courts. One was the new Supreme Court consisting of a Chief Justice and not less than six and not more than ten other Judges. That court would exercise jurisdiction in respect of constitutional matters, fundamental rights, election petitions, breach of the privileges of Parliament, as well as serving as the final court of civil and criminal appellate jurisdiction. It was also vested with a consultative jurisdiction.[45] The other was the Court of Appeal consisting of a President and not less than six and not more than eleven other Judges. That court was vested with an appellate jurisdiction for the correction of errors in fact or in law committed by any court of first instance, as well as jurisdiction to grant and issue writs and injunctions, and to try election petitions arising out of parliamentary elections.[46] Unlike the 1946 and 1972 Constitutions which provided that all serving Judges shall continue in office, the 1978 Constitution contained an inconspicuous transitional provision in terms of which all Judges of the Supreme Court and the High Courts holding office on the day immediately before the commencement of the Constitution, ceased to hold office.[47] They suffered "instantaneous official death".[48]

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following year), and in 1972 of Jaya Pathirana, an intensely vocal SLFP member of the 1960-64 House of Representatives. Pathirana had declined an appointment as a Commissioner of Assize in October 1970 "as he desired to remain in active politics" (Private and confidential letter from Felix Dias Bandaranaike, Minister of Public Administration, to Senator Jayamanne, Minister of Justice, dated 4 October 1970, Records of the Special Presidential Commission of Inquiry 1978, marked P 160). Other practitioners who were appointed to the Supreme Court included Dr H.W. Thambiah QC, Kingsley Herat, G.T. Samarawickrema QC, T.W. Rajaratnam, Malcolm Perera, Wilmot D. Gunasekera, S.W. Walpita and S. Sharvananda.

[45] Articles 118- 136.

[46] Articles 137-147.

[47] Article 163. Contemporary international standards require that where a court is abolished or restructured, the State should seek to ensure that measures are in place to facilitate, in consultation with the judiciary, the re-appointment of all existing members of the court to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned may be provided with full compensation for loss of office. See Consultative Council of European Judges, *Opinion No.10*; Judicial Integrity

J.R Jayewardene had practised as an Advocate of the Supreme Court before abandoning the profession quite early in his life to form a radical wing in the Ceylon National Congress. He was one of the few surviving members of the State Council and of the D.S. Senanayake Cabinet of 1947 in which he had served, at the age of 41, as Minister of Finance. His father had been an acting Judge of the Supreme Court. One brother was a District Judge, while another, H.W. Jayewardene QC, was the President of the Bar Association of Sri Lanka. His own political philosophy had apparently metamorphosed from extreme right wing in the years of the Dullesian cold war into "indigenous socialism". Through it all, he had remained a firm believer in constitutionalism. If President Jayewardene so wished, all the outgoing nineteen Judges of the Supreme Court could have been accommodated, on the basis of seniority, in the two new superior courts.[49] He chose instead to exclude eight Judges, and to re-appoint the remaining eleven to the two Courts without regard to seniority, experience or age. [50]

Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), UNCAC, Article 11: *Implementation Guide* (2013).

[48] H.L. de Silva, '*The role of the judiciary in the protection of fundamental rights*' in Centre for Society and Religion (1984) ***Independence of the Judiciary*** (Colombo): pp.52-62.

[49] On the day immediately before the commencement of the Constitution, the Supreme Court consisted of the following Judges (in order of seniority): N.D.M. Samarakone QC (Chief Justice), G.T.Samarawickrema QC, V.T. Thamotheram, J. Pathirana, D. Wimalaratne, T.W. Rajaratnam, C.V. Udalagama, T.A.de S. Wijesundera, S.D.M.L. Perera, I.M. Ismail, J.G.T. Weeraratne, A. Vythialingam, N. Tittewela, S. Sharvananda, S.W. Walpita, W.D. Gunasekera, B.S.C. Ratwatte, R.S. Wanasundera, and P. Colin Thome. The High Court Judges (in order of seniority) were: J.F.A. Soza, M.M. Abdul Cader, J.R.M. Perera, H.A.G. de Silva, C.N.de S.J. Goonewardene, L.H. de Alwis, T.J. Rajaratnam, K.D.O.S.M. Seneviratne, K.A.P. Ranasinghe, J.S. Abeywardene, A.A. de Silva, C.L.T. Moonemalle, S. Selliah, B.E. de Silva, G.R.T.D. Bandaranaike, D.G. Jayalath, T.D.G. de Alwis, and B. Senaratne.

[50] Five Judges of the High Court were also "removed" from office, although the High Court itself continued to exist in terms of the *Administration of Justice Law, No.44 of 1973*, under which it had been established. They were J.R.M. Perera (53), C.N.de S.J. Goonewardene (55) and A.A. de Silva (47) who had been members of the Attorney-General's Department, and T.J. Rajaratnam (59) and Bertram Senaratne (58) who were both senior District Judges prior to their appointment. No reasons were ever offered for their exclusion.

The eight Judges who were excluded had been guaranteed security of tenure by the Constitution in terms of which each had been appointed, and removal was only possible for proved misbehaviour or incapacity. They had functioned on the Supreme Court for over an year after the Jayewardene Government assumed office. Five of them, Justice Jaya Pathirana (57), Justice T.W. Rajaratnam (57), Justice Malcolm Perera (55), Justice S.W. Walpita (59), and Justice Wilmot D. Gunasekera (56) had abandoned the unofficial Bar, and by accepting judicial office had forfeited the right of private practice for life. Of the other three, Justice T.A.de S. Wijesundera (58) and Justice Noel Tittewela (55) had graduated through the Attorney-General's Department and reached the Court in the normal course of promotion, while Justice C.V. Udalagama (59) was a judicial officer who had been appointed, as many of his colleagues had previously been, at the end of a long career served in different parts of the country.[51]

[51] Although no reasons were ever offered for the "removal" of the eight Judges, it was perhaps not a coincidence that four of them – Justices Pathirana, Wijesundera, Udalagama and Tittewela – had been members of the Constitutional Court established under *The 1972 Constitution*. In December 1972, upon the resignation of three of the original members of that court, Chief Justice H.N.G. Fernando had made it known to his colleagues on the Supreme Court that, having regard to the treatment meted out to the three members by the executive and the legislature, and the circumstances leading to their resignation, none of the Judges should agree to serve on that court. Disregarding this "advice", Justice Pathirana and Commissioners of Assize Wijesundera and Udalagama accepted appointment to that court. They proceeded thereafter to approve several politically sensitive Bills of dubious constitutional validity, including the *Press Council Bill* and the *Associated Newspapers of Ceylon Ltd (Special Provisions) Bill*. They also approved the Administration of Justice Bill which, inter alia, abolished the Court of Appeal, thereby "removing" three of its Judges, the security of whose five-year tenure had been constitutionally guaranteed. Justice Tittewela had also served as Chairman of the Delimitation Commission appointed in 1974. (In 1959, when Prime Minister S.W.R.D. Bandaranaike invited a Judge of the Supreme Court to serve as Chairman of the Delimitation Commission which was then required by the Constitution to be appointed, the Judges had discussed the matter and decided, by a majority vote, against accepting the invitation.) The delimitation of electorates is essentially a political matter, and when existing boundaries are varied in order to create new electorates, some degree of political protest is inevitable. The reaction to the publication in October 1976, barely six months before the scheduled general election, of the Commission's report was, therefore, not that of general acceptance.

Seven Judges were chosen for re-appointment to the Supreme Court. They were Chief Justice N.T.D. Samarakone and Justices G.T. Samarawickrama, V.T. Thamotheram, I.M. Ismail, J.G.T. Weeraratne, S. Sharvananda, and R.S. Wanasundera. The last four were comparatively junior members of the former Supreme Court. Justice D. Wimalaratne, who had been senior to all four of them, was relegated to the Court of Appeal as its President. Justices A. Vythialingam, B.S.C. Ratwatte, and P. Colin Thome were appointed to the Court of Appeal.[52] Other new appointees to that Court of Appeal were the two senior High Court Judges, J.F.A. Soza and M.M. Abdul Cader; the Secretary to the Ministry of Justice, K.A.P. Ranasinghe; and a District Judge, K.C.E. de Alwis, who by-passed the High Court to take a "double promotion" leap into the Court of Appeal. Weeraratne, Sharvananda and De Alwis had already been chosen to serve on a special presidential commission that would recommend the removal of President Jayewardene's principal political opponent from the political scene.[53] At the ceremonial inauguration of the new Supreme Court on 11 September 1978, Chief Justice Samarakone was constrained to observe that: "I and my brothers have been members of the Old Supreme Court and would have wished for it an honourable demise and decent burial, but that was not to be".

Dr Colvin R. De Silva, writing at the time, described the process as a "witches' brew":

> *"The pressure lobbies swung into action, ranging far and wide to reach the Presidential ear. Policies got mixed up with personalities, and principles with both. Principles were the inevitable casualties. The Cabinet got drawn into the fray; and both President and Cabinet stand hurt in the outcome. It has been hard for anyone*

[52] Justices Vythialingam and Ratwatte had both been senior to Justice Wanasundera.

[53] The preferential treatment and greater seniority accorded to them was a clear message to the judiciary of the riches that lay in the path of judges who were willing to co-operate with the President. One of them, in due course, was elevated to the office of Chief Justice. It was perhaps poetic justice that of the other two, one commissioner entered into a financial transaction with a person who was the subject of inquiry by the commission and was found guilty by the Supreme Court of a corrupt act, while the other allegedly disgraced himself by spiriting away the commission's refrigerator, carpets and curtains.

> *involved to come unscathed from the imbroglio. One Judge at least of the shamefully dismantled Supreme Court has refused from the outset to have anything to do with the witches' cauldron. He will go into history and into the distinguished succession of judges who have firmly stood on the ground of principle when judicial independence came under executive or legislative assault. It is also known now that another Judge washed his hands off the whole affair by refusing his announced appointment after the slight of announced non-appointment."*[54]

The remaining vacancies on the Court of Appeal were filled with the appointment of four members of the unofficial Bar who had been associated in political and legal work on behalf of the ruling United National Party, J.A.R Victor Perera, H.D. Thambiah, H.D. Rodrigo, and E.A.D. Athukorale. Perera was a provincial practitioner who had stormed his way into the limelight only a month earlier by making public a letter allegedly written by him to the former Minister of Justice, Felix R. Dias Bandaranaike.[55] This letter, which was read out in the National State Assembly by Prime Minister Premadasa, expressed "joy that the nefarious regime in which you played such a prominent role has come to an end." The letter went on to allege, inter alia, that

> *"you have ruined our legal system and shattered the confidence we had in the judiciary. . . The appointments you made during the past seven years of party stooges and sycophants to quasi-judicial tribunals and other offices of importance ruined the country and were responsible for your ignominious downfall."*

Perera was appointed to the Court of Appeal barely a month after this alleged letter had been made public. Very soon after, he was also to adorn the Supreme Court, being preferred for

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[54] C.R. de Silva (1978) ***Monkeying with the Judiciary*** (Colombo). Anecdotal evidence suggests that Justice Malcolm Perera was first informed by the Chief Justice that he was "not on the list", and was later informed that he actually was, since it was High Court Judge Maurice Perera who was to be excluded. He declined to accept the appointment. Similarly, Justice W.D. Gunasekera was informed that he would be appointed to the Court of Appeal. When he declined to accept that appointment, he was informed that he would be appointed to the Supreme Court. In the circumstances, he declined that too.

[55] ***Ceylon Daily News***, 4th August 1978. Bandaranaike, however, denied having received it.

appointment over several senior colleagues including the President of the Court of Appeal. Unmistakably, the process of politicizing the Supreme Court had been set in motion. Seniority and merit had given way to that ambiguous criterion of "political acceptability".[56]

President Premadasa followed the traditionalist approach in recommending the appointment of judges to the superior courts, seniority in service generally being the primary consideration. He also reportedly followed the practice initiated by President Jayewardene of formally seeking the recommendation of the Chief Justice whenever a vacancy occurred. However, his successor, President Kumaratunge, literally tore up the rule book. On 30 October 1996, a relatively young associate professor of law who had never practised law or held judicial or legal office, was appointed to fill a vacancy on the Supreme Court. Dr Shirani Bandaranayake's appointment was announced through a photograph in a government newspaper which showed her taking her oath of office before the President, flanked by the President's secretary and the Minister of Justice, G.L. Peiris, who was himself a former professor and dean of law. At the age of 37, she was younger than all the judges of the Court of Appeal and the Supreme Court, and perhaps also of the High Court. The Bar refused to accord her the traditional welcome in open court, and some of her colleagues declined to sit with her.

An application to the Supreme Court was filed by three petitioners who argued before a Bench of seven Judges that the appointment was invalid because the President had not "consulted" the Chief Justice prior to making the appointment, and had in fact rejected the latter's recommendations.[57] Leave to

[56] That criterion continued to be applied by President Jayewardene in choosing practitioners for appointment to the Supreme Court. Other appointees during this period included E.A.D. Atukorale, R.N.M. Dheeraratne and M.D.H. Fernando. The latter, together with Gamini Dissanayake MP, had prepared a constitutional scheme for the United National Party when it was in Opposition. Later, he was in attendance at meetings of the Select Committee of the National State Assembly appointed to consider the revision of the Constitution following the general election of 1977.

[57] In accordance with previous practice, Chief Justice G.P.S. de Silva had written to the President recommending the appointment of Asoka de Z. Goonewardene, President of the Court of Appeal.

proceed was rejected by four Judges who held that (a) while the President had the "sole discretion" to make the appointment, that power was "neither untrammelled nor unrestrained and ought to be exercised within limits"; (b) in exercising the power to make appointments to the Supreme Court, there should be "co-operation" between the executive and the judiciary; and (c) the petitioners had failed to establish, prima facie, the absence of the necessary co-operation or how they proposed to supply that deficiency.[58] The other three Judges held that the petitioners lacked *locus standi* and, in an event, had failed to adduce evidence of any convention requiring the President to consult the Chief Justice[59]. While the constitutional challenge to the appointment was overcome, the integrity of the Court was undermined by the secrecy which surrounded the appointment, and the apparent willingness of a young and inexperienced non-practising lawyer to be installed in high judicial office in such an unconventional manner. It must be noted, however, that the appointment was in several respects unique: the new judge was the first woman, the first product of a non-urban school, and the first non-practising academic to be appointed to the Supreme Court.

Under the 1946 Constitution it was the invariable practice to maintain the full complement of Judges of the Supreme Court. In fact, it was known well before a Judge retired who his successor would be, and the new judge would be appointed on the day that the vacancy occurred. President Kumaratunge, on the other hand, kept prospective appointees to superior courts in suspense for long periods, often with a purpose. For example, when a vacancy occurred in the Court of Appeal on the retirement of Justice Ananda coomaraswamy on 8 April 1996, the most senior High Court Judge was Upali de Z Gunawardene. On 31 January 1996, he had commenced the trial of the editor of "The Sunday Times", Sinha Ratnatunge, a lawyer, who was indicted on a charge of criminal defamation of Kumaratunge. The publication related to Kumaratunge's alleged participation at a birthday

[58] *de Silva et al v. Bandaranayake*, 16th Decmber 1996. Per Justices Mark Fernando, A.R.B. Amerasinghe, S.W.B. Wadugodapitiya, and A.S. Wijetunge.
[59] Justices P. Ramanathan, P.R.P. Perera and S. Anandacoomaraswamy.

party.[60] Ordinarily, when a trial judge is promoted or transferred, the trial is continued by his successor who, with the consent of the parties, would adopt the evidence already recorded or recall the witnesses who had already testified. However, in this instance, the virtual complainant in that case chose to keep the vacancy unfilled.

On 17 May 1996, the prosecution having closed its case, Judge Gunawardene delivered a 17-page interim order in which he rejected a defence submission that a prima facie case had not been established against the accused. He proceeded to state that the publication was "a typical example of a defamatory statement" which had "a tendency to reflect on the moral excellence of the President", for it imputed to the President "dishonourable or improper conduct", in that "she chose to enter by the rear entrance in order to screen her improper conduct of attending a party at an ungodly hour not becoming of a lady". He added that the prosecution evidence was such "as to establish convincingly and to a moral certainty all the ingredients of the offence of defamation". An application in revision to the Court of Appeal, followed by an appeal to the Supreme Court, on the ground that the trial judge had pre-judged the issues before the defence case had been presented, were both rejected, and it was in August 1996 that the trial resumed. The vacancy in the Court of Appeal remained unfilled for another eleven months until Gunawardene had delivered a 325-page judgment in which he convicted and sentenced the editor for having published a statement that was "down-right defamatory" - "whatever his

[60] The indictment was based on the following paragraph which was part of a gossip column written by a columnist and published in the newspaper in February 1995, four months after the presidential election:

> Therefore, let us start at the top, about a party, graced by none other than H.E. the President Chandrika Kumaratunge. The occasion was the birthday of Liberal Party National List MP Asitha Perera (Well Mudaliyar Chanaka, How?) The place was the MP's permanent suite at the five-star Lanka Oberoi, but this time the President was more circumspect about her appearance and used the rear entrance of the hotel, watched by a phalanx of security guards and myself. She spent about ninety minutes at the party, from about 12.20 in the heat of the silent night until 2 am and as for what she ate, we assure you, it was not food from the Hilton. The reading public now has a fair idea of its First Citizen's epicurean tastes. But what of her estranged brother?

intention may have been"! Immediately thereafter, on 15 July 1997, Gunawardene was appointed a Judge of Appeal, and took his oath of office before the virtual complainant in the case he had just concluded. Indeed, on his retirement from the Court of Appeal, Kumaratunge bestowed on Justice Gunawardene the unique privilege of reverting to, and practising at, the Bar.

In 2001, with her parliamentary support rapidly decreasing, President Kumaratunge was compelled to agree to the enactment of the Seventeenth Amendment to the Constitution which established a 10-member Constitutional Council. It was chaired by the Speaker of Parliament and consisted of the Prime Minister, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of both the Prime Minister and the Leader of the Opposition (the nominations being made in consultation with the leaders of the political parties and independent groups represented in Parliament, three of the five being persons nominated in consultation with Members of Parliament who belong to minority communities so as to ensure that these three represent minority interests), and one person appointed by the President being a person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the two principal political parties.[61] The Amendment provided that no person shall be appointed by the President to the Supreme Court or the Court of Appeal unless such appointment had been approved by the Council upon a recommendation made to the Council by the President. Although this mechanism appeared to have some potential to introduce an element of uniformity as well as restraint into the appointment process, it also further politicized a process that was crying out for de-politicization. Unfortunately, when the first term of the Constitutional Council ended in March 2005, it was not re-constituted, ostensibly due to the inability to agree on the new members.[62]

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[61] The members of the first Constitutional Council were generally regarded as persons of high integrity.

[62] The 17th Amendment had been hastily drafted and several deficiencies in it contributed to problems that arose in its implementation. These deficiencies could easily have been remedied, but there was an almost total lack of will on the part of the executive to do so.

With no functioning Constitutional Council, Kumaratunge's successor, President Rajapakse, was free to appoint whomsoever he wished to the superior courts, and that was precisely what he did. Being a lawyer himself, having gained entrance to the Law College under a 1970s provision that enabled Members of Parliament to be admitted without the minimum qualification required of others, anecdotal evidence suggests that he often gave preference to those who had been his contemporaries at Law College, disregarding both seniority and experience at the Bar and in the judiciary. He also followed the example of President Kumaratunge in not filling vacancies when they occurred. For example, one vacancy on the Supreme Court occurred on 9 June 2009, and another on 15 May 2011. Both vacancies were filled only on 10 June 2011 with the appointment of W.P.G. Dep, Solicitor-General, and Sathya Hettige, President of the Court of Appeal. Dep had been the acting Attorney-General when the first vacancy occurred and was senior to Hettige in the Attorney-General's Department. It has been suggested that the reason for Dep's eventual much delayed appointment to the Supreme Court was President Rajapakse's desire to promote his former colleague at Law College, Eva Wanasundera to the office of Solicitor-General, with a view to her appointment as Attorney-General in August 2011.[63]

Meanwhile in September 2010 the Eighteenth Amendment to the Constitution replaced the Constitutional Council with a Parliamentary Council comprising the Prime Minister, the Speaker, the Leader of the Opposition, and two Members of Parliament nominated by the Prime Minister and the Leader of

[63] S.L. Gunasekera (2011) ***Lore of the Law and Other Memories*** (Colombo): p.210. None of these unconstitutional appointments were challenged by way of a writ of *quo warranto*. (In 1966, an order made in the course of an election petition was challenged by way of an application for *quo warranto* against the election judge. In the first instance, Justice Abeysundera issued notice on the election judge, Justice Sri Skanda Rajah, requiring him to show by what authority he purported to function as a Judge of the Supreme Court. He had been appointed in 1962 after the Criminal Law (Special Provisions) Act increased the strength of the Supreme Court from nine to eleven Judges. In 1966, in *Liyanage v. The Queen,* the Privy Council had invalidated that Act. After argument, a Divisional Bench held that the relevant section in that Act remained in force. The author appeared in support of the application.)

the Opposition respectively. Having opposed this Amendment, the Leader of the Opposition refused to participate in constituting this Council or in its proceedings. Whether he did so or not would have made no difference since the President was always assured of a majority in this Council. Rajapakse therefore continued without any compunction to continue to appoint Judges to both superior courts often without regard to seniority or merit, and apparently influenced by personal loyalty and friendship. For example, the President of the Court of Appeal, Justice Sriskandarajah, who had chaired the Bench that quashed the proceedings of the parliamentary select committee that recommended the removal of Chief Justice Shirani Bandaranayake, was repeatedly superseded as colleagues on that Court who were junior to him were promoted to the Supreme Court. More recently, it has been suggested that his appointments were influenced by his brothers, Defence Secretary Gotabhaya Rajapakse and Minister Basil Rajapakse.

The Chief Justice

Appointment to the office of Chief Justice was, by convention, based strictly on seniority in the Supreme Court.[64] When the 1946 Constitution came into force, the Chief Justice was Sir John Howard. Mr (later Sir) Alan Rose KC, another expatriate, who had been appointed to the Supreme Court in January 1945, and had served thereafter as Legal Secretary from October 1945 until the State Council ceased to exist two years later, was appointed Attorney-General. At the time of his appointment it had been agreed that the salary attached to his post would be higher than that of a Judge of the Supreme Court, and that the status of the post would take precedence before that of the Judges; but that the seniority of two serving Judges who had been appointed before him (Justices Wijewardene and Jayatilleke) would remain

[64] There is no international standard relating to the appointment of the Chief Justice. In India, strict seniority is observed, resulting in a rapid turnover of Chief Justices, with some serving only a few weeks in that office. In some States, especially in Latin America, the Chief Justice or President of the Supreme Court is elected, in rotation, for a specified period, from among the judges of that court by the judges themselves. This procedure is considered to be not inconsistent with the principle of judicial independence.

unaffected for purposes of promotion.[65] Accordingly, on the retirement of Howard, Sir Arthur Wijewardene KC was appointed Chief Justice, followed by Sir Edward Jayatilleke KC. Upon the retirement of the latter in October 1951, Sir Alan Rose was appointed to the office to which he would ordinarily have succeeded at that stage, on the basis of seniority, had he remained throughout on the Supreme Court. A precedent was thereby established that if a Judge of the Supreme Court agreed to leave the Court to serve as Attorney-General, he would not thereby lose his seniority on the Court, or the opportunity he would have had in the normal course of succeeding to the office of Chief Justice.[66] This precedent was invoked by Justice H.H. Basnayake KC who succeeded Sir Alan Rose as Attorney-General in October 1951. On 21 January 1955, an official announcement was made that Chief Justice Rose had been granted leave from 15 June 1955 prior to his premature retirement on 31 December 1955, and that Attorney-General Basnayake (who was himself on leave at the time) had been appointed to act as Chief Justice from 15 June, and thereafter to be the Chief Justice with effect from 1 January 1956.[67] There were four changes of government during Chief Justice Basnayake's tenure of office. He was succeeded in 1964 by Justice M.C. Sansoni, followed in 1966 by Justice H.N.G. Fernando.

In October 1971, a Court of Appeal was established to replace the Judicial Committee of the Privy Council as the country's highest appellate tribunal. Prime Minister Sirima Bandaranaike's choice for the office of President of that Court was not Chief Justice

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[65] Letter, 13th October 1947 from the Secretary to the Governor to Hon. A.E.P. Rose, quoted in *Parliamentary Debates (House of Representatives)* (15th March 1955) Col.2587.

[66] This precedent appears to have been later misunderstood by President Kumaratunge to mean that any Judge of the Supreme Court who was appointed Attorney-General would, by virtue of that appointment, supersede every other member of that court including those who were senior to that Judge at the time he left the court.

[67] This unusual announcement of appointments that were to take effect six months and one year later respectively, led to Justice C. Nagalingam KC, who was senior to Basnayake on the Supreme Court, and had acted for the Chief Justice on several previous occasions, retiring from the Court with immediate effect. However, Nagalingam was due to retire on 24 October 1955, before Basnayake's permanent appointment as Chief Justice took effect.

H.N.G. Fernando, but 65-year old retired Justice T.S. Fernando QC., then President of the Geneva-based International Commission of Jurists. In an editorial comment on his appointment, the pro-opposition *Ceylon Daily News*, several of whose directors had only recently been found by a commission of inquiry headed by him to have been guilty of wide-ranging offences under the exchange control laws of the country, commented thus:[68]

> *"The independence of the judiciary is not merely institutional. It is also personal. The calibre of judges, the integrity of the individual, is as vital as the guaranteed independence of the institution. It is in this perspective that we welcome the appointment of Mr. T .S. Fernando QC as the first President of Ceylon's Court of Appeal. While congratulating him on this, the crowning glory of his judicial career, we warmly commend the Prime Minister for her impeccable choice of this internationally known jurist, scholar and man of high integrity and accept it as a token of the Government's respect for the vital principle of an independent judiciary".*

In the hope of attracting to that court the best available talent in the country irrespective of age, a fixed term of five years was fixed for its judges. The government's professed desire to establish an independent and competent tribunal which would enjoy the confidence of all sections of the community was also reflected in the choice of the judges. Two were retired Judges of the Supreme Court (one of whom was a Tamil), and two were among the most senior functioning Judges of the Supreme Court (one of whom was a Roman Catholic).[69]

Meanwhile, in March 1972, immediately after the inaugural session of the new Court of Appeal, the Minister of Justice, Felix Dias Bandaranaike, submitted a cabinet memorandum in which he proposed the re-structuring of the superior courts. He recommended the establishment of one appellate court consisting of 21 judges. He also recommended that

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[68] ***Ceylon Daily News***, 22nd November 1971.
[69] T.S. Fernando QC (65), V. Sivasupramanium (63), A.L.S. Sirimanne (61), and G.T. Samarawickrema QC.

> *. . . all the existing Judges of the Court of Appeal and of the Supreme Court, and all the existing Commissioners of Assize, be offered appointments in the new Supreme Court even if some of them are above the age limit suggested above [65 years]. These persons could hold office in the new Court for the balance period of their current terms of office in their existing Courts. If their present salaries are higher than those of the new Court to which they are appointed, they could retain their present salaries as personal to them. There are at present 4 Judges of the Court of Appeal, 9 Judges of the Supreme Court and 4 Commissioners of Assize.*

On 5 April 1972, the Cabinet approved these proposals, and on 16 June 1972 a draft law to give effect to them was submitted to the Cabinet. On 3 July 1972, the Minister informed the President of the Court of Appeal, the Chief Justice and the Attorney-General of the Cabinet decision. The President of the Court of Appeal was further informed that he would be the Chief Justice of the new Supreme Court, and he was requested to inquire from his colleagues on the Court of Appeal whether they would agree to seniority in the new Court being determined among them by reference to their respective dates of appointment to the existing Supreme Court. On 7 July 1972, the President of the Court of Appeal wrote to the Minister to say that his colleagues were agreeable to that arrangement. Accordingly, if the proposed law was passed in that form and brought into operation as scheduled on 1 January 1974, Justice T.S. Fernando, Q.C., having been appointed President of the Court of Appeal on 20 November 1971, would have been entitled to continue in office as Chief Justice of the new Supreme Court until the end of 1976. What the Minister proposed was consistent with the principle of judicial independence, and was acceptable to all the Judges concerned.

A wholly unexpected development then occurred. On 26 June 1973, shortly after the final draft of the Administration of Justice Bill had been approved by the Cabinet, Attorney-General Tennekoon wrote to President William Gopallawa intimating his desire to retire from the public service on reaching his 59th year on 9 September 1973, "for reasons which are entirely personal", and applied for leave preparatory to retirement with immediate effect. On the next day, he withdrew his application for

immediate retirement and applied for leave instead.[70] In the twenty-four hours that intervened between these two dramatic communications, Tennekoon had discussions with both President Gopallawa and Prime Minister Sirima Bandaranaike. The Minister of Justice was not present at these discussions, but the Minister of Lands, Hector Kobbekaduwa, and the Governor of the Central Bank, Herbert Tennekoon (the Attorney-General's brother) were. No record of either discussion, even if made, is available. However, at the first meeting held thereafter, the Cabinet revisited the draft Bill and decided, without any memorandum before it, that no serving judge who was over 63 years of age should be appointed to the new Supreme Court. It was also decided that Tennekoon would be the Chief Justice of the new Supreme Court. Meanwhile, on 2 August 1973, he was appointed to the Court of Appeal.

On 17 November 1973, six weeks before the date fixed for the Administration of Justice Law to be brought into force, Chief Justice H.N.G. Fernando reached his retirement age of 63 years. The next senior member of that court, Justice G.P.A. Silva was appointed to succeed him on the understanding that he should not expect to be re-appointed to that office when the court re-structuring took effect. On 1 January 1974, when a 21-member single appellate court replaced the Court of Appeal and the Supreme Court, the new Court absorbed the judges of both appellate courts who were under 63 years of age. 60-year old Victor Tennekoon QC was appointed Chief Justice of the new Supreme Court superseding three Judges whose appointments to the previous Supreme Court had predated his – G.P.A. Silva, A.C. Alles and G.T. Samarawickrema. The Chief Justice of the outgoing Supreme Court, G.P.A. Silva, took premature retirement two years ahead of the due date. This was the first departure from previous practice. A new principle was thus established that the Prime Minister was free to choose the Chief Justice from among serving Judges irrespective of, and on considerations unrelated to, seniority.

[70] Letters, 27th June 1973 to the Minister of Justice and to the Secretary for Justice.

Even before the 1978 Constitution was adopted, President Jayewardene introduced the criterion of "political acceptability" when Chief Justice Victor Tennekoon retired in September 1977 on reaching the age of 63. The most senior judge was Justice G.T. Samarawickrema QC who by then had completed eleven years on the Bench, during which period he had acted as Chief Justice on several occasions, the most recent being in August of that year. Although the much respected Samarawickrema, who had initially been appointed from the Bar to the Supreme Court on the recommendation of Prime Minister Dudley Senanayake and had an impeccable record on the Bench was widely expected to be appointed Chief Justice, the choice of the Prime Minister and soon-to-be-President, J.R. Jayewardene, was his own personal legal adviser, N.D.M. Samarakoon, QC. 58-year old Samarakone was a leading civil lawyer in the District Court of Colombo who had never previously held any judicial office. As the President of the Bar Association remarked at the ceremonial sitting held to welcome the new Chief Justice, it was an "unprecedented step".[71] Samarakone himself said that he was "deeply conscious of the departure from tradition" that his appointment involved.[72] The principle was thus established that the President was completely free and unfettered in the choice of the Chief Justice.

In 1984, upon the retirement of Chief Justice Samarakoon in extremely unfortunate circumstances, President Jayewardene had no hesitation in appointing to that office the next senior Judge of the Supreme Court, Justice S. Sharvananda. He had been a member of the Special Presidential Commission of Inquiry that had, three years earlier, recommended the imposition of civic disabilities on Mrs Sirimavo Bandaranaike, the leader of the Sri Lanka Freedom Party.[73] However, in 1988, upon the retirement of Chief Justice Sharvananda, President Jayewardene deliberately bypassed the most senior judge, Justice R.S. Wanasundera, and instead appointed Justice K.A.P. Ranasinghe to that office.

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[71] ***Ceylon Daily News***, 15th September 1977.
[72] ***Ceylon Daily News***, 15th September 1977.
[73] The Cabinet of Ministers had promptly acted on that recommendation and employed its massive parliamentary majority to expel Mrs. Bandaranaike from Parliament and disqualify her from engaging in political activities for a period of seven years.

Ranasinghe was reputed to be "politically acceptable" to the Government. But more decisive was the fact that Wanasundera had delivered a dissenting judgment in a highly controversial and politically sensitive case - the constitutionality of the Thirteenth Amendment to the Constitution. Anecdotal evidence suggests that the President had informed Wanasundera, who was a close friend of his brother H.W. Jayewardene QC, that while he was being superseded because of his dissenting judgment, he was nevertheless willing to appoint him if he provided him with a signed but undated letter of resignation.[74] Whether or not that was true, what was clear was that President Jayewardene was not willing to promote a judge, despite his seniority and competence, if he was perceived to have fallen out of line with his Government's political interests.

In his time, President Premadasa reverted to the seniority principle when, in 1991, he appointed the most senior judge, H.D. Thambiah, to succeed Chief Justice Ranasinghe. On Thambiah's retirement a few months later, he resisted pressure emanating from several sources and again chose the most senior judge, G.P.S. De Silva. Chief Justice De Silva, who had followed the traditional path through the Attorney-General's Department, the Court of Appeal and the Supreme Court, has been described by a colleague as "honourable but cautious".[75] For eight years he occupied his office with quiet dignity and dispensed justice with competence and impartiality, keeping faith with his judicial oath. While his tenure was rarely marked by spectacular bursts of judicial activism, it will be remembered as that of the last true strict professional of integrity who led the Supreme Court.

Upon the retirement of Chief Justice G.P.S. De Silva in 1999, it was President Kumaratunge who was called upon to appoint his successor. Her personal choice was the Attorney-General, Sarath Nanda Silva. Silva had served in the Attorney General's Department from 1968 until his appointment in 1987 to the Court of Appeal. Six years later he was appointed President of the Court of Appeal, which office he had held for a few months at

[74] Gunasekera (2011): pp.198-199.
[75] International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, p.13.

the time of the general election of August 1994. On 16 February 1995, three months after she assumed office, President Kumaratunge appointed Silva as a presidential commissioner to investigate the 1988 assassination of her husband, Vijaya Kumaratunge. In October 1995, while the commission proceedings were continuing, she appointed Silva as a Judge of the Supreme Court. On 29 February 1996, the commission report was submitted to the President. On the following day, 1 March 1996, Justice Silva was appointed Attorney-General. At the time of that appointment he was the most junior judge of the Supreme Court.[76] Three and a half years later, on 16 September 1999, President Kumaratunge appointed Silva to the office of Chief Justice, superseding five judges who had been senior to him when he was a virtually non-functioning judge for only four months. They included the two most senior among them, Justice Mark Fernando and Justice A.R.B. Amarasinghe, both of whom had been judges of that court for over a decade and who were widely recognized as judges of competence, independence and integrity. His appointment was preceded by an abortive attempt to debate the matter in Parliament, a public appeal from the Leader of the Opposition to the President "not to do irreparable damage to the judiciary" and "endanger democracy in the land", and a statement from prominent citizens of the country appealing to the President to take "seniority, experience, competence and good conduct" into consideration, rather than "political attitudes".

[76] While holding office in the Court of Appeal, Sarath Silva was cited as a co-respondent in a divorce action filed in the District Court of Colombo. In July 1994, Judge Abeyratne sitting in the District Court of Colombo rejected the plaint against Silva without notice to the plaintiff in that case. On a complaint made by the plaintiff to the Judicial Service Commission (Chairman: Chief Justice G.P.S. De Silva; members: Justice Tissa Bandaranaike and Justice Mark Fernando) and a preliminary inquiry conducted by its two members, Judge Abeyratne was served a charge sheet. After prolonged proceedings, partly caused by President Kumaratunge's decision to re-constitute the Judicial Service Commission, and a disciplinary inquiry conducted by three justices of the Court of Appeal, Judge Abeyratne was compulsorily retired from service with effect from 31 July 1999. On appeal, the Commission affirmed the findings but mitigated the punishment by making an order debarring him from promotion for a period of two years and transferring him to a remote station with effect from 1st January 2000.

Upon the appointment of Silva as Chief Justice, the UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, made a public statement in which he referred to the fact that there were "two petitions on charges of corruption against him". He added that the two petitions should have been inquired into and disposed of before the appointment was made. The petitions he referred to had been submitted to the Supreme Court seeking to strike out the name of Sarath Nanda Silva, Attorney General, from the roll of attorneys-at-law on the ground of serious professional misconduct. In respect of one, the Supreme Court had called on Silva to provide his explanation before 15 October 1999. The other was being examined by Justice Shirani Bandaranayake. Immediately after President Kumaratunge appointed Silva as Chief Justice, three fundamental rights applications were filed in the Supreme Court challenging the appointment. Chief Justice Silva himself chose three judges to hear and determine the applications. When the complainants requested a larger bench, he constituted a bench of the seven most junior judges in ascending order, leaving out Justices Mark Fernando, A.R.B. Amerasinghe and Ranjit Dheeraratne. He announced that if the bench failed to conclude the hearing of the cases for any reason whatsoever, he would not constitute a larger bench. When one of the judges retired from office, he constituted a smaller bench of five judges, excluding the most senior. On 20 June 2001, the Court dismissed all three applications.

In June 2009, on the retirement of Chief Justice Sarath Silva, President Rajapakse bypassed the most senior judge, Justice Shirani Bandaranayake, and appointed Justice Asoka De Silva to that office. Almost simultaneously, he proceeded, in his capacity as Minister of Finance, to appoint the superseded judge's husband, Pradeep Kariyawasam, a middle-level private sector marketing executive, as Chairman of the Sri Lanka Insurance Corporation, a major institution in that ministry. Never before had the spouse of a Supreme Court Judge been the recipient of political largesse in this manner. In May 2010, Kariyawasam was appointed Chairman of the National Savings Bank, and shortly thereafter as a director of a hospital company chaired by President Rajapakse's brother, Defence Secretary Gotabhaya Rajapakse. In May 2011, on the retirement of Chief Justice Asoka De Silva, President Rajapakse appointed 53-year old

Justice Shirani Bandaranayake as the 43rd Chief Justice of Sri Lanka. Following the unconstitutional removal from office of Chief Justice Bandaranayake in January 2013, Rajapakse purported to appoint Peter Mohan Maithree Peiris, a practising lawyer and legal adviser to the cabinet, in the circumstances already referred to above.

Under the 1978 Constitution, the principle was thus established that the office of Chief Justice was in the nature of a gift from the President. Even the opportunity of acting in the office of Chief Justice when the permanent incumbent was out of the country was one that the President was free to bestow on judges of his choice (as, for example, when in March 2008 Rajapakse appointed Justice Nihal Jayasinghe, bypassing two other more senior judges) or deny to judges who were out of favour (as Kumaratunge demonstrated on several occasions by denying that opportunity to Justice Mark Fernando and instead appointing judges who were junior to him).

Interference with judicial tenure

It is a fundamental tenet of judicial independence that a judge should have a constitutionally guaranteed tenure, whether for life, until a mandatory retirement age, or the expiry of a fixed term of office. In order to protect the judiciary from undue influence, the power to discipline or remove a judge should be vested in a body which is independent of the legislature and executive. There is increasing international consensus that a judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.[77] The 1978 Constitution guaranteed the security of judicial tenure by providing that every Judge of the Supreme Court shall hold office "during good behaviour" and shall not be removed except by order of the President made after an address of Parliament, supported by a majority of its members, has been presented for

[77] See Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), UNCAC, Article 11: *Implementation Guide* (2013).

such removal on the ground of proved misbehaviour or incapacity. Each of the two previous Constitutions contained a provision in almost identical terms, but no attempt was ever made by the executive or the legislature under either of these Constitutions to initiate proceedings for the removal of a judge from office.[78] The advent of presidential government saw a sharp departure from previous practice and contemporary international standards, as the four episodes described below demonstrate.

The *first* occurred following the enactment in January 1978 of the Special Presidential Commissions of Inquiry Law, No.7 of 1978. That law empowered the President to appoint a commission consisting of Judges whenever it appeared to him to be necessary that an inquiry should be held and information obtained, *inter alia*, as to the administration of any public body, the administration of any law, the administration of justice, or the conduct of any public officer. A "public officer" included "any state officer" and, under the 1972 Constitution which was in force at the time of the enactment of this law, all judges were state officers. In March 1978, President Jayewardene appointed a Special Presidential Commission consisting of two Judges of the Supreme Court (Justice J.G.T. Weeraratne and Justice S. Sharvananda) and one District Judge (K.C.E. de Alwis) to inquire into and report on the administration of his predecessor in office as Prime Minister, Mrs Bandaranaike (1970-77).

On 1 August 1978, the proceedings of the commission commenced with an opening address by a lawyer-member of the working committee of the ruling United National Party who had been retained by the Government to present its case before the commission. His eight-day address, which was described by Mrs

[78] *The 1972 Constitution* provided, in section 129, that "No motion for the removal of a judge shall be placed on the agenda of the National State Assembly until the Speaker has obtained a report from the Judicial Services Disciplinary Board on such particulars of the charge as are alleged in the motion against the judge who is the subject of such motion." The findings of the Board on the particulars of the charge "are final and shall not be debated by the National State Assembly". The Judicial Services Disciplinary Board consisted of the Chief Justice of the Supreme Court and two other Judges of that Court nominated by the President.

Bandaranaike as "an orgy of character assassination",[79] was recorded by the state-controlled radio for broadcasting at peak hour each day and was reported in full in the national newspapers. In the course of his address he referred to the conduct of certain judges. One of them was Justice Pathirana whom he described as "a political stooge introduced to the Supreme Court bench by Felix Dias".[80] The headline on page 1 of one newspaper was "POLITICAL STOOGE ON SC BENCH – COUNSEL"; the lead story of another was captioned: "JUSTICE PATHIRANA ACTED ILLEGALLY: FELIX'S POLITICAL STOOGE IN SUPREME COURT: COUNSEL".[81] The Supreme Court took no action under its contempt powers either against the lawyer who made these statements against a serving judge, or against the newspapers; nor did the commission investigate and report on any of the several allegations made against the Judge. When the Supreme Court was reconstituted a month later, Justice Pathirana was one of the judges who was excluded. It had been possible for the executive to have ignored the constitutional processes and to have caused a judge whom it disliked or whose judicial conduct it obviously disapproved of, to be publicly abused in a forum in which no reply was possible and no defence was available to the judge concerned.[82] At the ceremonial inauguration of the Supreme

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[79] Statement made by S.R.D. Bandaranaike (1980) ***Third Interim Report of the Special Presidential Commission of Inquiry*** (Colombo: Department of Government Printing): Appendix A, p.158.

[80] ***Ceylon Daily Mirror***, 11th August 1978.

[81] ***Ceylon Daily Mirror***, 11th August 1978; ***Ceylon Daily News***, 11th August 1978.

[82] At the stage of the opening address, the proceedings were conducted ex parte and none of the persons whose conduct the special presidential commission was invited to investigate were permitted to be present or to be represented. Later, after evidence had also been recorded, notices were issued on certain persons. No notice was served, nor was an inquiry held, in respect of Justice Pathirana. The commission recommended the imposition of civic disabilities on three persons: Nihal Jayawickrama, former Permanent Secretary to the Ministry of Justice; Felix R. Dias Bandaranaike, a former Minister who held several portfolios from time to time, including Justice; and Sirima R.D. Bandaranaike, the former Prime Minister. The only findings relating to the judiciary were against Nihal Jayawickrama. They related to his role in introducing the concept of an annual Judges' Conference; his proposal to introduce "barefoot lawyers"; and his refusal to permit Judges of the Supreme Court to use official vehicles for private purposes.

Court in September 1978, Chief Justice Samarakone made a prophetic reference: "Words have been uttered and aspersions cast in another place which seemingly affects its hallowed name and what more is in store I do not know".

The *second* occurred in October 1982 when, on an application for a writ of prohibition filed by Felix Dias Bandaranaike, a former cabinet minister on whom "civic disabilities" had been imposed by Parliament following a report of the Special Presidential Commission of Inquiry referred to above, the Supreme Court held that one of the commissioners, K.C.E. de Alwis, by then a Judge of the Court of Appeal, had, by reason of misconduct, become unable to act as a member of the commission.[83] The Bench that made the order comprised Chief Justice Samarakone, Justice D. Wimalaratne and Justice P. Colin Thome. The misconduct found was that the commissioner had engaged in financial transactions with a person whose conduct was the subject of inquiry by the commission. This judgment was preceded by several days of argument during which the petitioner appeared in person and the commissioner was represented by counsel. A few weeks after the judgment, the disqualified commissioner addressed a letter to President Jayewardene in which he alleged that there were circumstances which had rendered it improper for two of the Supreme Court Judges – Justice Wimalaratne and Justice Colin-Thome – to have agreed to hear and determine the application, and that their judgment had been influenced by improper considerations. It was also alleged that the pleadings filed by the petitioner had been prepared in the chambers of Justice Colin-Thome. The commissioner had not challenged the competence of the court at any stage of the hearing; nor was any allegation of bias made by him or on his behalf. Nevertheless, at the instance of the Government, Parliament appointed a seven-member select committee chaired by the Minister of Justice, comprising five other ministers and one member of the opposition, to inquire into and report on the allegations made against the two Judges by the disgruntled litigant.

[83] *Bandaranaike v. De Alwis*, *Hansard*, 8th March 1983, Cols.709-722.

The two Supreme Court Judges whose conduct had been impugned were summoned and questioned by the select committee. It was apparent that an adverse finding by the select committee would almost certainly result in proceedings being initiated for the removal from office of the two Judges. The Judges, therefore, found themselves in a situation in which their own independence and integrity were seriously compromised. In his evidence, Justice Colin-Thome felt it necessary to impress upon the Government-dominated select committee, in a most abject and humiliating manner, where his own political loyalties lay.[84] For example:

> *"Far from being beholden to Mr Felix R Dias Bandaranaike [the petitioner in the application to the Supreme Court], he has had a vendetta against me since the CWE Commission of Inquiry and I have suffered greatly at his hands. Since then our relations have been severely strained. His step-brother, Mr Michael Dias, had been a friend of mine since he was my tutor in the Lex Aquilia at Cambridge University in 1945-48. However, my friendship with Michael Dias has brought me no advantages. The two brothers are as different as chalk and cheese."*
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> . . .
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> *"Ever since I led evidence before the CWE Commission of Inquiry in 1967 I have been a marked man by the SLFP [the principal Opposition party in Parliament to which the petitioner belonged]."*
>
> . . .
>
> *"I think in 1973, Honourable Minister of Lands*[85]*, your nephew Upul had that tragic death by drowning. I met you in the funeral house. That was a time when he*[86] *was turning Hulftsdorp upside down. We had a conversation about that. You took me to a side*

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[84] *Report of the Select Committee appointed to inquire into the representations made by Mr. K.C.E. de Alwis, former Judge of the Court of Appeal and a Member of the Special Presidential Commission, to His Excellency the President of the Democratic Socialist Republic of Sri Lanka, regarding the conduct of the proceedings relating to the Application No.S.C. Reference 1 of 1982 and other matters relating thereto*: Parliamentary Series No.62 of the First Parliament of the Democratic Socialist Republic of Sri Lanka (Fourth Session, 8th July 1984).

[85] The Minister of Lands, Gamini Dissanayake, was a member of the select committee.

[86] The reference is to Felix R Dias Bandaranaike, the former Minister of Justice.

> *room and you asked me what I thought about Felix. I think I told you in plain, blunt, Anglo-Saxon what I thought of him. You may remember this."*
> . . .
>
> *"I wish to say that in the 1977 election nothing gave me greater pleasure than listening all night to the Dompe result*[87]*."*
> . . .
>
> *"I think, Mr Wickremasinghe*[88]*, you will remember Mr Harry Jayewardene's induction as President of the Bar Association in 1976*[89]*, when the ceremony was in Queen's Hotel Kandy. I think you will vouch for this. I was one of the two or three Judges who specially went up for that function and got very unpopular with Felix. He tried to stop our cars. I had a long conversation about the state of affairs in the country at that time with His Excellency the President. I think you will bear witness to that. You were there playing a prominent part at that function."*

Justice Wimalaratne, whose record of independence and integrity was impeccable, also found it necessary to dispel any suspicion that he was anti-government. He sought to do so by citing a number of judgments in which he had held for the State, but only after the following prefactory remarks:

> *"Although it would not be proper for a judge to set down the way in which he had decided cases – whether for or against the government – Mr K C E de Alwis has compelled me to do so."*

The select committee, while making certain critical observations in regard to the conduct of the case, concluded that the allegations made against the two Judges had not been substantiated.

The *third* occurred in March 1984 when Chief Justice Samarakone, who was the chief guest at the annual awards

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[87] At the 1977 general election, Felix R Dias Bandaranaike contested the Dompe seat in Parliament and was narrowly defeated.
[88] Ranil Wickremasinghe, Minister of Education, was a member of the select committee.
[89] The reference was to H.W. Jayewardene QC, a brother of the President.

ceremony of a commercial tutory, made an ill-advised speech in which he referred to many matters of political controversy. For example, he referred to recent race riots in Colombo in which the homes of Tamil people had been destroyed and many lives lost:

> *"What happened was that people were driven, I think, to take a hand themselves and in effect they told the terrorists 'what you can do we can do better'. And they did;"*

to the "Job Bank", a list of unemployed persons compiled by Members of Parliament belonging to the ruling party;

> *"For the past year we have been trying our best to fill about 492 vacancies among typists. But we have a ruling imposed on us that we should recruit only from a place called the Job Bank. I believe all you people have heard of the Job Bank. It is a bank of the Government. It has no place, no buildings. It is only in name, but it is a most powerful place. . . Some of the people they send are supposed to be typists, but they cannot type a word. They can't spell. But we have to employ them. . . The Job Bank is a fraud on the youth of this country. It is like the blood bank; you have to wait for the donor, and the donor here is the MP."*

to bribery:

> *"The cost of living today is not merely rising but is galloping. . . I find that our people are taking bribes. I cannot blame them;"*

And he referred to the President:

> *"I read sometime ago that the President has said that his salary is a pauper's salary, and that he is living on the poverty line. I am surprised. He is an elected representative of the people. He has all the powers; all the palaces in Nuwara Eliya and Kandy. They are paying a hell of a lot of money to keep him in poverty."*

The Government's response was immediate. It decided to bring the Chief Justice before Parliament, but then discovered that the procedure for doing so had not been prescribed, as required by the Constitution. Accordingly, two steps were taken simultaneously. On 3 April 1984, Parliament resolved to appoint

a select committee in terms of standing order 78, to inquire into and report whether the Chief Justice had made the statements attributed to him in the press, and if so, to recommend what action should be taken. The Chief Justice was due to retire within a few months. Therefore, it was necessary to adopt the swiftest procedure in the shortest possible time. Enacting legislation, which required publication in the gazette and reference to the Supreme Court, could not have been accomplished before Chief Justice Samarakone reached his mandatory retirement age. Overnight, on 4 April 1984, a new standing order was drafted and adopted by Parliament. Standing Order 78A empowered the Speaker to appoint a select committee for the purpose of investigating and reporting on an allegation of misbehaviour or incapacity against a Judge of a superior court.[90]

Standing Order 78A contravened Article 4 of the Constitution which stated quite explicitly that judicial power may be exercised only by courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law. The sole exception is in regard to matters relating to the privileges, immunities and powers of Parliament and of its members, when judicial power may be exercised by Parliament according to law. Under the Parliament (Powers and Privileges) Act, Parliament could directly deal only with very trivial matters, such as disrespectful conduct within the precincts of Parliament, or creating a disturbance when Parliament was sitting. It now purported to give itself the power, through a standing order, to conduct what was virtually the trial of an offence. Parliament, which could only punish an outsider with admonition or removal from its precincts, that being the maximum penalty that it could impose in the exercise of its "judicial power", now gave itself the power to remove a Chief Justice from office. These extraordinary powers were acquired, not by law, but by amending its own procedural rules of debate, the standing orders.[91]

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[90] For the text, see footnote 25.

[91] According to Dr Rajiva Wijesinha, MP., "Unfortunately the standing order about impeachment is absurd, and indeed the Leader of the Opposition [Ranil Wickremasinghe] informed me they had introduced it to frighten Neville Samarakone and, after he was frightened, they did not introduce what should have been the more important part relating to investigation. Typical of the amateur approach of both government and opposition is that, though all agreed

The first select committee, chaired by Prime Minister Premadasa, held six meetings between 17 April and 20 July 1984. The Chief Justice declined to attend in protest against the new standing order 78A, but did not deny the statements attributed to him. The select committee reported on 9 August 1984 that the impugned speech was "not befitting the holder of the office of Chief Justice", and recommended that appropriate action be considered. On 5 September 1984, a resolution signed by 57 Members of Parliament, requesting the presentation of an address for the removal of Chief Justice Samarakone, was placed on the Order Paper. On the following day, the Speaker, acting under standing order 78A, appointed a select committee chaired by Minister Lalith Athulathmudali. This strange procedure did not go unchallenged. At its first meeting, the three opposition members, Sarath Muttetuwegama, Anura Bandaranaike and Dinesh Gunawardena, raised a preliminary objection. They submitted that the select committee could not determine "proved incapacity or misbehaviour" unless it had been judicially proved.

The select committee held 14 meetings between 11 September and 27 November 1984, at which S. Nadesan QC and his team of lawyers appearing for the Chief Justice argued that it was an unconstitutional body. Before the select committee concluded its sittings, the Chief Justice reached the mandatory retirement age. In its report to Parliament, the select committee concluded that while the speech *"constitutes a serious breach of convention and has thereby imperilled the independence of the judiciary and undermines the confidence of the public in the judiciary . . . every breach of convention does not necessarily amount to proved misbehaviour"*. The desire to humiliate a lawyer with no previous judicial experience who had been elevated to the highest judicial office, and had then become critical of his benefactor, obviously led the President to adopt the swiftest procedure in the shortest possible time in order to achieve that purpose.

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at the time that the standing order needed to be changed, nothing was done about this." ***The Impeachment: What I said was edited out by Ceylon Today*** <www.colombotelegraph.com>.

The *fourth* had all the features of a black comedy. The Constitution required every person appointed to be a Judge of the Supreme Court to take before the President the prescribed oath before entering upon the duties of his office. This was an oath of office and of allegiance to the Republic. In August 1983, Parliament amended the Constitution to make it a criminal offence for a person "to support, espouse, promote, finance, encourage, or advocate the establishment of a separate state within the territory of Sri Lanka".[92] This amendment was directed specifically at certain Tamil political and militant groups. Nevertheless, it also required a large category of persons holding public office, including Judges of the Supreme Court, to take within one month of the amendment coming into force, an additional oath undertaking not to perform any of the prohibited acts. The amendment provided that any holder of an office failing to take such oath within the prescribed time, shall cease to be in service or hold office. It was, therefore, possible for a Judge of the Supreme Court who enjoyed security of tenure under the Constitution to cease to hold office if he failed to take the new political oath.

The amendment came into force on 8 August 1983. By the end of that month, all the Judges of the Supreme Court had taken the new oath before each other, since they were all Justices of the Peace competent to administer oaths. On Friday 9 September, Chief Justice Samarakone was presiding over a Bench of five Judges hearing an application for judicial review. According to him,

> *"Counsel for the petitioners was making his submissions when one of my brother Judges who was reading a copy of the Act which had reached us two days earlier brought it to my notice that the provisions of section 157A of the Act contained a requirement that Judges of the Supreme Court should take their oaths in terms of the seventh schedule before the President which in fact had not been done by any of the Judges."*[93]

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[92] *Sixth Amendment to the Constitution*.
[93] In Re Saturday Review, ***Ceylon Daily News,*** 21st October 1983.

The Court immediately adjourned. After considering the matter, the Judges wrote to the President that in their opinion the period of one month was due to expire at midnight on that day, and that they, therefore, wished to take their oaths before him that afternoon. There was no reply from the President, but the Chief Justice was later informed by the Minister of Justice that the President had been advised by the Attorney General that the period of one month had expired on 7 September and that, since the Judges had not taken their oaths in the prescribed manner within the prescribed period, they had all ceased to hold office.

On Saturday 10 September, the government-controlled newspapers announced that the Judges had ceased to hold office, while others speculated on the options open to the government. Quoting official sources, it was reported that the court might be "reconstituted",[94] with some Judges being replaced,[95] or that the Supreme Court and the Court of Appeal might even be "amalgamated". [96] A cabinet spokesman announced that "different people or some of the people will be appointed".[97] Meanwhile, the chambers of the Judges were locked and barred and armed police guards placed on the premises to prevent access to them. Finally, on Thursday 15 September, after the President had consulted his Cabinet at its regular weekly meeting, all the Judges were issued with fresh letters of appointment and duly sworn in by the President. A traumatic week had come to an end.[98]

Contempt of judicial authority

The principle of judicial independence requires the State to ensure that persons exercising executive or legislative power do

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[94] ***The Sun***, 11th September 1983.
[95] ***The Sun***, 13th September 1983.
[96] ***The Sun***, 14th September 1983.
[97] ***The Sun***, 15th = September 1983.
[98] In an interesting sequel, it was argued by counsel appearing in the interrupted judicial review application that the requirement that the oath be taken before the President was directory and not mandatory. By a 7-2 majority decision, the Supreme Court accepted this submission and held that the Judges had not ceased to hold office: In Re Saturday Review, ***Ceylon Daily News***, 21st October 1983.

not interfere with the judicial process, or exercise or attempt to exercise any form of pressure on judges, whether overt or covert. The State must respect judicial decisions and refrain from any act or omission that frustrates the proper execution of a judicial decision. The State also has a duty to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them. These are internationally recognized obligations of the State[99] that were scrupulously observed by all governments since Independence. The emergence of the presidential executive marked a sharp departure from this tradition. While establishing absolute control over judicial appointments and, with the collusion of Parliament, over judicial tenure too, the presidential executive could exercise control over judicial decisions only through pliant judges. From time to time, a spark of independence would fly out of Hulftsdorp, and President Jayewardene would immediately seek to extinguish it by undermining the authority of the judiciary. Two such instances are described below.

In late 1982, following the first ever presidential election in which Jayewardene barely secured an absolute majority of the votes cast, Parliament amended the Constitution to extend its life for a further six years, thereby avoiding the general election that was due in the following year. The Bill for that amendment was required to be approved by a majority of votes at a national referendum. During the referendum campaign, the Government sought to stifle the opposition in a variety of ways. For example, a printing press in which literature advocating a "NO" vote was being printed was sealed under emergency regulations. A legal challenge in the Supreme Court was twice rejected on procedural grounds and finally dismissed on its merits.[100] An organization of the clergy of several religions, *Pavidi Handa* ("Voice of Clergy"), which campaigned for a "NO" vote, convened its first public meeting in Gampaha. It began distributing pamphlets that called for the holding of the general election due in 1983, and asked people to vote "no" to the proposal to extend the life of

[99] *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*, Part II, section 10(i).
[100] *Janatha Finance and Investments Ltd v. Douglas Liyanage*, S.C. Application No.127 of 1982, Supreme Court Minutes of 14th February 1983.

Parliament for a further six years. It was alleged that the Assistant Superintendent of Police of the area arrived at the meeting with a team of police officers, assaulted the participants, seized the pamphlets and dispersed the crowd. On a fundamental rights application, a different Bench of the Supreme Court (Justices D. Wimalaratne, Percy Colin Thome, M.M. Abdul Cader, B.S.C. Ratwatte and H. Rodrigo) held unanimously that the seizure of the pamphlets was a violation of the right to freedom of expression and publication, and awarded damages in Rs.2000 and costs in a sum of Rs.10,000 to the Secretary of *Pavidi Handa*, the Ven. Daramitipola Ratnasara. The judgment was delivered on 8 February 1983. On 2 March, on the instructions of President Jayewardene, the Cabinet decided to promote ASP Udugampola, the respondent in the fundamental rights application, and to pay the damages and costs out of state funds. The state controlled "Daily News" reported that the decision had been made "in order to ensure that public officers should do their jobs and follow orders without fear of consequences from adverse court decisions". The Government not only endorsed the illegal act of the police officer, but also seriously undermined the authority of the Supreme Court.[101]

A few months later, on International Women's Day 1983, a peaceful procession in Colombo led by Vivienne Goonewardene, a former Member of Parliament belonging to the Lanka Sama Samaj Party, was broken up by the Kollupitiya Police and she was arrested by Sub-Inspector Ganeshananthan. It was alleged that she was also thrown on the ground and kicked within the police station by another police officer. In a fundamental rights application brought by her, the Supreme Court (Justices B.S.C. Ratwatte, Percy Colin Thome and J.F.A. Soza) held that Mrs Goonewardene had been unlawfully arrested by Sub-Inspector Ganeshananthan. She was awarded compensation in Rs.2500. The Court declared that due to time constraints imposed by the Constitution it was unable to arrive at a finding on Mrs Goonewardene's allegation against the other police officer, but

[101] It was on the same day, 2nd March 1983, at the same meeting presided over by the President, that the Cabinet decided to establish a select committee of Parliament to inquire into the allegations made by K.C.E. de Alwis against two Judges of the Supreme Court who, coincidentally, happened to be members of this Bench as well.

recommended that the police investigate that allegation. The judgment was delivered on 8 June 1983.[102] On the following day, an official communiqué issued by the Secretary to the Ministry of Defence announced as follows:

> *"The work done by Sub-Inspector Ganeshanathan of Kollupitiya Police Station in dispersing a procession conducted by Mrs Vivienne Gunawardene on 08.03.1983 has been gone into and it has been decided that he should be given a special promotion. Accordingly, the acting Inspector-General of Police, Mr. S.S. Joseph, has ordered the promotion of Sub-Inspector Ganeshanathan to the rank of Inspector Class II with immediate effect."*

This press communiqué was published in the newspapers on 10 June 1983. On the next day, gangs of people assembled outside the residences of two of the Judges and the former residence of the third, and shouted obscenities. They were reported to have been transported in buses belonging to the state-owned Ceylon Transport Board, and carried placards and shouted slogans referring to the judgment. Numerous attempts by the Judges and by their neighbours to contact the police were unsuccessful. When the police finally arrived at the scene the gangs had left. It was a time when a state of emergency was in force and any form of demonstration without permission was illegal. President Jayewardene's response to this incident was that "they were merely exercising their fundamental right to the freedom of speech and expression".[103]

In his *Report of a Mission to Sri Lanka* in January 1984 on behalf of the International Commission of Jurists, Paul Sieghart states that he raised this matter with President Jayewardene.

> *"The President freely conceded that he had personally ordered the promotion of the two police officers, and the payment out of public funds of the damages and costs. This, he said, had been necessary to maintain police morale. He strongly criticized the "Supreme Court for not affording Mrs. Goonewardene's Sub-Inspector the opportunity of giving oral evidence, and clearly regarded this as a case of the*

[102] *Vivienne Goonewardene v. Hector Perera et al,* [1983] 1 SRL 305.
[103] Gunasekera (2011): p.200.

> *Court putting itself above the law. He explained, in more general terms, the difficulties which Judiciaries are apt to present to Executives if they are wholly outside anyone's control – a line of argument developed so regularly by holders of high executive office that it needs no elaboration here. He also volunteered the information that he had left Sri Lanka for a foreign visit some days before the "demonstration" outside the Judges' houses, but pointed out that the right to peaceful protest was always available to the People of Sri Lanka."*

Sieghart added that he did not suppose for a moment that President Jayewardene had any personal hand in the organization of the mobs before he left the country, nor had anyone suggested to him that there was any evidence that he had done.

> *"But he has now conceded that the promotion of the two police officers, and the payment of the damages and costs out of public funds, were his personal decisions – at a time when he found the Supreme Court a hindrance to some of his policies. The conclusion is inescapable that he was deliberately seeking to teach the Judges a lesson, in order to make them more pliable to the Executive's wishes. If that is so, these were grossly improper acts; but for the immunity from all suit which the President enjoys under Article 35(1) of the Constitution, they might well have been criminal offences under Article 116(2)."*[104]

Neither President Premadasa nor President Wijetunge appear to have interfered with the judicial process. President Kumaratunge reportedly made known to friends and colleagues, in language she considered appropriate for the occasion, what she thought of judges who delivered judgments against her Government. On one occasion, she publicly denounced an unnamed judge of the Supreme Court who she alleged had accepted a bribe. In 1999, when she installed her Attorney-General, Sarath Nanda Silva, in the office of Chief Justice, the Supreme Court ceased to be a matter of any real concern to her, confident in the knowledge that her interests and those of her Government would be adequately

[104] *Sri Lanka: A Mounting Tragedy of Errors*, by Paul Sieghart, Chairman, Executive Committee, JUSTICE, the British Section of the International Commission of Jurists, March 1984, p.60.

protected.[105] Her principal irritant nevertheless was Justice Mark Fernando who had, in two judgments, held that presidential immunity only prohibited the institution of legal proceedings against the President while in office, and that such immunity did not provide cover to public officials when acting upon an act of the President.[106] Kumaratunge responded by ignoring him, the most senior member of the Court, when appointing judges to act as Chief Justice whenever that office was temporarily vacant.

Under President Rajapakse, judges began to be subjected to violence with impunity. A particularly shocking instance was that of the Secretary of the Judicial Service Commission, Manjula Tillekeratne, a senior High Court judge. A statement issued by him on 18 September 2012 claimed that the Commissioners (the Chief Justice and two Judges of the Supreme Court) had been subjected to threats and intimidation from persons holding high office, especially after the Commission had taken disciplinary action against a judicial officer. Ten days later, on 28 September, he made another statement in which he claimed that there was a danger to the security of the Chief Justice and the other two members of the Commission and himself and their families. On 7 October, he was assaulted by four unidentified men in broad daylight on a public road in Colombo, shortly after he had dropped his wife and son at school. One of the assailants pistol-whipped the Judge, while the others beat him with their bare fists and an iron rod. He was admitted to the Colombo National Hospital with severe injuries to his face and head. No one was charged or even arrested in connection with this incident.

Earlier in the same year, in March 2012, High Court Judge W.T.M.P.B. Warawewa was reportedly threatened after he had delivered a dissenting judgment in what became known as the "White Flag Case". The other two judges in the Trial-at-Bar convicted General Sarath Fonseka, the former Army Commander, for suggesting that senior leaders of the LTTE had

[105] In a post-retirement interview, Sarath N. Silva asserted that the perception that he sustained the Chandrika Kumaratunge Government was "furthest from the truth". He added: "To her credit she has never spoken to me about a case and she knows me well enough not to do that". ***Daily Mirror,*** 7th August 2012.
[106] *Karunathilaka v. Dissanayake* [1999] 1 Sri LR 157; *Senasinghe v. Karunatilleke* [2003] 1 Sri LR 172.

been killed after they had surrendered to the armed forces in the final stages of the armed conflict, and sentenced him to three years imprisonment. Fonseka had contested Rajapakse in the presidential election of 2010, and been arrested a few days later and court martialled. In July 2012, Minister Rishad Bathiudeen allegedly threatened the Magistrate of Mannar and then orchestrated a mob to stone and set fire to part of the courthouse.

The blurring of a critical relationship

The life of a judge in the twentieth century was perhaps best described in the words of Sir Winston Churchill, expressed in the House of Commons in the course of a debate on judges' salaries:

> *"A form of life and conduct far more severe and restricted than that of ordinary people is required from judges . . . They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct . . . The judges have to maintain, though free from criticism [in Parliament], a far more rigorous standard than is required from any other class I know of in this Realm."*

The need to observe what was perceived to be an extraordinarily rigorous standard led many judges in common law jurisdictions to retreat from public life altogether into a wholly private life confined to home, family and friends. Lord Hailsham, a former Lord Chancellor, described the vocation of a judge as being "something like a priesthood". A former Chief Justice of the United States Supreme Court, William H. Taft, wrote that "the Chief Justice goes into a monastery and confines himself to his judicial work".

Having lived in the home of a judge for several years in the mid-twentieth century, I observed that the view of a judge's life in Ceylon at the time, though more liberal in nature, was still quite monastic in many of its qualities. While judges did not isolate themselves from the rest of society, or from school friends and former colleagues in the legal profession, they rarely, if ever, socialized with politicians in each other's homes. They did not invite politicians to their homes to celebrate their appointment to the Court. Nor did they invite politicians to bear witness at the

marriage of a son or daughter. The Constitution required their salaries to be determined by Parliament, charged on the Consolidated Fund, and not to be diminished during a judge's term of office. In that relatively calm and stable economy, their salaries were rarely increased. They drove, or were driven, to Hulftsdorp in their own cars. They lived in their own homes, except for the Chief Justice who was provided with an official residence which some incumbents in that office used only for official purposes.

The Executive of the day recognized and respected where the lines were drawn. For example, in 1958, when Prime Minister S.W.R.D. Bandaranaike wanted to persuade a Supreme Court Judge to head a commission of inquiry, he did not command the judges to attend him at his residence. He visited Hulftsdorp on a Saturday morning and met the judges in the judges' library. He failed to persuade any of them to accept the assignment. In 1973, Chief Justice H.N.G. Fernando sought an appointment with the Prime Minister. Mrs Bandaranaike did not consider it proper for her to meet at her residence with the judge who was at the time presiding over a trial in which the accused were charged with attempting to overthrow her Government. She requested the Permanent Secretary to the Ministry of Justice to discuss with the Chief Justice whatever matter the latter wished to discuss. It turned out to be a purely administrative problem relating to the Criminal Justice Commission that required resolution through amending legislation. Such was the scrupulous manner in which conventions that underpinned the separation of functions were understood and observed.

A dramatic change occurred with the advent of the Executive President, the ultimate source of power and patronage. In 1983, Justice Percy Colin Thome, who had been appointed to the Supreme Court in 1976 on the advice of Prime Minister Sirima Bandaranaike, described to a parliamentary select committee his relations with President Jayewardene:[107]

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[107] *Report of the Select Committee appointed to inquire into the representations made by Mr. K.C.E. de Alwis, former Judge of the Court of Appeal and a Member of the Special Presidential Commission, to His Excellency the President of the Democratic Socialist Republic of Sri Lanka, regarding the conduct of the proceedings relating to the Application No.S.C.Reference 1 of 1982 and other*

> *"I want to say this. My relations with His Excellency the President have been very cordial. In fact, I know him. I have only met Mrs Bandaranaike for a few seconds in my life. . . . But I have known the President from 1948 and I have had very cordial relations with him. I do not know whether somebody has been poisoning his mind. I have had very cordial relations with him. We had a common interest in history. I admire his culture, his refinement, and it was never at any time my intention to do anything harmful to him personally. We have met at several functions at President's House, at private dinners, and in 1981 he invited me and my wife for his birthday party at President's House. We were very honoured. So there is no vestige of truth at all in Mr de Alwis' allegation that I am anti-UNP and anti-government. My community, my family, are his traditional supporters."*

He also described how he enjoyed the hospitality of a cabinet minister:

> *"Thanks to the hospitality of the Honourable Minister of Lands,*[108] *we were all sent on that wonderful trip of the sites. We got younger. You know, we all went and it was a delightful trip. I wrote and told you about it . . . Lovely time, delightful! We were hoping we could make it a sort of annual event."*

President Rajapakse appeared to have intruded into the privacy of judicial life to an extent incompatible with judicial values. This is evident from photographs that have been published, especially on the internet. For example, in July 2011, a picture of Sathya Hettige with his head bowed deep, receiving his letter of appointment from President Rajapakse after having taken his oath of office as a Judge of the Supreme Court was followed by several other photographs. These were of the President and his brother Basil Rajapakse and the Prime Minister, D.M Jayaratne, partaking of the hospitality of the new judge at his home.

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matters relating thereto: Parliamentary Series No.62 of the First Parliament of the Democratic Socialist Republic of Sri Lanka (Fourth Session, 8th July 1984).

[108] Gamini Dissanayake, MP.

President Rajapakse was also invited by the new judge to his daughter's wedding to sign as a witness on behalf of his family.[109]

In November 2011, shortly after High Court Judge Deepali Wijesundera convicted Sarath Fonseka in the "White Flag Case",[110] President Rajapakse and Speaker Chamal Rajapakse were the attesting witnesses at the judge's daughter's wedding. Photographs of the new couple with the Rajapakse brothers and the judge standing in front of the poruwa and elsewhere were published on websites.[111] In the same year, when President Rajapakse's son, Namal, took his oaths as an attorney-at-law before Chief Justice Bandaranayake and two other Judges[112], the three Judges stepped down from the Bench and posed in their judicial attire for several photographs (probably in the Chief Justice's chambers) with the new attorney and his parents. In one picture, the External Affairs Minister G.L. Peiris, who was also in court for the ceremony, is seated while standing behind him, the Chief Justice is seen shaking hands with the young attorney. These photographs were published.[113] It is unlikely that this privilege was accorded to the hundreds of others who also took their oaths on that day in the same ceremony.

On 14 April 2014, Chief Justice Mohan Peiris travelled from Colombo to Tangalle, to join President Rajapakse and his immediate family in celebrating the Sinhala and Hindu New Year rituals at the Rajapakse "ancestral home", Carlton House. A news report stated that others who participated in this family event were Defence Secretary Gotabhaya Rajapakse and Mrs Ioma Rajapakse, and the Chairman of Sri Lankan Airlines, Nishantha Wickremasinghe, the brother of "the First Lady".

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[109] U. Kurukulasuriya, '*Can We Expect Justice From Servants of Military Dictators'* ***The Sunday Leader***, 21st August 2011.

[110] General Sarath Fonseka was convicted of making a false statement to the editor of a newspaper, namely, that Defence Secretary Gotabaya Rajapakse had ordered Brigadier Shavendra Silva of the 58th Battalion to shoot LTTE leaders who surrendered, and thereby attempted to generate ill-feeling among the people in violation of Emergency Regulation 28 made by the President under the Public Security Ordinance. He was sentenced to serve a term of three years imprisonment and fined Rs.5000.

[111] See ***Lankae News,*** 9th February 2012.

[112] Justice Gamini Amaratunge and Justice Suresh Chandra.

[113] ***Lankae News***. See also ***Lakbima***, 18th December 2011, p.1.

Several pictures that were published showed the participants, including the Chief Justice, "attired in white and facing south" feeding milk rice to each other and engaging in other traditional transactions in what was essentially a family occasion.[114] In September 2014, Peiris was a member of President Rajapakse's entourage (which included several Ministers, Members of Parliament and officials) on an official visit to Italy and the Vatican. It was the first occasion when a Chief Justice accompanied a political leader on a visit abroad.[115]

Patronage and Reciprocity

Presidential Largesse

Presidential patronage also extended to material benefits. For example, President Premadasa provided judges of the superior courts with state land at a nominal price for them to construct their own homes in an otherwise expensive Colombo suburb. President Kumaratunge was not to be outdone. In October 2001, she had been compelled to dissolve Parliament when, following a mass defection, her party lost the majority it had secured in the previous year's general election. In the general election held in December 2001, the UNP secured a comfortable majority and formed a government after having extracted from her, with considerable difficulty, the portfolios of defence and finance that she held. In the two years that followed, the Supreme Court headed by Chief Justice Sarath Silva delivered several questionable judgments and provided equally dubious advisory opinions. One of these enabled her to "recover" the Ministry of Defence, and another committed to prison for contempt one of her ministers who had defected to the opposition. In February

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[114] J. Alahapperuma (2014) ***Sri Lanka's First Family celebrates traditional*** (New Year: Carlton Hous).

[115] Earlier, Chief Justice Asoka de Silva had accompanied Justice Minister Milinda Moragoda to the Netherlands "to study the Dutch judicial system". At that time, his daughter was attending a legal academy in the Netherlands, and her husband, a state counsel in the Attorney-General's Department and son of another Judge of the Supreme Court, was on secondment as second secretary in the Sri Lankan Embassy in the Netherlands. See U. Kurukulasuriya, '*One retired CJ turns to monkhood while another returns to advise a kleptocracy*', ***The Sunday Leader***, 26th June 2011.

2004, she dissolved Parliament again, and in the general election of April 2004 her political party secured a parliamentary majority. In the following month, at the request of the Chief Justice, Kumaratunge submitted a cabinet memorandum entitled "Rectification of Anomalies in relation to salaries and allowances payable to judges of superior courts". In it she recommended backdated new salary scales with effect from 1 January 2001 and the consequent payment, as arrears, of a sum of Rs.630,000 to the Chief Justice, Rs.630,000 to each Judge of the Supreme Court, and sums ranging from Rs.30,000 to Rs.616,500 to each Judge of the Court of Appeal. [116]

President Rajapakse granted permits to judges to import vehicles free of duty, and allowed them to sell the permits if they so wished. He also provided them with personal bodyguards. He then devised a mechanism to enable them to earn foreign exchange. By arrangement with the military dictatorship of the Fiji Islands, Judges of the Supreme Court and the Court of Appeal were granted leave to serve as judges in Fiji from time to time.[117] This arrangement commenced at a time when Fiji was suspended from the Commonwealth owing to a military coup in that country, and judges from other Commonwealth countries serving in the Fijian judiciary had resigned. The Sri Lankan judges were, therefore, not allowed by the Australian and New Zealand Governments to travel via their countries, and were also denied medical services in these two countries. Notwithstanding these impediments, and the enormous backlogs in both superior courts, several judges availed themselves of this presidential concession.

Post-Retirement Employment

The post-retirement employment of judges by law firms, the private sector or the government is disapproved of in many

[116] She also recommended the increase of the rent allowance payable to judges of superior courts from Rs.4000 to Rs.12,000 per month. The text of the cabinet memorandum was published in ***The Sunday Leader***, 15th August 2004.
[117] Article 110(2) of *The Constitution* states that no Judge of the Supreme Court or Court of Appeal shall perform any other office (whether paid or not), or accept any place of profit or emolument except with the written consent of the President.

jurisdictions, if not altogether prohibited. The provision of an attractive pension for life is regarded as adequate compensation. The rationale is the risk that, in such situations, the judge's self-interest and his duty may appear to conflict in the eyes of a reasonable, fair-minded and informed person. Moreover, the conduct of a former judge often affects the public's perception of the judiciary and of other judges who continue to serve after that judge has left. Under the 1946 and 1972 Constitutions, retired Judges of the Supreme Court were not appointed to executive positions. President Premadasa departed from this tradition when he appointed retired Chief Justice Sharvananda as Governor of the Western Province, and President Kumaratunge appointed retired Justice Ramanathan as his successor. Unfortunately, there are statutes in Sri Lanka that require the President to appoint retired judges as members of boards and commissions. This inevitably creates an illegitimate expectation in the minds of at least some judges approaching retirement age, and may even be perceived as influencing their judgment. The Bribery Commission and the Human Rights Commission are two such bodies, to which retired judges have been appointed. The political bias displayed by both these commissions in recent years was such that they soon became objects of public ridicule.

It is not suggested that a chief justice or other judge of any of the superior courts should not serve the community, after retirement from judicial office, by sharing the legal knowledge or experience or any other interests or competencies he or she may possess. However, the appointment by President Rajapakse of Nihal Jayasinghe, immediately after his retirement from the Supreme Court, to head the Sri Lanka High Commission in London, one of the most important diplomatic missions abroad, was inexplicable, since he did not appear to possess any special diplomatic skills, knowledge or experience for the task. The insistence of that judge-turned-diplomat that he be addressed by the prefix "Justice", and his decision to describe himself as such, is believed to have bewildered the establishment in a country in which a clear distinction exists, and is observed, between the executive and the judiciary.

It was, however, an unprecedented appointment made by President Rajapakse that seriously compromised the

independence, integrity and credibility of the Supreme Court. Barely weeks after his retirement, Chief Justice Asoka De Silva was appointed as an Adviser to the President. It was not known, and the country was not informed, whether the Chief Justice sought this post-retirement employment, or whether the Head of the Government offered it to him, and why. Nor was it known whether discussions in regard to this post-retirement employment took place while the Chief Justice was still in office presiding over politically sensitive cases. It gave rise to serious questions not only in regard to his judgment, but also to the probity of his recent judicial decisions. It also raised the spectre of judicial corruption. When a judge, and a Chief Justice at that, decides to take a great leap from the Supreme Court to the Presidential Secretariat to serve the executive branch of government at its core, the alarm bells must surely begin to ring. The country was entitled to know, but was not told, the compelling reasons that led to such an unprecedented step being taken. Nor did the retired Chief Justice give any thought to public perception before he decided to take that leap.[118]

Chief Justice Sarath Nanda Silva (1999-2009)

The upside as well as the downside of presidential patronage was spectacularly demonstrated by Chief Justice Sarath Nanda Silva. Described by a former colleague as "charismatic, cunning and vindictive", Silva was also credited as being one of the great legal minds of his time.[119] Spawned by the executive presidency, he set about establishing his own patronage mechanism. On occasion, he even developed his office into an alternative political centre to the presidency.[120] By arrangement with an accommodating Minister of Justice, he retained control of an $18.2 million World

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[118] See N. Jayawickrama, '*A Breach of Faith*' ***Sunday Island***, 27th October 2011.

[119] S. Aziz, PC., in conversation with the United States Charge d'Affaires, reported in a confidential cable from the US Embassy in Colombo to the Department of State, Washington, 25th June 2007, on the subject: '*Ambitious Chief Justice breaks away from President*', ***WikiLeaks***, 15 November 2013 <www.colombotelegraph.com>.

[120] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, pp.10-12.

Bank grant which he had earlier administered from the office of the Attorney-General. This grant was intended to refurbish courthouses and train legal and judicial officers, but was capable of being misused as a slush fund or as an instrument of patronage. According to a former judge, "Silva used the World Bank [grant] to extract personal favours; it was a patronage system".[121] He extended his sphere of influence into the Ministry of Justice by securing the removal of the incumbent Secretary, a very competent and experienced officer, and her replacement with a lawyer of his choice from his previous department. He secured the reconstitution of the Judicial Service Commission of which he now became the ex-officio chairperson, by recommending the appointment of two junior judges instead of the two most senior as tradition demanded; in fact, one was removed and the other passed over. It has been alleged that judicial officers, often those who did not decide in favour of the Chief Justice's friends and political allies, were offered the option of resignation or dismissal, or were transferred to unfavourable locations.[122] It has even been suggested that he concerned himself with the annual elections of the Bar Association.

Presidential patronage, and the knowledge that there was no higher authority that could reverse his orders, appear to have led him to act in an autocratic manner with impunity. For example, in the course of judicial proceedings, he demanded that two senior

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[121] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, p.11.

[122] See International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Report No.172, 30th June 2009, pp.14-15. In February 2006, the two appointed members of the Judicial Service Commission, Justices Shirani Bandaranayake and T.B. Weerasuriya, resigned over differences with the Chief Justice regarding the exercise of its disciplinary powers. One highly publicized instance was the order made by the Commission to the Wellawaya Magistrate, Janaka Bandara, to cancel a judicial order made by him for the arrest of the Senior Superintendent of Police of Monaragala, M.U.A. Sherifdeen, to be produced for an identification parade in connection with the death of a bus conductor who had been knocked down and killed on the spot by a police jeep allegedly driven by the SSP. The Magistrate refused to comply with the Commission's order and was interdicted. He was subsequently summoned to the Chief Justice's Chambers where he was admonished and told that he did not know the law and had behaved like a "booruwa". ***The Sunday Leader***, 17th July 2005.

officials,[123] resign their respective offices forthwith, and submit sworn affidavits that neither would ever thereafter accept any office under the State. There was no legal provision that enabled him to make such orders. On another occasion, he punished a lawyer over an incident that had occurred in the lounge of the Colombo law library by suspending him from practice for a period of four years. The lawyer had allegedly thrown a packet of milk at another lawyer. The latter had appeared for the Chief Justice's partner in a divorce case filed by her husband.[124] He also used the contempt powers of the court with no regard either to law or precedent. In February 2003, he summarily convicted and imposed a sentence of rigorous imprisonment of one year on Anthony Fernando, a petitioner in a fundamental rights application who appeared in person in support of his own application. Fernando was alleged to have "raised his voice" when he objected to his application being heard by the Chief Justice since it related to the conduct of the Chief Justice himself.[125] In December 2004, S.B. Dissanayake, a minister who had defected from the Kumaratunge cabinet, was convicted of contempt and sentenced to a term of two years' rigorous imprisonment. Addressing a small gathering on a paddy field remote from the capital, Dissanayake was alleged to have criticized an advisory opinion that the Chief Justice had provided to President Kumaratunge, and described it as "disgraceful" and "unacceptable". Never in over a hundred years had the Supreme Court imposed sentences of such excessive length and rigour for contempt of court. Responding to two separate communications submitted by Fernando and Dissanayake, the Geneva-based Human Rights Committee expressed the "View" that the convictions constituted violations of Sri Lanka's obligations under the ICCPR.[126] Unfortunately, both Views were delivered after the respective sentences had been served.

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[123] P.B. Jayasundera, Secretary to the Treasury, and Sarath Wijesinghe, Chairman of the Consumer Authority. However, following his retirement from the Court, President Rajapakse re-appointed the former to the same office, and appointed the latter as Ambassador to the United Arab Emirates.
[124] See ***The Sunday Leader***, 1st August 2004.
[125] *A.M.E. Fernando v. Attorney General* (2003) 2 Sri LR 52.
[126] *Anthony Fernando v. Sri Lanka, Communication* No.1189/2003, 31st March 2005 (a violation of Article 9 of *ICCPR*); *S.B. Dissanayake v. Sri Lanka,*

The listing of cases before the Supreme Court was apparently done on an ad hoc basis on his directions. In the court over which he presided for ten years, lawyers and litigants watched with increasing frustration as the Chief Justice, with increasing frequency and regularity, constituted the same or similar benches to hear any matter of political sensitivity.[127] The judges whom he chose to sit with were either the newly appointed, relatively junior judges, or those who had previously served under him when he was a supervising officer in the Attorney General's Department. The most senior judge, one of few to be recruited from the unofficial bar, Justice Mark Fernando, a judge of competence and independence, retired prematurely on 31 January 2004, more than two years before the due date, without ever having sat with the Chief Justice, and having rarely been assigned any case of real significance. Indeed, another experienced and independent judicial officer of integrity, Justice C.V. Wigneswaran, when interviewed by the press shortly after his own retirement from the Supreme Court in September 2004, had this to say:[128]

> *"But in the Supreme Court, none of us knew how the allocation of cases was done. If the junior-most judge was in charge of allocation of cases, I must confess that I never got a chance to be involved in the process when I entered the Supreme Court in 2001. More often, only selected judges were in charge and that too for a long time. And it was a fact that Justice Mark Fernando was kept out of important cases. Since I was more often accommodated with Justice Mark Fernando, I was also spared the distinction of hearing socially or*

Communication No.1373/2005, 22nd July 2008 (violations of Articles 9(1), 19(3) and 25(b) of the *ICCPR*).

[127] Indeed, the two noteworthy decisions of the Supreme Court that were unfavourable to President Kumaratunge were (a) the judgment of Justice Mark Fernando (with Gunasekera J and Wigneswaran J agreeing) which held, inter alia, that the proclamation made by President Kumaratunge announcing a referendum in 2001 was invalid; and (b) the majority decision of Justice Wigneswaram and Justice Shirani Tilakawardene, (with Dissanayake J dissenting) which declared that the fundamental rights of the news editor of a private television station were violated by the President's secretary and the President's head of security by unreasonably denying him entry into President's House for the swearing-in ceremony of former Prime Minister Ranil Wickremasinghe in December 2001 without any valid reason.

[128] ***The Sunday Leader***, 31st October 2004.

politically sensitive cases. Even if I was accommodated on a bench at the leave stage, once my views were known to be contrary to certain others, I would never be given that case thereafter."

Justice Wigneswaran had more to say of the Sarath Silva Court. He spoke of prejudices and personal agendas interfering with the judicial process:

> *"It is not my intention to point accusing fingers at any individuals. But if you ask any lawyer in Hulftsdorp who has some understanding of what happens in the higher judiciary today, he would tell you looking at the constitution of a bench and the subject matter coming up before that bench, as to what the outcome would be. More often such evaluation would be correct. How is it possible? It is because the bias, prejudices and may be personal agendas of individual judges are fairly well delineated that it is possible to safely predict. Some judges would be very hard regarding the same matter when it relates to one set of litigants and very lenient with others."*

Questioned on an earlier statement he had made that there was a "constrained atmosphere" within the court, Justice Wigneswaran explained:

> *"The compulsions have come about due to an administration that expected a departmental hierarchical obedience from judges. In order to achieve such obedience wedges were driven into the system. Patronage to some and punishment to others were meted out. Comply or be condemned, was the underlying threat."*

The control Silva exercised over his colleagues in the Supreme Court was such that in his ten-year tenure in office, there were less than five reported opinions dissenting from the Chief Justice. This has been attributed to his excessive influence over other members of the Court, which meant that there was a real, though unspoken, reluctance for them to issue dissenting opinions.[129]

President Kumaratunge encouraged the Chief Justice she had appointed by superseding several senior judges to develop a

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[129] International Bar Association, *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*: p.32.

special relationship with her. It was claimed by a once powerful member of the Kumaratunge Cabinet that Silva was a "close friend and trusted confidant of President Kumaratunge whose advice she has sought and received not only on legal and constitutional matters, but also on political strategy"[130]. She accorded him presidential protection whenever allegations of misconduct were leveled against him. In 2001, Kumaratunge prorogued Parliament to abort a resolution that sought the appointment of a select committee to inquire into a complaint of misbehavior against the Chief Justice. In February 2004, she frustrated a second attempt by parliamentarians to have the Chief Justice removed from office on fourteen grounds of misbehavior.[131]

The Chief Justice reciprocated with several judgments and advisory opinions that the President desired. For instance, following the general election of 5 December 2001 at which the UNP secured a comfortable majority in Parliament, Kumaratunge was compelled to invite her principal political opponent, Ranil Wickremasinghe, to form a government. In mid-2002, fearing that Kumaratunge may exercise her power of dissolution at any time, the UNP Cabinet decided to seek parliamentary approval to amend the Constitution, *inter alia*, (a) to make the President's power to dissolve Parliament subject to parliamentary control whenever the majority of members belonged to a political party of which the President was not a member, and (b) to permit each member to vote for or against the Bill according to his or her conscience, and yet be immuned from

[130] Communication No.1373/2005 submitted by S.B. Dissanayake, former Minister and General Secretary of the Sri Lanka Freedom Party, to the Human Rights Committee following his conviction and sentence for contempt of court, 7th March 2005.

[131] On 3rd November 2003, the UNP government parliamentary group decided to present to the Speaker a resolution signed by over 100 members of Parliament for the presentation of an address to the President for the removal of the Chief Justice on 14 grounds of misbehaviour. Notice of that resolution was submitted to the Speaker on 4th November 2003, and Prime Minister Ranil Wickremasinghe began making preparations to obtain the participation of judges from Commonwealth countries to serve on the tribunal that would inquire into allegations of misbehaviour. In February 2004, Kumaratunge dissolved Parliament and ordered a general election that saw the exit of the UNP Government.

disciplinary action by the political party to which such member belonged. It was believed that at least twenty members of Kumaratunge's party were proposing to vote for the proposed Nineteenth Amendment. Silva constituted a seven-judge Bench, from which he excluded the three most senior judges, to examine the constitutionality of the Bill.[132] This Bench held that the proposed amendments to the Constitution infringed Article 4. Any Bill that is inconsistent with Article 4 may be passed by a two-thirds majority. The Chief Justice, however, went beyond his judicial role, and trespassing into legislative territory held that Article 4 was "linked" to Article 3 which is one of ten Articles of the Constitution which require both a two-third majority in Parliament and approval by a majority at a referendum for the adoption of any inconsistent legislation.[133] He thus retained for Kumaratunge the power to dissolve Parliament at a moment of her choosing, and effectively aborted the anticipated cross-overs.[134]

Several other decisions and advisory opinions[135] of the Sarath Silva Court enabled Kumaratunge to regain her parliamentary majority at the 2004 general election. For instance, in late 2003, Kumaratunge sought an advisory opinion concerning the exercise

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[132] The Bench comprised Chief Justice Sarath Silva and Justices S.W.B. Wadugodapitiya, Shirani Bandaranayake, Ismail, P. Edussuriya, H.S. Yapa, and Asoka de Silva.

[133] Article 83 specifies these ten "entrenched" Articles. It does not include Article 4 among them.

[134] '*In Re The Nineteenth Amendment to the Constitution*', 3rd October 2002.

[135] Article 129 of the Constitution provides that:

> (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration **and the Court may**, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.
>
> (3) Such opinion . . . shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.
>
> (4) Every proceeding under paragraph (1) of this Article **shall be held in private** unless the Court for special reasons otherwise directs.

of powers relating to defence. On 4 November 2003, while Prime Minister Wickremasinghe was in the United States of America on an official visit to that country, President Kumaratunge removed from office the Minister of Defence, the Minister of the Interior, and the Minister of Mass Communication, and appointed herself Minister in charge of these subjects.[136] On the following day, the presidential secretariat issued a brief news release containing the "essence" of the opinion of the Supreme Court on the matters referred to it by the President.[137] The news release claimed that the Court was of the opinion, inter alia, that "the plenary executive power including the defence of Sri Lanka is vested and reposed with the President", and that "the said power vested in the President relating to the defence of Sri Lanka under the Constitution includes the control of the armed forces as commander-in-chief of the forces". This opinion stultified the growth of the Constitution. If it was expressed in good faith, it failed to adapt the Constitution to the realities of democratic power structures. It ignored the fact that the Constitution is a living instrument, sustained by the popular will, not a last will and testament. The full text of the opinion of the Supreme Court was never published.[138]

On 7 February 2004, President Kumaratunge dissolved Parliament and fixed 2 April 2004 as the date for the general

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[136] She also removed the Secretaries to the Ministries of Defence and Mass Communication and appointed her own nominees to those offices. She dismissed the Chairperson and Board of Directors of the Associated Newspapers of Ceylon Ltd., (a government-controlled newspaper company which published, inter alia, the "Daily News"), and appointed her own nominees. Similarly, she re-constituted the management and editorial heads of the Sri Lanka Rupavahini Corporation and Independent Television Network (both government-controlled television stations) and of the Sri Lanka Broadcasting Corporation. By another proclamation issued simultaneously, the President prorogued Parliament with immediate effect until 19th November 2003. (The annual budget was due to be presented to Parliament on 12th November 2003). The Presidential Secretariat also announced that a state of emergency had been declared. Addressing the nation that night, President Kumaratunge stated that she had acted in the interest of "national security".

[137] The Court consisted of Chief Justice Silva, and Justices Shirani Bandaranayake, H.S. Yapa, Asoka De Silva and Nihal Jayasinghe.

[138] See N. Jayawickrama, '*Misinterpreting the Constitution*' ***The Sunday Leader***, 30th November 2003; N. Jayawickrama, '*The Defence Portfolio*' ***Daily News***, 20th December 2003.

election – barely two years into the life of a government which enjoyed the overwhelming confidence of Parliament.[139] On 10 March 2004, at the height of the general election campaign, the Chief Justice took the extraordinary step of informing the press that the Judges of the Supreme Court were examining a speech made by the UNP national organizer, S.B. Dissanayake, with a view to dealing with him for contempt. The speech was one which Dissanayake was alleged to have made nearly five months earlier in which he criticized the advisory opinion referred to above.[140] Five days later, during the final fortnight of the general election campaign, the "Daily News" reported that the Chief Justice had instructed that notice be issued on Dissanayake to appear before the Supreme Court and show cause why he should not be punished for contempt of court.[141]

As the countdown to the general election began, the UPFA raised a new issue – the legality of a tax amnesty granted by the UNP government. On 12 March 2004, President Kumaratunge sought the opinion of the Supreme Court on the constitutionality of the Inland Revenue (Special Provisions) Act under which the tax amnesty had been granted. That law had been enacted in or about March 2003, having been passed by Parliament and certified by the Speaker. Article 80(3) of the Constitution states

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[139] On the same day, immediately before she dissolved Parliament, the President appointed two members of her party, L Kadirgamar and D.M. Jayaratne, into the UNF Cabinet of Ministers and assigned to them the subjects of media and mass communication, and posts and telecommunications, respectively. On 11th February 2004, she removed from office all non-Cabinet Ministers and all Deputy Ministers. On 12th March 2004, the United People's Freedom Alliance (UPFA) formed by the SLFP and the JVP published its election manifesto.

[140] ***The Daily Mirror*** of 3rd March 2004 had reported verbatim an interview with Anura Bandaranaike, the UPFA national organizer and brother of President Kumaratunge, in which he confidently predicted that Dissanayake "will be in jail very soon".

[141] In fact, no Rule had been issued by the Supreme Court on or before the date of this news report, nor was any Rule issued between the date of the news report and the date of the general election. The Chief Justice, who had volunteered information to the press only five days prior to this news report, took no steps to contradict this news report, which was published at a crucial stage of the general election when Dissanayake was campaigning not only in his own electoral district, but throughout the country as a principal speaker on behalf of the UNP. Dissanayake was later convicted of contempt of court and sentenced to rigorous imprisonment for two years.

that "where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, *no court* or tribunal *shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.* Notwithstanding this explicit constitutional provision, the Chief Justice constituted a Bench to re-examine the validity of that law. On 27 March, excerpts of the opinion of the Court were faxed to newspapers by the presidential secretariat. According to these excerpts, the Court[142] had advised that the Act was inconsistent with the Constitution. A few days later, the UPFA published full-page paid advertisements in all the newspapers containing the Court's opinion that the tax amnesty was illegal.

In the final week of the election campaign, state media publicized a letter from the Chief Justice in which he alleged that the monetary assets of the Mahapola Higher Education Scholarship Trust Fund, of which he was a trustee, had been transferred to a private company by the UNP Minister of Commerce without his knowledge and that he was deeply perturbed by it. It was also reported that President Kumaratunge "being shocked", had requested the Chief Justice to conduct an immediate investigation into the alleged fraud and to take steps to re-transfer the money into the Fund.[143] In the final days of the campaign this became a major issue, and full page advertisements were inserted in newspapers by the UPFA based on the Chief Justice's complaint.[144]

Shortly before midnight on 1 April 2004, the day previous to polling day, the government-controlled ITN television station

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[142] The Court consisted of Chief Justice Silva, and Justices Shirani Bandaranayake, H.S. Yapa, Asoka De Silva and Nihal Jayasinghe.

[143] See '*CJ as Chairman kept in the dark over transfer of Mahapola Trust Funds to private company*' ***Daily News***, 25th March 2004 at p.1

[144] The Chief Justice's allegations were refuted through a private television station and private newspapers by Dr W.S. Weerasooria, one of the other trustees of the Fund. He explained that in March 2003 the trustees had unanimously decided to establish the National Wealth Corporation as a fully owned subsidiary of the Mahapola Trust Fund. The purpose was to manage the portfolio of funds so as to increase the returns in order to meet the increasing demand for scholarships in the context of falling interest rates on treasury bonds in which the funds had been invested. The Chief Justice had been kept informed of all the decisions taken by the Trust and it had been so recorded in the minutes.

began televising a religious programme from a Buddhist temple in Colombo.[145] This programme continued into the early hours of polling day. Prominent among those in the temple, listening to the chanting of "pirith" were several UPFA candidates and presidential aides. Among them were UPFA Minister Lakshman Kadirgamar, a Christian, and UPFA candidate A.H.M.Fowzie, a Muslim. Seated at the feet of Minister Kadirgamar (who appeared to be on an elevated seat) was the Chief Justice, Sarath Silva. Television cameras constantly focused on the Chief Justice during the long programme. No previous Chief Justice had allowed himself to be photographed or televised with candidates belonging to a particular political party on the eve of a general election.[146]

One of the issues that arose sometime after the 2004 general election was in regard to the date of the next presidential election. President Kumaratunge, in her second term in office, was not eligible to contest. Her party had chosen Mahinda Rajapakse as its candidate, despite misgivings entertained by Kumaratunge who appeared to favour the candidature of her brother, Anura Bandaranaike. Kumaratunge had commenced her first term on 12 November 1994, but had invoked the Third Amendment and declared her intention to seek re-election one year before her first term ended. Having won that election, she had taken her oath of office before the Chief Justice at a nationally televised ceremony immediately after the declaration of the result on 22 December 1999. In terms of the Constitution, her second term of office

[145] Instructions issued by the Commissioner of Elections to the media required all discussions on political matters to cease at midnight on 1st April 2004. All private television stations observed this injunction and terminated their transmissions.

[146] In the general election held on 2nd April, the UPFA led by President Kumaratunge secured 105 seats (PA: 66 and JVP 39), while the UNP won 82 seats. The Tamil National Alliance which contested the Northern and Eastern provinces won 22 seats. The remaining 16 seats were shared among four small parties. Notwithstanding the fact that she was able to attract the support of only one member from the other parties, President Kumaratunge formed a minority government with seven short of a majority in Parliament. Although her preferred choice for the office of Prime Minister was national list MP Lakshman Kadirgamar, she was compelled by powerful sections of her party and allied groups to appoint Mahinda Rajapakse as the new Prime Minister.

would end, six years later, in December 2005. However, in a statement to the press sometime in 2004, Chief Justice Sarath Silva declared that he had administered a second oath in an unpublicized, apparently private, ceremony on an undisclosed date in November 2000, which was when her first term would ordinarily have ended. If, indeed, her second term commenced in November 2000, Kumaratunge was entitled to remain in office until November 2006.

As the public debate on the date of the next presidential election grew in intensity, President Kumaratunge turned to her Chief Justice for an advisory opinion. The Chief Justice, however, chose to prioritize a fundamental rights application filed by a Buddhist monk.[147] The monk, who was believed to have been "inspired" by Prime Minister Mahinda Rajapakse to do so, complained that the Commissioner of Elections had failed to make a pronouncement that the date of the next presidential election would be in November 2005, and not in November 2006 as contended by the incumbent President. On a single day, Monday 22 August 2005, a five-judge Bench headed by Chief Justice Sarath Silva heard several counsel. They included counsel for the President as well as the Attorney-General in person, who argued that the election was not due until November 2006. Four days later, the Chief Justice announced that Kumaratunge's second term had commenced in December 1999, and consequently it would end in December 2005. The decisive date was the date on which the result of the election was declared, namely, 22 December 1999. With this sudden and wholly unexpected (but constitutionally sound, it is submitted, for somewhat different reasons[148]) ruling that gave Kumaratunge barely three months more to remain in office, the "special relationship" between the President and the Chief Justice was instantaneously and

[147] The monk, Ven. Dr Omalpe Sobitha Thera, was a Member of Parliament and the general secretary of the Jathika Hela Urumaya. The judgment in a fundamental rights application is binding, whereas an advisory opinion is not.
[148] See N. Jayawickrama, '*The President's First Term: When did it end?*' ***The Sunday Leader***, 21st November 2004; N.Jayawickrama, '*Timing of the Presidential Poll*', Interview with Vimukthi Yapa, ***The Sunday Leader***, 26th June 2005.

unceremoniously terminated.[149] Silva's focus now was on Kumaratunge's potential successor, Mahinda Rajapakse, at whose wedding Silva's young son had been the page-boy.[150]

Rajapakse, however, faced a serious problem which Kumaratunge was reportedly attempting to exploit to deprive him of his party's nomination. Earlier in the year, Sonali Samarasinghe, an investigative journalist on "The Sunday Leader", published a series of articles, supported by documentary evidence, in which she alleged that a sum of Rs. 82 million received as Tsunami relief had been siphoned off into a private bank account controlled by Rajapakse.[151] Based on these reports, the UNP made a complaint to the police of criminal breach of trust and criminal misappropriation. The police thereupon began a criminal investigation into what became known as the "Helping Hambantota Scam". Rajapakse filed a fundamental rights application in the Supreme Court, on advice allegedly given by a Supreme Court Judge. The case was called on 28 September 2005 before a Bench headed by the Chief Justice, and including Justice Nihal Jayasinghe who was reportedly a frequent visitor to "Temple Trees".[152] Despite opposition from the Deputy

[149] Kumaratunge had reportedly complained to her legal team that the Chief Justice had repeatedly assured her in private that she could lawfully remain in office until November 2006.

[150] U. Kurukulasuriya, '*Sri Lanka's Judiciary further compromised by appointment of conflicted, inexperienced chief justice*' < uvindu@lankaindependent.com>.

[151] See, for example, S. Samarasinghe, '*Questions on Helping Hambantota the PM is ducking*' ***The Sunday Leader***, 31st July 2005. It was alleged that a sum of Rs.82,958,250 received by the Prime Minister's Office following the tsunami of December 2004 had been deposited at the Standard Chartered Bank in a special account opened under the Rajapakse Memorial Educational and Social Services Foundation, described as the Hambantota Tsunami Disaster Development Programme (also known as Helping Hambantota). Among the objectives of this foundation were "to establish and maintain a Rajapakse Memorial Holiday Resort and Botanical Garden, organize and hold exhibitions, symposia, conferences, debates, tours and excursions." The officers of this private foundation included Chamal Rajapakse (Chairman), Mahinda Rajapakse (Vice-Chairman), Basil Rajapakse, Gothabhaya Rajapakse, Prithi Rajapakse, Vichitra Rajapakse, Lalith Candrasekera, Shiranthi Wickremasinghe, Udayanga Weeratunge, and Jaliya Wickremasuriya. The address provided to the Bank when this account was opened was that of the Rajapakse family at Pangiriwatte Road, Mirihana, Nugegoda.

[152] See Upul Jayasuriya, '*Sarath Silva: A Retrospective*'.

Solicitor-General who appeared for the State, the Court granted interim relief to the petitioner by directing that the investigation be forthwith suspended, and that the matter be listed again on a date after the presidential election. At the election, the issue was *sub-judice* and could not be raised. [153]

When the case was next listed, four months later, President Rajapakse had assumed office. The same Deputy Solicitor-General now informed the Court[154] that it was not intended to proceed with the investigation. Accordingly, the Court granted the declaration applied for by Rajapakse. In his judgment, the Chief Justice held (a) that Kabir Hashim MP, with no personal interest in the matter, and purporting to act on behalf of the UNP, had written a letter directly to police headquarters instead of making a statement in the ordinary course to a police station; and (b) that Chandra Fernando, Inspector-General of Police, and Lionel Gunetilleke, Deputy Inspector-General of Police (CID), in violation of the Criminal Procedure Code, had commenced an investigation without any basis purportedly on a letter given to police headquarters. The Chief Justice ordered Hashim, Fernando and Gunetilleke to pay personally a sum of Rs.100,000 each to Rajapakse by way of compensation. He also ordered the State to pay a sum of Rs.200,000 to Rajapakse as costs.

Following the installation of President Rajapakse in office, Silva appeared to have established the same "special relationship" with him that he had developed with his predecessor. In fact, in a very candid interview with a journalist, he made the astounding admission that in cases involving the State, he always informed President Rajapakse what the decision of the Court would be before delivering judgment. "Of course, I did not show him the judgment", he added. In the interview conducted at his home, he

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[153] On 18 October 2014, at a public seminar organized by the JVP at the New Town Hall, Colombo, Sarath Silva made this astounding confession: See ***The Sunday Times***, 26th October 2014: p.8

> "I met a JVP member at the Narahenpita pola recently and he asked me why I did not give the right judgment in 2005, and I could not answer him. But today I tender an apology for it. I am very sorry. I am asking the whole country: forgive me."

[154] On this occasion, the Court consisted of Chief Justice Silva and Justices Shirani Tilakawardena and N.E. Dissanayake.

exclaimed: "How many times has the President been seated where you are now seated !". He demonstrated his shift of loyalty to his new patron in a judgment in which he pruned down the presidential perks of Kumaratunge, including denying her the official residence allocated to her at Independence Square in Colombo. In a later judgment written by Justice Shiranee Tilakawardene, with which he concurred, the Court fined Kumaratunge Rs 3 million in a case involving a sale of state land, "to remind" present and future "office holders of their fiduciary obligations to the state".

Chief Justice Silva lent the power and the prestige of his office in aid of the extreme nationalism and the unitary vision of his new patron.[155] In July 2005, he invalidated the Post-Tsunami Operational Management Structure (PTOMS) agreed upon by the Kumaratunge Government and the LTTE for coordinating aid delivery following the December 2004 tsunami.[156] This interim order also aborted a potential opportunity for continuing negotiations between the Government and the LTTE. In October 2006, he invalidated a 1987 proclamation of President Jayewardene that had merged the eastern and northern provinces to form one administrative unit having one elected provincial council. This single unit was intended to create the basis for political autonomy in the predominantly Tamil-speaking region of the country, and was strenuously opposed by Sinhala nationalists.[157]

In September 2006, Chief Justice Silva delivered a judgment that has been described as "an example of judicial waywardness"; of judicial independence mutating into judicial despotism.[158] He

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[155] In 1999, he had presided over the Bench that approved the draft Constitution introduced by President Kumaratunge. That draft provided for the devolution of power and envisaged Sri Lanka as a Union of Regions.

[156] *Weerawansa v. Attorney-General*, 15th July 2005.

[157] *Wijesekera v. Attorney-General*, 16th October 2006. The petitioners were three residents in the two provinces who complained that they had been denied the right to vote in a referendum that had been promised in 1987. The jurisdiction of the court was invoked under Article 126 of *The Constitution* which requires a petitioner to file a fundamental rights application within a month of the violation complained of.

[158] Sir N. Rodley, '*The Singarasa Case: Quis Custodiet . . .? A Test for the Bangalore Principles of Judicial Conduct*' (2008) ***Isr.L.Rev.*** 41:3, 500-521.

held that Sri Lanka's accession to the Optional Protocol to the ICCPR in October 1997 was inconsistent with the Constitution and in excess of the power of the President. According to him, the conferment of a right on a Sri Lankan to address a communication to the Human Rights Committee in respect of a violation of a right recognized in the ICCPR that results from acts, omissions or developments in Sri Lanka; and a recognition of the power of the Human Rights Committee to receive and consider such a communication, "amounted to a conferment of public law rights", and "was therefore a purported exercise of legislative power which comes within the realm of Parliament and the People at a Referendum". In his view, it was also "a purported conferment of a judicial power on the Human Rights Committee", and therefore a violation of the constitutional provisions vesting judicial power in the Sri Lankan judiciary.[159] Silva had asked and answered a question that neither party had raised.[160] In so doing, he appeared to demonstrate a complete misunderstanding of the international legal significance of accession to the Protocol. As a distinguished international jurist

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The Court consisted of Chief Justice Silva and Justices Nihal Jayasinghe, N.K. Udalagama, N.E. Dissanayake and Gamini Amaratunge.

[159] *Singarasa v. Attorney-General*, 15th September 2006.

[160] Nallaratnam Singarasa had been convicted under the *Prevention of Terrorism (Temporary Provisions) Act* of 1979 and been sentenced to 50 years rigorous imprisonment which was later reduced by the Court of Appeal to 35 years. The key evidence on which he was convicted was an allegedly coerced confession which he claimed had been obtained after four months' detention during which he was tortured. Singarasa availed himself of the right of individual petition to the Human Rights Committee under the Optional Protocol. The Committee found violations of several provisions of the ICCPR; notably Articles 2, 7, and 14. In communicating its "Views" to the Government it recommended "release or retrial and compensation". Singarasa thereupon sought relief from the Supreme Court. He did not argue that the Committee's Views were *per se* enforceable in the Sri Lankan courts. Nor did he argue that the Committee's Views were *per se* binding. Instead, he asked the Court to exercise its inherent powers of revision and/or review to address a situation in which the Government had argued, in its response to the Committee's Views, that the State did not have the "legal authority to execute the decision of the Human Rights Committee to release the convict or grant retrial". In fact, President Rajapakse did have the power* under Article 34 of the Constitution to grant a pardon or to remit the whole or part of any punishment imposed by a court.

observed, it was "Alice in Wonderland (or perhaps Alice Through the Looking Glass) reasoning".[161]

Then, suddenly, Chief Justice Silva changed track and placed himself on reverse gear. He delivered a series of judgments that actually received public acclaim. For example, on 8 June 2007, a Bench of the Supreme Court (of which he was not a member, but was believed to have influenced the decision) granted an interim injunction to prevent the Inspector-General of Police from taking steps to evict 376 Tamil persons from Colombo on a directive of Defence Secretary Gotabhaya Rajapakse. On 14 June, he issued a stay order against government plans to sell nearly 25 per cent of its shares in Sri Lanka Telecom to a Malaysian company. In the following month, he issued an injunction against a slum clearance programme of the Defence Ministry that sought to evict about 400 persons from their homes in the Colombo suburb of Slave Island. In 2008, he ordered the Government to reduce electricity tariffs. Many of these orders were ignored by the Rajapakse Government. A Judge of the Supreme Court explained the reason for this intriguing change of direction: in mid-May 2007, President Rajapakse had "privately asked" Chief Justice Sarath Silva to apply for premature retirement to enable him to appoint to that office Justice Nihal Jayasinghe, who was fourth in seniority among the judges but was due to retire shortly.[162] If true, it was an act of base ingratitude! Silva continued in office until he

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[161] N. Rodley (2008): p.500 at 504. Rodley argues that this judgment raises the need to address situations when a court hands down decisions not dictated by any doctrinally recognizable exposition of the law, or unsustainable on the facts or the law or both. He suggests that the Bangalore Principles be reviewed to consider the incorporation of a new judicial value that would address "the uncontrolled application of judicial caprice" or "judicial eccentricity". Curiously, in March 2008, when the Rajapakse Government was anxious to convince the European Union that it had fulfilled its international human rights obligations, the Chief Justice provided an advisory opinion that Sri Lanka had given "adequate recognition" to the ICCPR and that Sri Lankans "derive the benefit and guarantee of rights contained in the ICCPR": *Advisory Opinion of the Supreme Court on the International Covenant on Civil and Political Rights*, SC Reference No.1/2008. He referred to *Act No.56 of 2007*.

[162] Information provided by Justice Jagath Balapatabandi to the United States Charge d'Affaires, reported in a confidential cable from the US Embassy in Colombo to the Department of State, Washington, 25th June 2007, on the subject: '*Ambitious Chief Justice breaks away from President*', ***WikiLeaks***, 15th November 2013 <www.colombotelegraph.com>.

reached his 65th year in 2009. He then involved himself actively in the election campaign of General Sarath Fonseka, the former Army Commander and Chief of Defence Staff, who quit the latter office to challenge Mahinda Rajapakse at the presidential election in January 2010. Four years later, addressing a public meeting convened to emphasize the need to choose a "common candidate" to challenge Rajapakse if he sought re-election for the third time, Silva described the President as "a harbinger of evil" (*henahura*).[163]

The Legacy of Chief Justice Sarath Nanda Silva

Sarath Nanda Silva bequeathed to his successors, who lacked his political sagacity and legal acumen, a legacy of political subservience. This became immediately evident when, in November 2009, having served four years in office, Rajapakse announced his intention to seek re-election for a further term. He obviously wished to benefit from the wave of triumphalism that was sweeping the south following the brutal decimation of the LTTE six months earlier. On 26 January 2010, in results announced in controversial circumstances, he was declared elected. A few days later, his challenger, General Sarath Fonseka, was detained by military authorities. Rajapakse immediately sought the advisory opinion of the Supreme Court on when his second term would commence. This was hardly necessary since the Court had, in 2005, already held that the effective date of commencement was the date of the election for the second term, the incumbent President being required to assume office within two weeks of that date. However, Silva's immediate successor, Chief Justice Asoka De Silva, who had been appointed six months earlier superseding Justice Shirani Bandaranayake, constituted a seven-member bench over which he presided. He reportedly heard both Attorney-General Mohan Peiris and counsel for the President submit that the President's first term would continue until 19 November 2010, on which day the second term would commence. It was announced that he had held a*ccordingly, and had purported to overrule the Court's 2005 judgment. The

[163] ***Colombo Telegraph***, 12th November 2014.

opinion was not published. An advisory opinion is not binding, since it is neither a judgment nor a determination of the Court. Nevertheless, there was no challenge by anyone to any executive act performed during that extended "bonus" term of ten additional months purportedly "legitimized" by a Supreme Court advisory opinion.[164]

Some months later, on a reference from the Court of Appeal, Chief Justice Asoka De Silva held that a court martial was a "competent court" within the meaning of that term in the Constitution.[165] Accordingly, on the basis of that interpretation, which was contrary to contemporary international jurisprudence, the unsuccessful presidential contender Sarath Fonseka, who had been imprisoned on the order of a military tribunal, forfeited the seat in Parliament that he had secured in the general election.

On 31 August 2010, Chief Justice Asoka De Silva received from the President a Bill for the Eighteenth Amendment to the Constitution which had been certified by the Cabinet as being "urgent in the national interest".[166] For reasons yet unknown, he excluded himself from the Bench that would examine the constitutionality of this Bill. Instead, he nominated the judge he had superseded, Justice Shirani Bandaranayake, to preside over a five-judge Bench.[167] Two years earlier, in a classified cable to the State Department, the United States Ambassador had identified Bandaranayake as a supposed "Rajapakse loyalist".[168] That loyalty became evident when the Court assembled on that day at

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[164] See N. Jayawickrama, '*The President's Second Term: When does it Commence?*' ***The Sunday Island***, 31st January 2010; N. Jayawickrama, '*The President's First Term: Why the Supreme Court is Wrong*' ***The Sunday Island***, 7th February 2010.

[165] *Sarath Fonseka v. Kithulegoda*, S.C. Reference No.1/2010.

[166] A Bill so certified is not required to be published in the Gazette. Nor can its provisions be challenged in court by any citizen. Instead, the Bill is referred by the President to the Chief Justice, and the Supreme Court is required to make its constitutional determination on the Bill within 24 hours, and to communicate that determination only to the President and the Speaker. The Court is required to hear only the Attorney-General, but on this occasion the ingenuity of a few human rights activist-lawyers resulted in their being able to secure a brief audience before the Court.

[167] Justice Bandaranayake, Justice K. Sripavan, Justice P.A. Ratnayake, Justice S.I. Imam and Justice R.K.S. Suresh Chandra.

[168] ***WikiLeaks***, 24th February 2010 <www.colombotelegraph.com>

10.30 a.m. It must have required incredible effort on the part of Bandaranayake and her four colleagues to sit in court a whole day, listen to submissions from Attorney-General Mohan Peiris and six other counsel including academic Rohan Edirisinha who appeared in person, and thereafter write a determination, all within the space of 24 hours, on the constitutional validity of some 93 paragraphs of a Bill which, when subsequently published in "The Island" newspaper, occupied one full page and a half of small print. The Judges also carried a further heavy burden because their determination would be final and conclusive for all purposes and for all time.[169]

The Eighteenth Amendment, which Bandaranayake certified as not requiring the approval of the people at a referendum made a profound change in the governance of Sri Lanka. It enabled a President to seek re-election to office for as many terms as he wished (by repealing the two-term limit), and it abolished the Constitutional Council. There was nothing in the determination to indicate that the Court had even attempted to interpret the relevant provisions of the Constitution. For example, it did not examine the meaning to be attributed to the phrase "an amendment which is inconsistent" with the concept that "sovereignty is in the people and is inalienable" Since "sovereignty" includes "the powers of government, fundamental rights and the franchise", the Court would logically have had to ask whether it would be consistent with the peoples' sovereignty to deny a citizen the right (which he or she enjoyed under the Constitution) to institute proceedings in a court or tribunal against

[169] Some 32 years ago, the Constitutional Court, declined to make a determination on the Sri Lanka Press Council Bill even within the 14 days stipulated by the 1972 Constitution. Seven petitions had been filed by citizens and a political party leader, and several senior counsel appeared in support of these petitions. On Day 21, confronted by angry noises from the National State Assembly, the President of the Constitutional Court, Justice T.S. Fernando, explained why the Court intended to permit each counsel to make his submissions in full:

> "It is the duty of us all, whether we be judges or not, to uphold the Constitution. To uphold the Constitution we as judges must first understand the meaning of the relevant provisions of the Constitution. For that understanding we have to rely on our own judgment assisted, if need be, by the opinions of learned counsel. Any other course of action involves, in our opinion, an abdication of our functions."

a president, upon completion of his term of office, in respect of something done by him in his official or private capacity, by enabling that president to repeatedly seek re-election every six years, and thereby perhaps even outlive that citizen.

The Court did not consider whether it was consistent with the peoples' sovereignty to deny accountability in governance by vesting the power of appointment of scores of senior judges, public servants and police officers in a president whose actions (unlike that of a prime minister under earlier constitutions) cannot be questioned in any forum. How did it enhance the peoples' franchise (as the Court claimed it did) if a person who sought election to the office of president had to contend with an incumbent who had already served two or more terms in that office, and who was allowed to choose the date of that election, appoint the elections commission that would conduct the election, exercise absolute control over all the other institutions of government and its personnel including the police, and who also enjoyed immunity in respect of all his official and private acts?

There was nothing in the Bill for the Eighteenth Amendment that could not have been deferred for 21 days. The next presidential election was not due for at least another six years. To have utilized an extraordinary procedure which was intended principally for revenue legislation,[170] in order to provide cover

[170] The special procedure to be followed when the Cabinet of Ministers considered a Bill to be "urgent in the national interest" had its origin in *The 1972 Constitution*. It was introduced into that Constitution when the Constituent Assembly decided to remove the jurisdiction of courts to review the constitutionality of laws, and provide instead for the review of proposed legislation by a specially created Constitutional Court. To enable a Bill to be reviewed, it was necessary that it be published in the Gazette at least seven days before it was placed on the agenda of the National State Assembly. A question that immediately arose was in respect of revenue legislation, especially following the presentation of the annual budget. The experience of the demonetization exercise of 1970 was fresh in everyone's mind. Under the 1946 Constitution then in force, it had been possible for Parliament to enact the demonetization law in one sitting. Had there been a delay, many people would have begun disposing of their Rs.100 notes, thereby creating chaos in the currency markets. It was to provide for such extraordinary situations that a special procedure was introduced to enable a Bill to be examined by the Court without making it public, and then presenting it to the National State Assembly

and secrecy for extremely vital, far-reaching and controversial amendments to the Constitution, was, therefore, a gross abuse of the law-making process. The Supreme Court overlooked its constitutional duty under Article 105 to "protect, vindicate and enforce the rights of the people" (including the right to challenge proposed legislation) by failing to question the validity of a reference made to it through the inappropriate use of a special procedure.[171]

Conclusion

A compromised judicial system

Prior to the advent of the Executive President, Sri Lanka possessed a truly competent, independent and impartial judiciary, buttressed by an equally competent and vibrant legal profession. The citizen could confidently expect not only quality professional representation, but also equal justice under the law. The judiciary was rarely, if ever, inhibited by the pomp and splendour, or the power and authority, of the State or its agents. The United Nations had not yet formulated the basic principles on the independence of the judiciary, and an international code of judicial conduct had not yet been conceived. Yet, judges of that time remained true to their only guide: the judicial oath. The Attorney-General, the principal law officer of the State, was also conscious that he exercised powers of a quasi-judicial nature. He did not go to anyone's office other than his own. Ministers and senior government officials who sought his legal advice saw him in his own chambers, with the only exception being perhaps the Governor-General and the Prime Minister.

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at the earliest possible opportunity. Indeed, in justifying its inclusion in the 1972 Constitution, Dr Colvin R de Silva had this to say:

> "There comes once in a way, as in the case of the demonetization law, the need for a government in the national interest urgently to pass a law in the shortest possible time before people can make preparations against that law".

[171] See N. Jayawickrama, '*Abuse of the Law-Making Process*' ***Sunday Island***, 16th September 2010.

The fact that the government of the day, even when backed by a two-third majority, might have had a very strong interest in particular litigation, often left the judiciary unmoved. For instance, in 1954, when Sir John Kotelawela was Prime Minister, the Supreme Court did not hesitate, at the close of the prosecution case in a trial-at-bar, to acquit the editor of a left-wing newspaper charged with the criminal defamation of the Governor-General designate, Sir Oliver Goonetilleke.[172] In 1955, the Supreme Court acquitted two opposition members of Parliament charged with having breached the privileges of parliament.[173] In 1961, when Mrs Bandaranaike was Prime Minister, the Supreme Court read the doctrine of separation of powers into the 1946 Constitution and held the appointment by the executive of tribunals that exercised judicial or quasi-judicial power to be invalid.[174] In 1964 a District Judge declared the Official Language Act of 1956 to be inconsistent with the Constitution and therefore void.[175] In the same year, the Supreme Court directed the Permanent Secretary to the Ministry of Defence and External Affairs to forthwith discontinue the requirement of "clearance" which a person wishing to travel abroad had to obtain, since it was an executive device, unknown to the law and applied without any legal authority.[176] In 1966, when Dudley Senanayake was Prime Minister, the brother of the Leader of the Opposition who was charged under the Bribery Act was acquitted by a District Judge at the close of the prosecution case, and that acquittal was affirmed by the Supreme Court as soon as Queen's Counsel flown down from London to argue the

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[172] *The Queen v. Theja Gunawardene*, 3rd December 1954.
[173] *The Attorney-General v. Samarakkody and Dahanayake*.
[174] Four tribunals were held to have been constituted in contravention of section 55(1) of the Constitution, and thereby to be lacking in the essential attributes of independence and impartiality. They were (i) Bribery Tribunals established under the *Bribery Act 1954*: *Senadhira v. Bribery Commissioner* (1961) 63 NLR 313; (ii) The office of Quazi established under the *Muslim Marriage and Divorce Act 1954*: *Jailabdeen v. Danina Umma* (1962) 64 NLR 419; (iii) The licensing authority constituted under the *Licensing of Traders Act 1961*: *Ibrahim v. Government Agent, Vavuniya* (1966) 69 NLR 217; and (iv) an *Arbitrator appointed under the Co-operative Societies Ordinance 1936*: *Karunatilleke v. Abeywira* (1966) 68 NLR 503.
[175] *Kodeswaran v. Attorney-General*, D.C. Colombo 1026/Z, judgment of O.L. de Kretser, District Judge, Colombo.
[176] '*Aseerwatham v. Permanent Secretary to the Ministry of Defence and External Affairs*' ***Journal of the International Commission of Jurists*** VI, 319.

Attorney-General's appeal had concluded his submissions.[177] In 1967, at the close of the prosecution case, three Judges of the Supreme Court presiding over a trial-at-bar acquitted a prominent Buddhist priest, a former Army Commander and several low ranking military personnel who were charged with having conspired to overthrow the government.[178] In 1975, at the trial of several Tamil political leaders who were charged under emergency regulations with sedition, the High Court upheld the submission made by the 72-strong defence team that the declaration of the state of emergency was invalid under the Constitution.[179]

One must, of course, guard against being too starry-eyed when looking at the judiciary of this period. There were great moments in history when the Supreme Court failed. At Independence, the biggest challenge was nation building. We now know, sixty-six years later, that the political leadership failed to measure up to that challenge, and that a cautious Supreme Court also contributed to that failure. For example, section 29 of the 1946 Constitution was one of the principal guarantees offered to the minority communities against discriminatory legislation; but when the new citizenship and franchise laws were challenged, the Supreme Court retreated.[180] When a courageous district judge[181]

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[177] *The Queen v. Ratwatte*. It was alleged that the then Prime Minister's brother, who was her private secretary, had accepted a bribe from an Indian national in exchange for the grant of citizenship. The Bribery Commissioner, V.T. Pandita Gunewardene, had certified that a prima facie case existed. The Acting Attorney-General, Victor Tennekoon QC, disagreed. His successor, A.C.M. Ameer QC, decided to serve an indictment. At the close of the prosecution case in the District Court of Colombo, the accused was acquitted. The Attorney-General appealed against the acquittal and retained E.F.N. Gratiaen QC, who was then practising in England, to argue the appeal. After Gratiaen had concluded his submissions, the Supreme Court (Chief Justice H.N.G. Fernando and Justice T.S. Fernando) dismissed the appeal without calling upon counsel for the respondent.

[178] *The Queen v. Gnanaseeha Thero et al* (1968) 73 New Law Reports 154.

[179] *The Attorney-General v. Amirthalingam et al*. This judgment was, however, reversed by the Supreme Court on appeal.

[180] *Mudannayake v.* Sivagnanasunderam (1951) 53 NLR 25. Chief Justice Sir Edward Jayatilleke thought that:

> "To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion or

struck down the Official Language Act, the Supreme Court first avoided the issue, and then procrastinated, and thereby kept the impugned law alive.[182] The judiciary, of course, had its own share of problems which successive governments had failed to address. The trial rolls were long. The backlog in the appellate court was enormous. The rules of civil and criminal procedure were Victorian. I recall expressing the exasperation of a starry-eyed young lawyer when, writing the annual report as honorary secretary of the Bar Council in 1969, I described the judicial system as an antique labyrinth with tortuous passages and cavities through which the potential litigant must grope, often blindfolded, in his search for justice.

> caste, would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion."

A package of laws was enacted immediately after Independence. It consisted of the *Citizenship Act No.18 of 1948*, the *Immigrants and Emigrants Act No.20 of 1948*, the *Indian and Pakistani Residents (Citizenship) Act No.3 of 1949*, and the *Parliamentary Elections (Amendment) Act No.48 of 1949*. These laws were designed to exclude from their purview as many of the persons of Indian origin living and working in Ceylon as was possible. The Supreme Court judgments were affirmed by the Judicial Committee of the Privy Council which considered that:

> "It is . . a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals . . The migratory habits of the Indian Tamils are facts which in their Lordships opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community."

See *Kodakkan Pillai v. Sivagnanasunderam* (1953) 54 NLR 433.

[181] O.L. de Kretser, District Judge of Colombo.

[182] In 1967, on appeal, a bench of two Judges of the Supreme Court confined its attention to the preliminary issue and held that a public servant in Ceylon had no right to sue the Crown for the recovery of its wages. The Court did not call upon the Attorney-General to submit his arguments on the question of the validity of the Official Language Act, a question of "extraordinary importance and great difficulty" which would warrant reference to a bench of five or more Judges. Chief Justice H.N.G. Fernando explained that if a case could be decided on one of two grounds, one involving a constitutional question and the other a question of statutory construction or general law, the Court will decide only the latter. On appeal, the Privy Council, in 1969, reversed the Supreme Court decision on the preliminary issue and referred it to the Supreme Court for its "considered judgment" on the substantive issue. The appeal was thereafter never listed in the Supreme Court. In 1972, the impugned Act was incorporated in the new Constitution.

Unfortunately, some of the legal and constitutional changes of the early 1970s also had an adverse effect on the judiciary. The change in the medium of legal education from English to Sinhala or Tamil, insisted upon by the ministry of education, resulted in creating lawyers who were deprived of access, not only to the ever-growing mass of global legal literature, but also to our statutes and to over two centuries of our law reports. The fusion of the two branches of the legal profession, intended to reduce the cost of litigation and help young lawyers to gain a foothold in the profession, resulted not only in the mass production of lawyers, but also in a dramatic lowering of professional standards. The installation of the National State Assembly as "the supreme instrument of state power" through which judicial power flowed to the courts, and the designation of judges as "state officers" in common with all other government employees, may not have had any immediate impact on the actual functioning of the courts, but it emboldened legislators with a false notion of superiority. When the judiciary was stripped of its jurisdiction to examine and pronounce upon the validity of legislation, the balance of power between the three branches of government was eroded and the Constitution was undermined. When the country's principal newspaper company was acquired by the state, an essential adjunct to the judiciary, a free media, was seriously crippled.

It was in this context, when the traditional judicial culture had begun to be subjected to negative winds of change, that the 1978 Constitution, in 42 sections spread over two chapters, proclaimed a very detailed and comprehensive statement of safeguards aimed at securing the independence of the judiciary.[183] These two chapters had been formulated by a team of lawyers led by the President's brother, H.W. Jayewardene Q.C., following discussions at several symposia attended by lawyers, judges and academics. They received the approval of the representatives of the Opposition who participated in the select committee on the revision of the 1972 Constitution. Indeed, it could well have been said of these two chapters that which was claimed for the provisions in the 1946 Constitution designed to protect the rights of the minorities in Ceylon: that they contained all the safeguards

[183] This contrasts with five sections in the *1946 Constitution* and 11 sections in the *1972 Constitution* that sought to achieve the same objective.

that the wit of man could have devised to protect and promote the independence of the judiciary. Unfortunately, left out of consideration was the new office of Executive President, and the all-encompassing power of that office.

In the 37 years that this Constitution has remained in force, the independence and integrity of the judiciary, and especially of the Supreme Court, reached incredibly low depths. The judicial culture that grew and developed under this Constitution was the antithesis of the aspirations so eloquently and exhaustively expressed in it. In fact, the judicial culture spawned by this Constitution, especially in the twenty-first century, has been one of extreme deference to the presidential executive. The judiciary capitulated to executive assertions of state security. Neither political opponents of the government, nor members of ethnic minorities, or indeed civil society, were likely to derive any tangible benefit by invoking the fundamental rights guaranteed in the Constitution.[184]

Equally dramatic has been the transformation of the office of Attorney-General. Although deemed a "public officer" (or "state officer"), each constitution provided for the Attorney-General to be appointed, not by the Public Service Commission but by the Governor-General or the President (as the case may be). Since Independence, the Department of the Attorney-General was traditionally assigned to the Ministry of Justice, and was therefore subject to supervision by the Permanent Secretary of that ministry. However, convention demanded that neither the Minister nor the Permanent Secretary should issue any directions to the Attorney-General (except on matters of policy) in respect of the exercise of his powers and duties. Unfortunately, under the Executive President, the independence, integrity and dignity of that office have been severely compromised. In 1978, the then Attorney-General allegedly colluded in inserting into a Bill already passed by Parliament a new section that had not been tabled, read, debated or passed.[185] In more recent times, the

[184] See Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights*.

[185] See Statement made by S.R.D. Bandaranaike (1980) ***Third Interim Report of the Special Presidential Commission of Inquiry*** (Colombo: Department of

Attorney-General's Department has been "overwhelmingly politicized", with officers not tendering correct advice for fear of incurring the displeasure of the executive.[186] Attorney-General Mohan Peiris reportedly departed from the tradition established by his predecessors, and began the practice of visiting public officers in their offices. "As this practice developed, the number of political actors approaching the Attorney-General seeking various favours and concessions increased."[187] On Peiris's initiative, several indictments served against politicians and others with political "clout" were withdrawn.[188] Finally, in April 2011, during Peiris' tenure, the Attorney-General's Department and its subjects and functions were removed from the Ministry of Justice and brought directly under the authority of the President.[189]

Government Printing), Appendix A, p.158. The new section 21A had been specifically inserted into the Special Presidential Commissions of Inquiry (Amendment) Bill to nullify an application for a writ of prohibition that had been filed in the Supreme Court Registry on behalf of Mrs Bandaranaike while the Bill was being debated in the House. Prime Minister Premadasa later admitted that he had received a copy of the application while the Bill was being debated, and Attorney-General Siva Pasupathi stated that the new section had been immediately drafted to meet the new situation. However, the *Hansard* of 20th November 1978 (which was later recalled) made no reference to that section being moved as an amendment at any stage of the proceedings.

[186] International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: p.71.

[187] International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: p.78.

[188] Those who benefitted from the Attorney-General's decision not to proceed with prosecutions included two police officers charged with the murder of a man in custody; a former deputy minister charged with unlawful assembly and murder; a UNP parliamentarian charged with murder who later crossed over to the government and was rewarded with a ministry; an officer of the Criminal Investigation Department charged with the torture of a suspect; and a former General Manager of Railways charged with bribery. See International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka*: pp.79-85.

[189] Gazette Extraordinary No.1651/20 of 30th April 2010 which contained the assignment by the President of subjects and functions to Ministries makes no reference to the Department of the Attorney-General or its subjects and functions such as the institution of criminal prosecutions and the provision of legal advice to government departments. Nor does it refer to a Ministry in his charge to which the Department of the Attorney-General has been assigned. The Attorney-General appears to have colluded in this unconstitutional arrangement whereby a department of government appears to remain free of supervision by a secretary to a ministry as required by Article 52 of *The Constitution*.

Sections of the once vibrant Bar also appear to have been subdued by the power and patronage of the presidency. Elevation to the status of "President's Counsel" is now entirely at the discretion of the President, and in recent years scores of lawyers have been duly rewarded by the President for their support and loyalty, irrespective of their standing in the profession. Similarly, the less enterprising among them appear to have sought, and been compensated, with appointment to the Supreme Court.

A corrupt judiciary

In my early years of practice at the Bar any suggestion that a judge at any level might be corrupt would have been so preposterous that, in fact, it was never heard. From below the Bench, some of the judges seemed short-tempered and discourteous; some seemed lazy - one, in particular, appeared to fall asleep from time to time; and not every judge appeared to be learned in the law. But it was unthinkable that a judge could be corrupt in the financial sense. Some ten years later, in the 1970s, when I was serving as Permanent Secretary to the Ministry of Justice and also, *ex officio*, as a member of the body required by the 1972 Constitution to recommend the appointment and transfer of judicial officers, I encountered, for the first time, a complaint that a magistrate had accepted a bribe. The complaint appeared to be true. When confronted, the magistrate resigned his office. It was also during this period that I saw and experienced, with considerable unease and sadness, how a few serving judges could demean themselves, and the sanctity of their office, in the pursuit of preferential treatment from the executive branch of government. These were isolated instances of "canvassing" for high judicial office. These efforts rarely succeeded, and the chosen few were generally the best available judicial talent.

The picture changed dramatically in the 1980s and in the next two decades. The legal and judicial reforms of the 1970s[190] were reversed and the Victorian procedural laws revived. Many a

[190] For example, the *Administration of Justice Laws of 1974 and 1975*.

litigant or accused person began to find it more economical to secure the disappearance of a case record or the absence of a witness than continue to retain counsel for prolonged periods when no progress was made in his or her case.[191] Complicated procedural steps meant several gatekeepers requiring payment to facilitate movement of the case record to the next stage of judicial proceedings. A national survey conducted in 2002 found that corruption was rampant in the Sri Lankan judicial system, and that most judges were aware of its occurrence. While those who had benefitted most were reportedly court clerks, followed by police officers and fiscals, lawyers too appeared to have engaged in bribery, both as bribe givers and bribe takers at every stage of court proceedings. 12 per cent of court users admitted having resorted to bribery to expedite the legitimate processes in the system. However, it was the judges themselves who identified at least five of their brethren as bribe takers.[192]

The contemporary definition of judicial corruption extends beyond conventional bribery. It is not limited to seeking or accepting money or gifts. An insidious and equally damaging form of corruption arises from the interaction between the judiciary and the executive. For example, the political patronage through which a judge acquires his office, a promotion, an extension of service, preferential treatment, or promise of employment after retirement, gives rise to corruption if and when the executive makes demands on such judge. So too does undue familiarity between the judge and members of the executive. A high rate of decisions in favour of the executive is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties. So, too, if the executive were to provide lucrative employment, or extend other preferential treatment, to immediate members of a judge's family. In this regard, the judge's relationship with the executive branch of government is often the litmus test.

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[191] According to Sarath Silva, when he was appointed President of the Court of Appeal, "the overload had reached bursting point with an enormous backlog of about 18,500 cases". ***Daily News***, 15th December 1995.

[192] (2002) ***A System under Siege: An Inquiry into the Judicial System of Sri Lanka*** (Colombo: Marga Institute).

The extent to which even the minor judiciary has been politicized (and thereby corrupted) is evident from the observation made by a very perceptive observer of the judicial scene who, writing in 2011, notes that

> *"when a judge from one station is transferred to another, the members of the Bar of the court to which he/she had been posted frequently ask the question: 'Is the judge UNP or SLFP?' and/or the question: 'Is he/she honest?' This is something that was wholly unheard of in the 'old days'. Then, when a judge was transferred from one station to another, all that the Bar of the court to which he was appointed or transferred would seek to find out was whether he was courteous, or 'accommodated' and/or gave 'dates' to counsel."*[193]

The phenomenon of judicial corruption has debilitated not only the Sri Lankan judiciary, but also Sri Lankan society as a whole. A feeling of futility or karmic inevitability is pervasive all around. Falling standards, or no standards at all, are accepted as if that were decreed by fate. It contrasts so strikingly with the vibrant pre-presidential past when any perceived intrusion into judicial independence evoked an immediate spirited response from the legal profession, opposition politicians, civil society, and indeed from judges themselves. It was also a time when, unlike now, those who exercised political power at the highest levels of the State recognized, and respected the fact, that a clear distinction existed, and must continue to exist, between the legislature, the executive and the judiciary.[194]

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[193] S.L. Gunasekera (2011) ***Lore of the Law and Other Memories*** (Colombo): p.185.

[194] It was, no doubt, in accord with the current style of governance in Sri Lanka that the Government, in March 2014, sponsored a resolution in the UN Human Rights Council entitled "*Integrity of the judicial system*" (A/HRC/25/L.5 of 20th March 2014). It expressed the conviction that "the integrity of the judicial system, together with its independence and impartiality, is an essential prerequisite for the protection of human rights and fundamental freedoms, for upholding the rule of law and democracy and ensuring that there is no discrimination in the administration of justice". Stressing that "the integrity of the judiciary should be observed at all times", the resolution requested the UN High Commissioner for Human Rights to convene an expert consultation, with the participation of States, the special procedures, the treaty bodies and non-governmental organizations, "for an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in combating human rights

violations". The resolution was co-sponsored by Belarus, China, Cuba, Democratic Republic of Korea, Kyrgyzstan, Russian Federation, Sudan, Tajikistan and the Bolivarian Republic of Venezuela!

4

The Presidency and the Supreme Court: The Constitutional Jurisprudence of Presidential Powers under the 1978 Constitution

Sachintha Dias

Introduction

The Second Republican Constitution of 1978 introduced the office of the Executive President, vesting the holder of the office with considerable powers, enumerated predominantly in Chapter VII of the Constitution. The powers vested in the office of the Executive President were so vast that it famously prompted the President at the time, J.R. Jayewardene, to proclaim that the only thing he could not do as President was to make a man a woman and *vice versa*.[1] Though much has been said about the concentration of power in the office of the President and the need to abolish the executive presidency, there has been very little analysis of the manner in which the powers of the President have evolved over the life of the Constitution, through the jurisprudence of the superior courts.

This essay will seek to examine how the institution which has the sole and exclusive jurisdiction to hear and determine any matter relating to the interpretation of the Constitution,[2] the Supreme Court, has moulded the powers of the President through the process of judicial interpretation. In analysing the jurisprudence on the powers of the President under various heads, the writer will argue that despite small victories in between, the Courts have largely refrained from referring to the founding principles of the Constitution including the Rule of Law, the separation of powers and constitutionalism itself to keep the 'overmighty executive'[3] in check. The selective application of these principles in some cases perhaps gives credence to the theory of judicial realism. However in most cases, it will be noted that the legal justification given by the Courts in rejecting the various arguments which sought to curtail the powers of the President have had a sound

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[1] For an analysis of the arguments forwarded for a powerful executive at the time of drafting the Second Republican Constitution, see J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Sumathi): p.106.

[2] The 1978 Constitution: Article 125 (1).

[3] C.R. de Silva, '*The Overmighty Executive? A Liberal Viewpoint*' in C. Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy). See now, C.R. de Silva, '*The Overmighty Executive Reconsidered*', elsewhere in this book.

jurisprudential basis, making the allegation against the Court purely that it has at times been overly positivist and reluctant to engage in the kind of activism which may have been desirable given the imbalance of power between the organs of Government under the 1978 Constitution.

This essay does not contain an exhaustive analysis of all case law relating to all powers of the President. Such an analysis would have to be the subject of a much larger work. Instead, the focus has been to analyse trends in the judicial treatment of the President's powers through a survey of what my view are landmark judgments relating to certain key powers of the President including immunity from suit, the power to make appointments and the power to promulgate emergency regulations. In conclusion, I will assess whether the Supreme Court has fulfilled its role as the guardian of the Constitution in relation to the vast powers of the President and will analyse the possible reasons for the success or the failure of the Court in this area.

Immunity from Suit: An Impregnable Shield

A presidential power that has been contested fiercely before the Courts of Sri Lanka has been the immunity of the President from suit enshrined in Article 35 of the Constitution. Time and again, attempts to challenge the powers and actions of the President before the Courts have been thwarted by the veil of immunity cast over the President. The battle to find exceptions to the seemingly blanket immunity conferred by Article 35 has taken on many complexions. Article 35 reads as follows:

> 35. (1) 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.
>
> (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during

which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) 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.

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.

Early Battles: Election Offences

An early case that went into the extent of the immunity conferred on the President was *Kumaranatunge v. Jayakody and another*.[4] This was a case where the President was cited as a respondent in the context of an election petition filed in terms of the Ceylon (Parliamentary Elections) Order-in-Council 1946. The petitioner was an unsuccessful candidate for election to the Mahara seat at the Parliamentary Elections held in May 1983, and challenged the election of the first respondent, the successful candidate, on the basis that the second respondent, the President of the Republic, had at an election meeting held in support of the first respondent's candidature, committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner.

Counsel for the petitioner sought to rely on Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, which requires the petitioner to join as respondent in the Election Petition, *any person against whom any allegation of any corrupt practice is*

[4] (1984) 2 SLR 45.

made in the petition, as a basis for citing the President as a respondent in the petition. When confronted with the immunity conferred on the President by Article 35 of the Constitution, counsel for the Petitioner submitted that Article 35 does not apply to the present case for the reason that the Election Petition is not a proceeding against the President. His contention was that the test to determine whether proceedings were against a particular person was to look at the relief sought. In the present case, the object of the election petition and the only relief sought thereon was a declaration that the election was void. Thus, the proceedings were solely against the candidate and not against the President. It was only in compliance with the mandatory provision of Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council that the latter was joined as a respondent to the petition.

The Courts however rejected this submission holding that an election petition was a proceeding *sui generis* which cannot be equated to a private litigation between and limited to two parties. The State and the public had an interest in an election petition and that is why once filed, such petition could not be withdrawn without leave of the Election Judge. But perhaps the better basis for rejecting the argument was that an election petition entails legal consequences for all parties against whom allegations of any corrupt or illegal practices are made. The election judge is called upon not only to determine that the election is void but also to report any offenders to the President. Such persons would incur the Penal consequences stipulated in Section 82 D of the Ceylon (Parliamentary Elections) Order-in-Council. Thus the Court held that an election petition is a proceeding not only against the candidate, but also against all respondents joined in the Election Petition. The Courts reiterated what has become a familiar refrain in the context of the immunity of the President; that Article 35 gives blanket immunity to the President from having proceedings instituted or continued against him in any court in respect of anything done or omitted to be done by him either in his official or private capacity during the tenure of his office.

Counsel for the petitioner then resorted to relying on the underlying principles of the Constitution, submitting that the immunity enshrined in Article 35 jars with the concept of

democracy, the purity of elections and the right of franchise. It was submitted that Sri Lanka cannot be a Democratic Socialist Republic, if the President is given the comprehensive immunity envisaged by Article 35 of the Constitution. It is prudent to note here that the Courts did acknowledge that absolute immunity of the President may conceptually be inconsistent with the principles of democracy and sovereignty of the people. However, their Lordships held firm to the view that it is not for a court of law to question the validity of any particular provision of the Constitution. It was held that where the language of the Constitution is plain and unambiguous, effect has to be given to it and a court cannot cut down the scope or amplitude of such provision for the reason that it cannot notionally harmonize with an ideal of the Constitution. Thus, the attempt to carve out exceptions to the immunity of the President on the basis of statutory requirements, the nature of the relief sought on the petition as well as the basic features of the Constitution was stubbornly resisted by the Supreme Court.[5]

Immunity: Rationale and Exceptions

Perhaps the most frequently cited judgment on Presidential immunity is *Mallikarachchi v. Shiva Pasupati, Attorney General.*[6] In this case, Sharvanada CJ engaged in an exhaustive analysis of Presidential immunity, its scope, justification and rationale. The Petitioner in the case challenged the order made by the President proscribing the Janatha Vimukthi Peramuna (JVP) under the provisions of the Emergency Regulations under the Public Security Ordinance. The Petitioner, a member of the JVP, contended that the President had, in proscribing his party, exercised the power vested in him by the relevant Emergency Regulations *mala fide* and without any grounds. He sought a declaration from Court that his Fundamental Rights enshrined in Articles 14 (1) (a), (b), (c) and (d) and Article 12 (2) of the Constitution had been violated by the said proscription and also

[5] See however, the dissenting judgment of Wadugopitiya J. in which his Lordship foreshadows the exceptions to be subsequently carved out to Presidential immunity by holding that the immunity given to the President was not a blanket cover to protect the wrongful activities of other persons.
[6] (1985) 1 SLR 74.

prayed *inter alia* for a declaration that the President's order was inoperative. The petitioner cited 'Shiva Pasupati', Attorney General, as the respondent to his application. The Court conclusively defined the scope of Article 35, holding that Article 35 (1) confers on the President during his tenure of office an absolute immunity in legal proceedings with regard to acts or omissions in his official or private capacity. The Court held that the object of Article 35 is to protect from harassment the person holding the high office of the Executive Head of the State and noted that such a provision is not unique to the 1978 Constitution, with the 1972 Constitution as well as the Constitutions of several other countries including India, containing similar provisions.

Sharvanada CJ explained the rationale for Presidential immunity. It was held not to be based on the idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle was 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 removed from office under the provisions of Article 38 of the Constitution. Once a person has ceased to hold office as President, he may be held to account in proceedings in the ordinary courts of law. The key question to be decided in the case however was whether the proceedings could be brought under Article 35 (3) of the Constitution and whether therefore, the institution of proceedings against the Attorney General was permissible.

Article 35 (3) provides that the immunity of the President shall not apply to any proceedings in 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. It further provides that in relation to the exercise of any power, pertaining to any such subject or function, it is competent to institute proceeding against the Attorney General. Article 44 (2) gives a discretion to the President to assign to himself any Ministerial subjects or functions and vests him with the residual power to remain in charge of any subject or function not assigned to any Minister under the provisions of Article 44 (1).

Sharvanada CJ held that Article 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney General in respect of the actions or omissions of the President. The order of proscription complained of by the Petitioner was however, 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 was, 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. Therefore, his Lordship was of the view that the Attorney General could not be called upon to answer the allegations in the petitioner's application as he does not represent the President in proceedings which are not covered by the proviso to Article 35 (3).

Counsel for the petitioner sought to justify the citing of the Attorney General as respondent by reference to Rule 65 of the Supreme Court Rules, which provides that in proceedings under Article 126 of the Constitution, the Attorney General shall be cited as respondent. The Court however held that Rule 65 was designed to meet the mandate of Article 134 of the Constitution, which states that the Attorney General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. That Rule however did not visualize the Attorney General being made a sole party respondent to answer allegations against the President.

It is interesting to note that the Court felt inclined to explain the rationale for Presidential immunity, given that it only had to rely on a plain reading of Article 35 to dismiss the petition. This is particularly noteworthy given the holding in *Kumaranatunge*,[7] which emphasised the limited role of the Courts when confronted with clear and unambiguous provisions of the Constitution. This perhaps indicates that their Lordships were not entirely at ease with the consequences of blanket immunity and felt obliged to lay out the basis on which such immunity rests. It may have been

[7] Discussed above.

interesting to argue on the nature of the President's powers to make Emergency Regulations under the Public Security Ordinance and perhaps equate it to the assigning of Ministerial powers and functions under Article 44 (2) of the Constitution[8]. However, no such argument was made and the immunity of the President withstood this newest challenge based on the exception to immunity provided for in Article 35 (3).

The Dependent: Challenging the President's Acts through Those who Rely on Them

Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al[9] concerned the date of the Provincial Council Elections and was another case concerning the immunity of the President in relation to proclamations and emergency regulations made under the Public Security Ordinance. After the date of the Provincial Council elections and the date for commencing postal voting was fixed as per the Provincial Council Elections Act No.22 of 1998, the returning officers suspended the postal voting a day before the issue of postal ballot papers was to commence without adducing any reasons therefore. The very next day, the President issued a proclamation under section 2 of the Public Security Ordinance (PSO), bringing the provisions of Part II of the ordinance into operation throughout Sri Lanka 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 first respondent, the Commissioner of Elections, took no steps to fix a fresh date for the poll.

The petitioners complained that the failure of the Commissioner of Elections and the returning officers of the twelve districts to hold elections to the five Provincial Councils, on and after the decided date, was an infringement of their fundamental rights under Articles 12 (1) and 14 (1) (a) of the Constitution. The Courts held that the making of the Proclamation and the Regulation, as well as the conduct of the respondents in relation to the five

[8] The Court's response to Emergency Regulations promulgated by the President will be discussed below.
[9] (1999) 1 SLR 157.

elections, clearly constitute 'executive action' as per Article 126 of the Constitution which vests the Court with the jurisdiction to determine Fundamental Rights claims and that the Court would ordinarily have jurisdiction over the matter. The question relevant to the present discussion was whether that jurisdiction was ousted by reason of the immunity of the President enshrined in Article 35 of the Constitution.

Mark Fernando J. emphatically held that Article 35 does not oust the jurisdiction of the Court with regard to the Proclamation and Regulation issued by the President under the PSO. Article 35 only prohibits the institution of legal proceedings against the President while in office. It does not exclude judicial review of an impugned act or omission against some other person who does not enjoy immunity from suit but relies on an act done by the President in order to justify his conduct. His Lordship held that **"**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". The Respondents were relying on the Proclamation and Regulation of the President, and the review thereof by the Court was not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.

Thus, *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al* could be seen as a case which dented the hitherto impregnable fortress of presidential immunity, albeit rather mildly. Fernando J. clarified that the immunity of the president enshrined in Article 35 was *immunity ratione personae,* or immunity personal to the President during her period of office. There was no constitutional bar to challenge the acts of the President in a suit against a person who does not enjoy immunity, provided the person concerned is relying on an act of the President. Thus, the door was opened for a challenge to an act of the President through a proxy other than the Attorney General under the provisions of Article 35 (3).

An interesting variation of the above argument was made in *Victor Ivan v. Hon. Sarath N. Silva and others.*[10] The President appointed the respondent as the Chief Justice. The petitioners alleged that the appointment, which was made during the pendency of a disciplinary inquiry into the respondent *qua* attorney-at-law under Section 42 of the Judicature Act, violated their Fundamental Rights under Article 12(1), 14 (1) (a) and (g) of the Constitution. The petitioners prayed for a declaration that their fundamental rights were violated and that the said appointment was null and void. Counsel for the petitioner argued that the respondent was the 'beneficiary' of the impugned appointment by the President. The appointment could therefore be questioned through the respondent who was 'invoking' the President's act. The burden lay on the respondent to establish the lawfulness of the act of the President, notwithstanding the immunity under Article 35, which was personal to the President.[11] In response to this argument, Wadugopitiya J. cited cases such as *Mallikarachchi v. Shiva Pasupathy. Attorney General, Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al and Joseph Perera v. Attorney-General et al* to reiterate that though the President's immunity remains inviolable, the acts of the President under certain circumstances, may be challenged. However, his Lordship followed *Karunathilake* in holding that for such a challenge on an act of the president to succeed, there must be some other officer who has himself performed some executive or administrative act which violates someone's fundamental rights and relies on the act of the President to justify the same.

In the present case, the respondent had not "invoked" the President's act to rely on or justify any act. The observation was also made that there was no allegation of any executive or administrative action violative of anyone's fundamental rights performed by the respondent. The only act challenged was that of

[10] (1998) 1 SLR 340.

[11] Wadugopitiya J. first dealt with the issue of the constitutionality of the appointment made by the President. This section of the Judgment will be dealt with subsequently when dealing with the President's power of appointments.

the President in appointing the respondent as Chief Justice. In the circumstances, his Lordship was of the view that what the petitioners were asking the Courts to do was to amend Article 35 of the Constitution by judicial action, something which was not within the power of the Court to do. Therefore, it was emphatically held that the President enjoyed immunity under Article 35 (1) of the Constitution in respect of appointing the Chief Justice. His Lordship also held that Article 35 would be rendered meaningless and indeed nugatory, if any individual were to be deemed to be able to question the act of appointment as has been prayed for by the petitioners.

His Lordship also observed in *obiter* that in cases where the President's acts are challenged, the President cannot be made a party and cannot even be defended by the Attorney General, which raises serious questions about the applicability of the rule of *audi alteram partem* to such proceedings. It was further held that the only way in which to remove the Chief Justice from office was to follow the procedure under paragraphs (2) and (3) of Article 107 of the Constitution. Thus it could be seen that his Lordship clearly demarcated the scope of the exception to immunity carved out by Mark Fernando J in *Karunathilake*. The Court firmly entrenched the requirement that another party, who himself has committed some administrative or executive action which is challenged before Court and who relies on the President's actions to justify such conduct is essential to challenge the validity of the acts of the President. A party who benefits from the President's action would therefore be insufficient.

Challenging the President's Acts through Writ

In *Rev. Seruwila Saranakinthi and others v. The Attorney General and others*[12], the petitioners who were electors of the Eastern Province, invoked the writ jurisdiction of the Court of Appeal, against the Attorney-General, the Minister and the Secretary of the Ministry of Home Affairs, Provincial Councils and Local Government. The substantial relief sought was the grant and issue of a mandate in the nature of writ of mandamus directing the respondents to

[12]C.A. 852/2002 (Writ) (2004) 1 SLR 365.

take necessary action to hold a poll in the Eastern Province under the present administrative structure as required by section 37(2)(a) of the Provincial Councils Act, No. 42 of 1987. They also sought a direction to the respondents to refrain from altering administrative structure of Eastern Province without holding such a poll. The power of determining the date of the poll was vested with the President in terms of the provisions of section 37(2)(a) of Provincial Council Act, No.42 of 1987.

The Court reiterated the holding in *Mallikarachchi v. Shiva Pasupati, Attorney General*, that as per Article 35 (3) of the Constitution, the only instances in which acts or omissions of the President could be the subject of judicial proceedings through the representation of the Attorney General were where the President exercised powers under Article 44(2). The Petitioners did not contend that the President's power of determining the date of the poll in terms of the provisions of section 37(2)(a) of Provincial Council Act, No.42 of 1987 is a function that is covered by Article 44(2) of the Constitution. Thus, the Court held that the Petitioners had erred in citing the Attorney General as the Respondent and the petition failed.

Thus, it is clear that challenging the acts of the President through the writ jurisdiction of the Court of appeal does not alter the fundamental principles of immunity that apply when such a challenge is made by invoking the Fundamental Rights jurisdiction of the Supreme Court.

Immunity not Immutable

That the immunity of the President does not apply after ceasing to hold office has been firmly established. In *H. Senarath And Others v. Chandrika Bandaranaike And Others*[13] the Courts declared that that there had been an infringement of the Petitioners' rights guaranteed under Article 12 (1) of the Constitution due to the unreasonable, arbitrary and mala fide action of *inter alia* the first Respondent, who was at the material time, the President of the Republic, in securing for the first Respondent a free grant of land vested in the Urban Development Authority, a premises from which two public authorities were ejected to be used as her

[13] SC (FR) 503/2005.

residence after retirement and staff and other facilities, contrary to the provisions of the President's Entitlements Act No. 4 of 1986.

In *Sugathapala Mendis And Others v. Chandrika Bandaranayaike Kumarathung And Others* (The Water's Edge Case), the former President was held to be in violation of Article 12 (1) of the Constitution in the appropriation of public assets, which were held in trust for the public.[14]

Observations: Immunity of the President

The foregoing analysis demonstrates that Presidential immunity has been challenged based on statutory requirements, through proxies (i.e. by persons invoking or benefiting from the act or through the Attorney General) and by reference to wider principles underlying the Constitution. However, the Courts have carved out very limited exceptions to the President's immunity, with the acts of the President amenable to challenge only through another party invoking the same and as shall be observed later, in the context of Emergency Regulations. There is no question that immunity from suit for the Executive President is largely justified. As held by Sharvananda CJ in *Mallikarachchi v. Shiva Pasupati, Attorney General*,

> "It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. 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".[15]

However, one of the key checks that exist on the President, given that he is immune from suit during his period of office, is the fact that he is amenable to the jurisdiction of Parliament and the representatives of the People therein, by whom he might be

[14] SC (FR) 352/2007.
[15] (1985) 1 SLR 74, 78.

impeached and removed from office under the provisions of Article 38 of the Constitution.[16]

Nevertheless, given the hierarchical nature of party politics in Sri Lanka, where the President enjoys untrammelled power as the head of the party, this check is hardly effective when the President is from the same party as the governing party in Parliament. This is amply demonstrated by the attempt to impeach President Premadasa, where the President prorogued Parliament upon getting wind of an impeachment motion and managed to exercise his influence to thwart the impeachment motion and sack the initiators from the party. The narrative of this attempted impeachment is captured in the case of *Dissanayake v. Kaleel*,[17] concerning the expulsion of the members concerned.

It is therefore contended that the Courts should employ the techniques of constitutional interpretation including reading the Constitution as a whole and subjecting it to a teleological interpretation based on the founding principles of the Constitution, to carve out reasonable exceptions to the immunity of the President. As held by Justice White in his dissenting opinion in *Nixon v. Fitzgerald*,[18] "Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law". At the very least, the Courts should have jurisdiction over acts of the President which amount to intentional violations of the Constitution as argued in *Sumanasiri Liyanage v. H.E. Mahinda Rajapakse and others*,[19] discussed below. The case of *Rameshwar Prasad v. Union of India and others*[20] provides an example of the judiciary crafting exceptions to Constitutional immunity in relation to the Governor. In this case, the Court held that the immunity conferred by the Constitution did not preclude the

[16] For an exposition of the other non – judicial checks applicable to the Executive President in the United States, See the judgment of Powell J. in *Nixon v. Fitzgerald* 457 U.S. 731 (1982).
[17] (1993) 2 SLR 135.
[18] 457 U.S. 731 (1982).
[19] S.C. FR No 297/2008.
[20] AIR 2006 SC 980.

Court from examining the validity of the action on the grounds that it was *ultra vires* or *mala fide.*[21]

The Supreme Court determination on the Eighteenth Amendment to the Constitution (2002)[22] provides an example of the kind of reasoning that may be adopted to carve out exceptions to the immunity of the President from suit.[23] Though the Eighteenth Amendment determination (2002) did not directly concern presidential powers, the Courts made reference to the powers of the President by way of analogy. The Court held that in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People, which is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. That would be inconsistent with the Rule of Law. The Court explicitly recognised that the immunity given to the President under Article 35 is limited. Though the limitations identified were those that had already been recognised by the Courts, such as Article 35 (3) of the Constitution, Emergency Regulations made by the President[24] and to the limited extent discussed in the next segment, Presidential Appointments[25], there lies no barrier to extending this line of reasoning to allow the Courts to exercise jurisdiction over other acts of the President, notwithstanding Presidential immunity in light of the founding values of the Constitution.

[21] It must be noted however that the immunity conferred by Article 361 of the Indian Constitution is immunity *ratione materiae,* or immunity in respect of official acts and not personal immunity as is the case with Article 35 of the Sri Lankan Constitution.
[22](2002) 3 SLR 71.
[23]The determination is also important in establishing the link between Articles 3 and 4 of the Constitution. The Courts cited several determination of the Supreme Court (SC Special Determinations 5/80, 1/82, 2/83, 1/84 and 7/87) in holding that Articles 3 and 4 must be read together.
[24] *Joseph Perera v. Attorney General*(1992) 1 SLR 199.
[25] *Silva v. Bandaranayake* (1997) 1 SLR92.

Powers of Appointment: A Sword over other Organs of Government

Another power of the President, which serves to entrench the Presidential institution as a whole, and based on which a considerable amount of litigation has taken place, is the power of the President to make appointments to public office. It has to be noted that most challenges to the President's powers of appointment have been resolutely defended through the immunity of the President and that there is a significant overlap between the jurisprudence under these two areas.

Appointing the Guards: Appointment of Judges to the Superior Courts

A seminal case concerning the powers of the President to appoint Judges to the superior Courts is *Edward Francis William Silva, President's Counsel and Three Others v. Shirani Bandaranayake and Three Others*.[26] Here, the Petitioners challenged the appointment by the President of the first respondent as a Judge of the Supreme Court under Article 107 of the Constitution. The key issue before the Court was the nature and extent of the power of appointing Judges to the Superior Courts, conferred on the President by the said Article. Mark Fernando J. in his judgment acknowledged that Article 107 does not expressly prescribe any qualifications or restrictions on the power of the President to make appointments under Article 107. However, his Lordship held that considerations of comity require that in the exercise of that power, there should be cooperation between the Executive and the Judiciary in order to fulfil the object of Article 107.

> "The Chief Justice, as the head of the Judiciary, would undoubtedly be most knowledgeable about some aspects, while the President would be best informed about other aspects. Thus co-operation between them would, unquestionably, ensure the best result".

Fernando J. was cautious to indicate that the manner, the nature and the extent of the co-operation needed are left to the discretion

[26] (1997) 1 SLR 92.

of the President and the Chief Justice, and that this may vary depending on the circumstances. It was also highlighted that the power of appointing Judges is neither untrammelled nor unrestrained, and ought to be exercised within limits, as the power is discretionary and not absolute. Fernando J. held that if, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed, because it is the will of the People which that provision manifests, that such a person cannot hold that office. Article 125 would then require the Court, in appropriate proceedings, to exercise its judicial power in order to determine the question of ineligibility. Other examples of reviewable appointments cited by his Lordship included the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude.

Despite this, his Lordship stopped short of questioning the validity of the appointment in question, holding that the petitioners have failed to establish, *prima facie*, the absence of the necessary co-operation, and have also failed to indicate how they propose to supply that deficiency. Mark Fernando J's judgment in the present case could be seen as a cautious step to read into the provisions of Article 107, certain conditions that the President must follow in appointing Judges to the Superior Courts. Though his Lordship based such conditions on considerations of comity, his Lordship proceeded to state quite clearly that the discretion of the President with regard to appointments was not absolute and was subject to the Constitution, furnishing several examples of appointments, which in his Lordship's opinion would be unconstitutional and which would not withstand a legal challenge.

The Appointment of the Chief Justice

Victor Ivan v. Hon. Sarath N. Silva and others[27] was a case which analysed the impact of Fernando J's judgment in *Edward Francis Silva v. Shirani Bandaranayake*, in the context of the appointment of

[27] (1998) 1 SLR 340.

the Chief Justice. Following Fernando J.'s judgment, Wadugopitiya J. held that it was desirable that there be co-operation between the President and the Chief Justice before an appointment is made to the superior Courts. However his Lordship noted that Fernando J. does not in any way suggest that such co-operation and consultation was a legal or constitutional requirement or was in any way mandatory. It was noted that there were no suggestions of the nature of the co-operation and consultation that was required in the appointment of the Chief Justice himself. Thus his Lordship came to the conclusion that the appointment of the respondent by the President was wholly intra vires and not violative of any constitutional provision.

It will be seen therefore, that the requirements of co-operation and consultation that Fernando J. deemed desirable in making appointments to the superior Courts under Article 107 of the Constitution have definitively been held not to be mandatory requirements. Therefore, unless the appointment is manifestly flawed to the tune of the examples given by Fernando J. in *Edward Francis Silva v. Shirani Bandaranayake,* it is unlikely that a legal challenge to an appointment made by the President under Article 107 could be sustained.

Court to order Appointments?

An interesting issue regarding the President's powers of appointment is whether a Court order pursuant to a fundamental rights violation has an impact on the same. In *Brigadier Liyanage v. Chandananda De Silva*[28] it was held that the failure to promote the Petitioner following his acquittal in a criminal trial was arbitrary and violative of the petitioner's fundamental rights guaranteed under the Constitution. The Court made order that the promotion of Brigadier Liyanage be implemented. But upon the President choosing not to comply with the said order, the Courts held that the refusal of the President to follow a Court order could not be challenged in Court.

Thus the power of the Courts to issue just and equitable orders

[28] (2000) 1 SLR 21.

under its fundamental rights jurisdiction[29] will be of no avail to a Petitioner whose remedy lies in the hands of the President. The Courts cannot force the hand of the President, even in the face of the violation of fundamental rights.

The Seventeenth Amendment: A Step Towards Accountability and Good Governance

A seminal point in the evolution of the powers of the President vis-à-vis the public service was the seventeenth amendment to the Constitution of Sri Lanka. This amendment aimed to alter the legal regime for the appointment, regulation of service and disciplinary control of Public Officers forming part of the Executive. It placed a restriction on the discretion hitherto exercised by the President and the Cabinet of Ministers in relation to these matters and subjected such discretion to the Constitutional Council, the new body to be established under the amendment. The amendment was referred as an urgent bill for determination by the Supreme Court as to its constitutionality under Article 122 (1) of the Constitution[30].

The question before the Supreme Court was whether the amendment amounted to an erosion of the Executive power of the President and is thereby inconsistent with Article 3 read with Article 4 (b) of the Constitution. Article 3 states that the Sovereignty is in the People and is inalienable and Article 4 states that the Executive power of the People shall exercised by the President. The Supreme Court held that the President was empowered to appoint one member to the Constitutional Council and that though there was a restriction on the discretion of the President, the appointments to the Constitutional Council as per Article 41 A (1) (c) would be the act and deed of the President. The Court further held that the powers of appointment, transfer, control and dismissal of all heads of Department are vested in the Cabinet of Ministers, chaired by the President, though this power had to be exercised after ascertaining the views of the Public Service Commission. Moreover, the President would still appoint

[29] Article 126 (4).
[30] S.C. Determination No. 6/2010.

the Heads of the Army, Navy and Air Force, which is an essential part of the defence of Sri Lanka referred to in Article 4 (b).

These four matters taken together were sufficient for the Supreme Court to hold that though there was a restriction on the discretion of the President in relation to the appointment, dismissal etc. of Public Officers, the amendment does not erode the executive power of the President in a manner that is inconsistent with Article 3 read with Article 4 (b) of the Constitution. Therefore, there was no requirement of a Referendum in terms of Article 83 of the Constitution for the amendment to be effective.

Though the determination enabled the passing of a Constitutional amendment which received a resounding mandate in Parliament and was widely accepted as a step in the direction of good governance without the need for a referendum, the long term impact of a holding that the amendment did not alter Articles 3 and 4 of the Constitution will be seen later.

Seventeenth Amendment: The Aftermath

Following the coming into force of the Seventeenth Amendment to the Constitution, the non-appointment of members of the Constitutional Council, as well as several of the Commissions envisaged by the amendment, led to cases which challenged the President's power to appoint, or refrain from making appointments to these positions. These cases led to an interesting conflict between the duties of the President under the provisions of the new amendment and the immunity of the President under Article 35.

One such case is *Public Interest Law Foundation and Another v. Attorney General and Another.*[31] The Petitioners invoked the writ jurisdiction of the Court of Appeal seeking a writ of mandamus compelling the President to appoint certain members of the Election Commission. The Petitioners contended that consequent to the Seventeenth Amendment coming into force, the President is left with no discretion to appoint the Chairperson and the members

[31] (2004) 1 SLR 169.

of the Election Commission once the recommendations of the Constitutional Council had been made. The Petitioner argued that the basic features contained in Article 41B of the Seventeenth Amendment would be nullified if Article 35 were invoked. Sripavan J. cited a line of authority including *Mallikarachchi v. Shiva Pasupati,Attorney General, Edward Francis Silva v. ShiraniBandaranayake, Karunathilake v. DayanandaDissanayake, Commissioner of Elections* and *Victor Ivan v. Hon. Sarath N. Silva and others* in coming to the well established conclusion that Article 35 gives blanket immunity to the President from having proceedings instituted or continued against her in her official or private capacity, except in circumstances specified in Article 35 (3). The present case did not fall within the ambit of Article 35 (3), thus the Attorney General was not competent answer the allegations in the petition. Article 41B of the Constitution conferred the power to make appointments exclusively on the President and had to be read subject to Article 35 of the Constitution. Thus the Court of Appeal determined that the President could not be compelled to make appointments under the provisions of the Seventeenth Amendment to the Constitution and that the amendment had not altered the blanket immunity of the President from suit.

That the legal regime for appointments created by the Seventeenth Amendment to the Constitution did not alter the inability to institute proceedings against the President for matters related to such appointments was confirmed by the subsequent case of *Sumanasiri Liyanage v. H.E. Mahinda Rajapakse and others* S.C. FR No 297/2008. The Petitioners in this case challenged the non appointment of the Constitutional Council in terms of the former[32] Article 41A of the Constitution and the appointment of the fourth respondent, Mohan Pieris, President's Counsel, as the Attorney General, allegedly in violation of the procedure prescribed by the Seventeenth Amendment to the Constitution.

The Attorney General raised the preliminary objection that the petitioners could not maintain the application due to the immunity of the President enshrined in Article 35 of the Constitution. But the more interesting argument raised by the

[32] At the time the case was decided, the Seventeenth Amendment to the Constitution had been repealed.

Attorney General was that since the Seventeenth Amendment did not result in an erosion of the executive power of the President, the provisions relating to the constitution of the Constitutional Council should be deemed to be a directory requirement, in order to ensure a reading of the provisions of the seventeenth amendment which is consistent with Article 3 read with Article 4 (b) of the Constitution. The Attorney General also argued that the President should not be compelled to appoint the Council in view of the specific provisions of the Seventeenth Amendment that vests the discretion in the President to 'satisfy himself' that all the criteria contained in the Constitution pertaining to nominations to the Council had been adhered to. The argument was also made that the President was required to give consideration to the views of the Parliamentary Select Committee appointed with regard to the implementation of the seventeenth amendment before making appointments to the Constitutional Council, due to the responsibility of the President to Parliament in terms of Article 42 of the Constitution.

Unfortunately, by the time judgment was delivered, the Seventeenth Amendment to the Constitution was repealed and replaced by the Eighteenth Amendment and the questions in the petition became ones of purely academic interest. J.A.N. Silva CJ decided not to deal with the arguments pertaining to the nature of the duty of the President to appoint the members of the Constitutional Council and resorted to the all too familiar refrain of Presidential immunity to dismiss the petition. The Petitioners made an innovative argument that provisions such as Article 38 (2) (a) (i) of the Constitution, which deals with the process for the removal of the President where the President is guilty of intentional violation of the Constitution and where an inquiry and report of the Supreme Court may be necessitated, displays that the immunity conferred by Article 35 (1) is not absolute and that the jurisdiction of the Supreme Court may be invoked where intentional violation of the Constitution is involved. The Petitioners also relied on *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al* to argue that the challenge was on the act of the President and not on the President himself.

Silva CJ dismissed the former argument, holding that Article 38 merely provides the procedure for Parliament to hold the

President accountable to it for the due discharge of his powers, duties and functions under the Constitution or any written law as contemplated by Article 42 of the Constitution. He also dismissed the latter argument holding that the preliminary objection of the Attorney General was with respect to the petitioners challenging the President himself and not the act of the President as manifested by the President being made a respondent.

It may have been interesting to observe how the Courts would have responded to the argument that what was being challenged was the act of the President and not the doer, if the President was not cited as a respondent. However, as held by Wadugopitiya J. *in Victor Ivan v. Hon. Sarath Silva*, to challenge the act of the President, one must cite another party who relies on the act of the President to justify his conduct. Citing the fourth respondent who had been appointed to the post of Attorney General may not have been sufficient, since as held in *Victor Ivan* in the context of the appointment of the Chief Justice, such beneficiary of the President's act is not invoking the act of the President to justify any executive or administrative action committed by such person.

The Eighteenth Amendment: Redefinition or Reversal?

The Eighteenth Amendment to the Constitution had a profound impact on both the President's powers of appointment and the term of the Executive President. The President referred the Bill to the Supreme Court for determination of its constitutionality in term of Article 122 (1) (b) of the Constitution as an urgent bill in the national interest.[33] Several Petitioners appeared before the Court on the basis that numerous provisions of the Bill were inconsistent with Articles 3 and 4 of the Constitution, thereby requiring the Bill to be passed by the People at a Referendum in accordance with Article 83 of the Constitution.

Clause 5 of the Bill had the effect of repealing the Constitutional Council established by the Seventeenth Amendment to the Constitution and replacing the same with a Parliamentary

[33] S.C. (Special Determination) No. 01/2010.

Council consisting the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the Prime Minister and of the Leader of the Opposition respectively, both Nominees being Members of Parliament. The President was empowered to make appointments to key positions and commissions including that of the Chief Justice, the Elections Commission and the Public Service Commission. In making such appointments, the President 'shall seek the observations of the Parliamentary Council'. This was a far cry from the provisions of the Seventeenth Amendment, under which none of the specified appointments were to be made by the President, except on a recommendation of the Council. Counsel for the petitioners contended that the Constitutional Council was established with the intention of safeguarding the independence of the judiciary through placing a restriction on the discretion of the President in appointing judges. The removal of this safeguard was contrary to Article 4(c) of the Constitution which specified how judicial power was to be exercised.

The Courts however cited *Edward Francis William Silva, President's Counsel and Three Others v. Shirani Bandaranayake and Three Others* in holding that prior to the introduction of the Seventeenth Amendment, the discretion of the President in making judicial appointments was unfettered. It was held that the special determination of the Supreme Court on the Seventeenth Amendment had been very clear that the provisions of the amendment did not restrict the discretion of the President in a manner inconsistent with Article 4 (a) of the Constitution. Thus the Courts held that the proposed Eighteenth Amendment was only a process of redefining the restrictions that were placed on the President by the provisions of the Seventeenth Amendment and was in no way inconsistent with Article 3 of the Constitution read with Article 4.

It is submitted that in the author's view, the reasoning of the Supreme Court in the determination on the Eighteenth Amendment was legally tenable, given the reasoning of the Supreme Court in the special determination on the Seventeenth Amendment to the Constitution. The determination in the latter case, that the provisions of the Seventeenth Amendment did not erode the executive powers of the President, allowed the Court to reason *vis-à-vis* the Eighteenth Amendment, that a return to a

regime for appointments similar to that which existed prior to the Seventeenth Amendment was not inconsistent with Article 3 read with Article 4. The Eighteenth Amendment therefore, did not need to be approved by the People at a Referendum.

The Amendment that Never got Through: The Nineteenth Amendment of 2002

A case in which contrary reasoning was adopted was the determination on the Nineteenth Amendment to the Constitution.[34] The Bill introduced *inter alia* provisions curtailing the President's powers relating to the dissolution of Parliament, particularly when the President is not a member of the governing party, and the President's discretion to appoint a Prime Minister, with the President being mandated to appoint as Prime Minister a person nominated by a Resolution of Parliament. The Courts here took a refreshingly activist view and held that the relevant clauses of the Bill have to be examined in the light of Articles 3 and 4 of the Constitution, which enshrine the sovereignty of the people and the manner in which it should be exercised by the different organs of Government. This examination should be made in the light of the balance of power that has been struck in the Constitution and in the context of the separation of powers contained particularly in Article 4. The Courts further held that the organs of Government referred to in Article 4 must exercise their power only in trust for the people. In light of this the Court held that the dissolution of Parliament is a component of executive power of the People to be exercised by the President for the People. It cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of the Constitution. Thus the transfer of power from the President to Parliament as contemplated in the amendment violated Article 3, read with Article 4 of the Constitution and had to be approved by the people at a referendum.

What is noteworthy is the reference to concepts such as public power being held in trust for people and the separation of powers, in the absence of the same in the special determinations on the seventeenth and the eighteenth amendments. However, it must be

[34](2002) 3 SLR 85.

noted that in all three determinations, the use of these founding values or the lack thereof, ultimately resulted in entrenching the powers of the President.[35]

Observations: Powers of Appointment

The foregoing cases demonstrate the vast powers of the President pertaining to appointments to public office. Powers of appointment are a key factor which serves to entrench the power and influence of the President over the other organs of Government. The influence exerted on the persons holding public office is accentuated when the power of appointment is coupled with the power of removal. As per Interpretation Ordinance, the general rule is that an appointing authority has the power to remove an appointee[36]. Even where special rules for removal are provided, as in the case of the impeachment of a judge of the superior courts[37] it is contended for the reasons set out in the conclusion of this chapter, that the President exerts considerable influence over the same.[38]

The Supreme Court has not often resorted to the basic values and principles of the Constitution, nor adopted the various theories of Constitutional interpretation, to justify reading in mandatory restrictions to the President's power to make appointments to key positions. It is pertinent to note that this is in stark contrast to their counterparts in India. In *Supreme Court Advocates-on Record Association v Union of India*,[39] part of the famous 'Three Judges Cases',[40] the Supreme Court of India developed the principle that judicial independence means that no other organ of government would have a say in the appointment of judges. The Court then went on to create the collegiate system under which the

[35] For a critique of the Supreme Court Determination on the Nineteenth Amendment, See R. Edrisinha, '*The Constitutional Crisis :Cohabitation and Defence*' ***The Sunday Leader*** <http://www.thesundayleader.lk/archive/20031221/spotlight-2.htm> accessed 21st August 2014.
[36] Interpretation Ordinance (Cap.12): Section 14 (f).
[37] The 1978 Constitution: Article 107 (3).
[38] See Concluding Observations below.
[39] AIR 1994 SC 268.
[40] Also involving *S. P. Gupta v. Union of India* AIR 1982 SC 149and *In re* Special Reference 1 of 1998.

appointment and transfer of judges are decided by a forum chaired by the chief justice and four other judges of the Supreme Court. Whilst such a collegiate system has no place in the Indian Constitution and could be criticised as a step too far in judicial activism, it is submitted that the reasoning adopted by the court on the fundamental importance attached to the independence of the judiciary could be adopted in espousing the more moderate approach of reading in mandatory requirements in the exercise of the President's powers of appointment.[41]

The amendment that heralded a drastic change to the President's powers of appointment unfortunately lasted only a few years and was not implemented even during its existence. The Supreme Court determination that the Seventeenth Amendment did not violate Article 3 read with Article 4 (b) allowed the amendment to be repealed with one fell swoop. It is contended that the Seventeenth Amendment did alter the powers of the Executive in a manner that violated Article 3 read with Article 4 (b) and that the Supreme Court should have determined as such and that the amendment be approved by the People at a Referendum. This would have entrenched the salutary provisions of the seventeenth amendment making it much more difficult to repeal. This unfortunately did not take place and the Eighteenth Amendment reversed almost *in toto* the progress achieved by the Seventeenth Amendment. Despite the determination on the Eighteenth Amendment being arguably sound in law, given that the party led by the President had control of over two-thirds of the seats in Parliament, the Supreme Court was the only institution that was capable of preventing the Executive from reversing the provisions of the Seventeenth Amendment to the Constitution. While some might argue that the Court was powerless to prevent this, it may also be asserted that the Court lacked the judicial will to do so.

[41] For an argument that the Courts should get involved in resolving the power tussle between the President and the Senate in the United States regarding appointments, see '*Developments in the Law: Presidential Authority*' (2012) 125 ***Harvard Law Review*** 2057.

Emergency Regulations

The power of the President to promulgate emergency regulations under the Public Security Ordinance as per Article 155 of the Constitution has been a rare area in which the Court has been willing to exercise its judicial power.

Emergency Regulations not to violate the Constitution

An important case concerning emergency regulations is *Joseph Perera v. Attorney General.*[42] The police arrested the petitioners after dispersing a youth meeting they had organised. The respondents sought to justify the arrest and detention on the basis of powers vested in the police by the Emergency Regulations. The Courts held that Article 155(2) of the Constitution empowers the President to make regulations overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. Thus, the President's legislative power of making Emergency Regulations is not unlimited, and it was not competent for the President to restrict via Emergency Regulations, the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Articles 15(1) to (8) of the Constitution.

Moreover, the Court held that the Emergency Regulations owe their validity to the President's subjective satisfaction that it is necessary in the interest of public security and public order, and that it is not for the Court to question bona fide regulations made to meet the challenges of the situation. However, the situation is different altogether when the impugned regulation concerns the Fundamental Rights enshrined in the Constitution. In such a case, the Court was competent to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by Emergency Regulation and the object sought to be achieved by the same. If the court does not find any such nexus or finds that activities which are not pernicious have

[42](1992) 1 SLR 199.

been included within the sweep of the restriction, the court was not barred from declaring such Regulation void as infringing Article 155(2) of the Constitution.

Accordingly, the Court found that the present Regulations confer unguided and unfettered discretion upon an executive authority without narrow, objective and definite standards of guidance. Thus the Regulations did not fall within the restrictions to the freedom of speech enshrined in Article 15 of the Constitution and were invalid. They were also held to violate Article 12 of the Constitution, as they would permit arbitrary and capricious exercise of power which is the antithesis of equality before the law.

Regulations to be in the Proper Form

We have seen in *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al,* that Mark Fernando J. entertained a challenge on an Emergency Regulation on the basis that it was the decision and not the person of the President that was being challenged.

Fernando J. in fact went a step further in his analysis of the validity of the acts of the President under the PSO in *Karunathilake.* While declining to rule on the validity or otherwise of the Proclamation issued by the President, his Lordship ruled that the Emergency Regulation made thereunder was invalid. He held that, in as much as emergency regulations are a species of delegated legislation which must be in the form of a rule and in as much as the impugned regulation had the character of an order, it was not an emergency regulation at all. There was no legal provision authorizing the making of an order.

Regulations must be for the Purposes specified in the Public Security Ordinance

In *Wijesekera and Others v. Attorney General* [43] the petitioners contended that the proclamation declaring that Section 37 (1) of the Provincial Councils Act shall apply to the Northern and Eastern Provinces, resulting in their merger for administrative

[43] (2007) 1 SLR 38.

purposes violated their rights under Article 12 (1) of the Constitution. The Courts held that the Power reposed in the President by S5 of the Public Security Ordinance to make Emergency Regulations amending any law, has to be read subject to the provisions of Art 155(2) and that an Emergency Regulation cannot have the effect of amending or overriding the provisions of the Constitution. The amendment introduced by the Regulation in question had the effect overriding the provisions of Art 154(A)(3) which only empowers the Parliament to provide by law for the merger of two or three provinces. Moreover, the impugned Emergency Regulations could not be reasonably related to any of the purposes provided in Section 5 (1) of the Public Security Ordinance. It had manifestly been made for the collateral purpose of amending an unrelated law by means of which the President purported to empower himself to act in contravention of specific conditions laid down in the law. It was held that the clause in Article 80 (3) of the Constitution, barring judicial review does not apply to Emergency Regulations, being in the nature of delegated legislation and that the impugned Emergency Regulation was ultra vires and made in excess of the power reposed in the President. It was therefore invalid and of no effect or avail in law.

The foregoing cases demonstrates that despite Emergency Regulations being used frequently by the President, the Courts have been prepared to question the *vires* of the act of the President to promulgate Emergency Regulations, by reference not only to the provisions of the Constitution, but also the form of such Regulations and the purposes for which such Regulations may be promulgated as per Section 5 (1) of the PSO. Thus, at least in the sphere of Emergency Regulations, the Courts have asserted the supremacy of the Constitution in curbing the powers of the President, and clear in their stance that such regulations are a form of delegated legislation and are subject to judicial review. The Courts have not been shy to declare such regulations invalid on the basis that they were made ultra vires.

Power to enter into Treaties and Covenants

A case in which the powers of the President were ostensibly circumcised was *Sinharasa v. The Attorney General*[44]. In the context of an application for revision of a Supreme Court Judgment in the light of a finding of the Human Rights Committee under the Optional Protocol of the ICCPR, the Courts held that the President had acted ultra vires in acceding to the Optional Protocol of the ICCPR, and making a declaration thereunder. His Lordship Sarath Silva CJ held that Articles 3 and 4 formed the effective framework of the Constitution and that as evinced by such Articles, the Sri Lankan Constitution is cast in a Republican mould where Sovereignty is reposed in the People. It was noted that there was a functional separation in the exercise of the power derived from the Sovereignty of the People by the three organs of Government and that such organs do not have a plenary power that transcends the Constitution. Therefore, the exercise of power was circumscribed by the Constitution and written law that derives its authority there from.

Having cited these principles, his Lordship held that Article 33 (f) of the Constitution limits the power of the Executive to bind the Republic qua state. The Article empowers the President *"to do all such acts and things; not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do." Thus, the President is empowered* to enter into a treaty or accede to a Covenant, the contents of which are not inconsistent with the Constitution or written law. His Lordship held that the limitation interposes the principle of lega1ity, being the primary meaning of the Rule of Law. It was held that the accession to the Optional Protocol conferred public law rights and was an exercise in legislative power by the President, contrary to Article 4 (a) of the Constitution under which the legislative power of the people was to be exercised by Parliament and Article 76, under which Parliament may not abdicate its legislative power. The accession was also held to be a conferment of judicial power to the Human Rights Committee in

[44]S.C. SpL (LA) No. 182/99.

Geneva, contrary to Article 3 read with Article 4 (c) of the Constitution, which deals with the manner in which judicial power is to be exercised.[45] Therefore the accession to the Optional Protocol was inconsistent with the provisions of the Constitution and was in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration therefore did not bind the Republic qua state and had no legal effect within the Republic.

This case is an illustration of the willingness of the Supreme Court to resort to the basic structure of the Constitution and principles such as the separation of powers, the rule of law and constitutionalism to narrow the scope of the President's powers if it so wished.

Concluding Observations

As we look back over the jurisprudence of the superior courts on the subject of Presidential powers over the three and a half decade lifespan of the Second Republican Constitution, it is a fair argument to make that the "overmighty executive" has become even mightier, in spite of the Supreme Court's sole and exclusive jurisdiction to interpret the Constitution and keep the executive in check.[46] In fact, it has been argued that the makers of the Second Republican Constitution envisaged a hybrid Presidential – Parliamentary system[47] where executive power vested in the President **and** the Cabinet of Ministers, all of whom (other than the President) have to be members of the legislature.[48]

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[45] It maybe argued that this point was wrongly decided as the power of the Human Rights Committee only extends to making recommendations and not binding judicial decisions

[46] For a discussion of the developments relating to the Executive Presidency in the post war era, See M. Gomez (2014) ***Reform and Reconciliation in Post-War Sri Lanka*** (2011) ***Asian Yearbook of International Law***, Vol.17, 117,127 – 128.

[47]See R. Edrisinha, note 31; A.J. Wilson (1980) ***The Gaullist System In Asia*** (Macmillan): pp.46 & 208; H.M. Zafrullah (1981) ***Sri Lanka's Hybrid Presidential and Parliamentary System & the Separation of Powers Doctrine*** (University of Malaysia Press).

[48] This is unlike the case in France, where the members of the cabinet are not members of Parliament

In the Supreme Court Determination on the Thirteenth Amendment to the Constitution,[49] Wanasundera J. in his dissenting opinion held that

> "any attempt to bypass it (the cabinet) and exercise executive powers without the valve and conduit of the cabinet would be contrary to the fundamental mechanism and design of the constitution. It could even be said that the exercise of executive power by the President is subject to this condition… This follows from the pattern of our constitution modeled on the previous constitution, which is a parliamentary democracy with a cabinet system…To take any other view is to sanction the possibility of establishing a dictatorship in our country; with a one man rule."[50]

However, the Supreme Court has not subsequently taken cognizance of the hybrid nature of executive power in the Constitution, nor used reasoning akin to that of Wanasundere J. above, to reign in the powers of the Executive President.

Presidential immunity has been used as an impregnable shield and the powers of appointment of the President have been deployed as the sword in the battle to entrench vast powers in the office of the President. The potential Achilles heel to the office of the President, the Supreme Court, has been unable to resort to the principles underlying the Constitution and the doctrine of Constitutionalism to keep the powers of the President in check, except for limited instances such as emergency regulations and in fashioning out narrow exceptions to Presidential immunity.

The Supreme Court has selectively resorted to the values underpinning the Constitution in cases such as *Singarasa*and the Special Determination on the Nineteenth Amendment to the Constitution, the latter case ironically serving to safeguard the powers of the President. This demonstrates that the Court is capable of applying such principles to shape the powers of the

[49](1987) 2 SLR 312.
[50](1987) 2 SLR 312, 341.

President in accordance with such values. The will to do so however, has been lacking. The question then arises as to why such will has been lacking. It is contended that one of the key reasons for this unwillingness to check the powers of the President is the President's power to appoint the judges of the Superior Courts.

Though Judges are expected to have security of tenure after their appointment and though as Marsoof J. pointed out in *Attorney General v. Shirani Bandaranayake and Others*[51] the power to impeach a Judge of the Superior Courts through the process outlined in Article 107 of the Constitution is vested jointly in the Parliament and the President, the power the President commands over the Parliament, particularly if the governing party is the party to which the President belongs, enables the President to significantly influence the impeachment process[52]. The President's power over parliament is in turn fuelled by the power of the President to make appointments to the Cabinet of Ministers and the hierarchical structure of Sri Lanka's political parties.

Therefore, it is asserted that an appointment mechanism that can ensure independence whilst retaining accountability, resembling the procedure introduced by the Seventeenth Amendment to the Constitution, is essential if the Courts are to fulfil the role of restraining the powers of the Executive President. The primary application of the doctrine of separation of powers elucidated by Montesquieu lies in relation to the independence of the judiciary from legislative and executive influence. As Blackstone has observed, the main preservation of public liberty in England consists "in the distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown".[53] In fact, as pronounced by the Privy Council in relation to the 1947 Constitution in *Liyanage v. the Queen*[54] "the importance of securing the independence of the

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[51] SC Appeal no. 67/2013.

[52] This is amply demonstrated by the context surrounding the recent impeachment of Chief Justice Shirani Bandaranayake as well as impeachment attempts in the past, particularly the impeachment process initiated against Neville Samarakoon CJ.

[53] ***Blackstone's Commentaries*** (12th Ed.)1, 269.

[54] (1965) 68 N.L.R. 265.

judges and maintaining the dividing line between the judiciary and the executive and also, one should add, the Legislature, was appreciated by those who framed the Constitution". Unless such appreciation is recognized or at the very least read into the Sri Lankan Constitution, and the independence of the judiciary guaranteed in an effective manner, the powers of the President will continue to grow, untrammelled and unchecked by the other organs of government.

5

The Executive Presidency and Immunity from Suit: Article 35 as Outlier

Niran Anketell

Introduction

Democracies have often struggled with the need to balance the importance of shielding state functionaries from the vagaries of incessant litigation with the importance of protecting the rule of law. In presidential systems, executive presidents are often granted limited immunity from suit, though the degree and nature of such immunity varies from jurisdiction to jurisdiction. This paper undertakes a comparative study of presidential immunities in various jurisdictions from a Sri Lankan perspective. The paper will comprise three parts. Part 1 analyses Article 35 of the Second Republican Constitution of 1978 and the manner in which Sri Lankan courts have interpreted relevant constitutional provisions. Part 2 will consider the doctrine of presidential immunity reflected through American and French jurisprudence, and the degrees to which they shield presidential action. Finally, Part 3 will consider Article 35 in light of other immunity provisions and question the suitability of the Article 35 formulation in the context of the Sri Lankan presidency.

Article 35 and the Courts

The constitutional provisions on presidential immunity are found in Article 35 of the 1978 Constitution. Article 35(1) lays down the substantive rule in relation to Presidential immunity:

> "[w]hile 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 text of the article thus appears to provide absolute immunity to the person of the President for the duration of his presidency. Article 35(2), which suspends the running of time during the pendency of a person's tenure in office as President for the purpose of determining the prescription of a claim also confirms that Article 35 envisages immunity for an individual only for as long as he holds the office of President. A President may be made a party to an action – civil or criminal – in respect of acts

committed during the pendency of his term only after he ceases to hold office.

Article 35(3) however lists the exceptions to the substantive rule in Article 35(1). It provides that the provisions of Article 35(1) would not apply to 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]"

Besides the exceptions relating to election petitions heard by the Supreme Court in relation to the election of a President, or those relating to petitions heard in the Court of Appeal relating to the election of a Member of Parliament,[1] or the exercise of the consultative jurisdiction of the Supreme Court under Article 129, an important exception is provided in relation to the exercise of powers exercised by the President qua Cabinet Minister. Article 44(2) provides that the President may assign to himself the subjects and functions of a Minister and determine the number of Ministries in his charge. The effect of the exception in Article 35(3) would be to render 35(1) inapplicable to the exercise of power pertaining to any such subject or function.

The proviso to Article 35(3) stipulates that proceedings under the exception must be instituted against the Attorney General. This means that except in relation to election and referendum petitions, no adversarial legal proceedings may be instituted directly against the President.

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[1] The Fourteenth Amendment to the Constitution that came into effect on 24th May 1988 amended Article 35 so as to not grant the President immunity in relation to election petitions in the Court of Appeal against the election of a Member of Parliament.

This very broad immunity provided to the President has often emerged in constitutional litigation in the Supreme Court and Court of Appeal over the years. Despite the seemingly clear provisions in Article 35, several questions involving issues of constitutional interpretation and legal first principles have been argued before the appellate courts. The first case to grapple with the nature of presidential immunity under the 1978 Constitution was *Visuvalingam v. Liyanage (No.1)*[2] where a full bench of the Supreme Court heard arguments on the issue of whether the failure of the judges of the Supreme Court and Court of Appeal to take oaths within the specified time limits mandated by the Sixth Amendment to the Constitution resulted in their ceasing to hold office as judges. The issue emerged in this case because a five-judge bench had been constituted to hear a fundamental rights application, but a sitting was adjourned when it came to light that the Justices of the Court had not taken oaths as required by Sixth Amendment. 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 sittings, the question arose whether the hearing should commence *de novo* or merely be resumed. The state argued that proceedings should be started *de novo* because the judges had ceased to hold office and had been re-appointed 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 raised by the state was that the court was precluded from directly or indirectly calling in 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). In their decision, seven judges of the Supreme Court held that proceedings could be continued because the judges had not ceased to hold office. In his concurrence, Justice Sharvananda dismissed the preliminary objection raised by the state on the basis, *inter alia,* that actions of the executive are not above the law and that the rule of law would be found wanting in its completeness if Article 35 was interpreted to preclude any court from questioning the validity or legality of the act of a President. He further stated:

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[2] *Visuvalingam v. Liyanage (No.1)*, (1983) 1 SLR 203.

> "…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."[3]

Going further, Justice Sharvananda held:

> "[t]hough 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."[4]

In *Mallikarachchi v. Shiva Pasupati,*[5] Chief Justice Sharvananda expanded on his opinion in *Visuvalingam*. The petitioner in the case alleged that the proscription by the President of the Janatha Vimukthi Peramuna (JVP) in terms of the prevailing emergency regulations was invalid as it infringed his fundamental rights. The five judges were unanimous in refusing to grant leave to proceed. Explaining the reasons for the refusal of leave, the Chief Justice held that because the petition did not fall within the exceptions to Article 35(3), the immunity of the President would preclude such action. He further stated that this inability to maintain an action in the face of Article 35(1) could not be cured by the naming of the Attorney General as a Respondent, stating:

> "[a]rticle 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney-General in respect of the actions or omissions of the President in the exercise of any powers pertaining to subject or functions assigned to the President or remaining in his charge under that paragraph 2 of Article

[3] Ibid: p.210.
[4] Ibid.
[5] *Mallikarachchi vs. Shiva Pasupati* (1985) 1 SLR 74.

> 44. It is only in respect of those acts or omissions of the President, that it is competent to proceed against the Attorney-General."[6]

The Chief Justice 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."[7] Dealing with the purpose of Article 35, he said:

> "[t]he 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."[8]

Following this reasoning, the Chief Justice observed that the President is not above the law of the land. The Chief Justice 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. He went on to say:

> "[i]f 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."[9]

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[6] Ibid: p.77.
[7] Ibid.
[8] Ibid: p.78.
[9] Ibid.

Thus, in the reasoning of the Chief Justice, two distinct arguments justified the conferring of immunity on the President. First, the President – for the duration of his term in office – ought not to be answerable to the jurisdiction of any, except the representatives of the people by whom he may be impeached. Second, the efficient working of the government would be impeded if the President were not to be provided with immunity.

Despite this ruling, the Supreme Court in later cases signalled willingness to strike down emergency regulations promulgated by the President. In *Wickremabandu v. Herath*[10] the court struck down parts of an emergency regulation that it considered to be violative of the petitioner's fundamental rights. In *Joseph Perera v. Attorney General*[11] a five judge bench of the court also held Regulation 28 of the Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986 to be *ultra vires* the constitution. Neither the majority judgment nor the minority judgment dealt specifically with Article 35.

It was in the case of *Karunatilake v. Dayananda Dissanayake (No.1)*[12] that Justice Mark Fernando articulated the reasoning through which emergency regulations promulgated by the President could be struck down. Justice Mark Fernando held, referring to Article 35 of the Constitution:

> "[w]hat 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,

[10] *Wickremabandu v. Herath* (1990) 2 SLR 348.
[11] *Joseph Perera v. Attorney General* (1992) 1 SLR 199.
[12] *Karunatilake v. Dayananda Dissanayake* (1) (1999) 1 SLR 157.

> 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."[13]

Karunatilake's case, read with *Visuvalingam,* signified the possibility of a gradual erosion of the effect of Article 35's grant of near blanket immunity. The decoupling of a presidential act from the person of the President, would, if taken to its natural conclusion, open the doors to uninhibited judicial review, at least in respect of public law and constitutional matters. However, *Karunatilake* left certain questions unanswered, such as whether a suit against a presidential act could be dismissed for non-joinder of necessary parties. Sri Lanka's appellate courts have generally adopted a strict attitude to non-joinder of parties in public law and constitutional cases, consistently holding that where a necessary party was not named, the petition would be liable to be dismissed.[14]

The matter of non-joinder in relation to immunity arose in the case of *Silva v. Bandaranayake*[15] where the petitioners alleged that the appointment by the President of Dr Shirani Bandaranayake as a judge of the Supreme Court violated their fundamental rights under the constitution. A seven-judge bench was constituted to consider whether leave to proceed could be granted. The Justices unanimously refused to allow leave to proceed, with Justice Fernando writing on behalf of himself and three other Justices of the Court, and Justice Perera's concurrence on behalf of himself and two other Justices. While Justice Fernando's judgment did not deal with the question of immunity, Justice Perera's reasoning included the assertion that the President's acts were immune from judicial scrutiny by virtue of Article 35, except in actions relevant

[13] Ibid: p.17.
[14] See *Farook v Siriwardena*(1997) 1 SLR 145; *Rawaya Publishers v. Wijayadasa Rajapaksha* (2001) 3 SLR 13.
[15] *Silva v. Bandaranayake* (1997) 1 SLR 92.

to Article 35(3). Following the *dicta* in the *Mallikarachchi* case, Justice Perera stated:

> "[w]e are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party"[16]

Having made this point, Justice Perera went on to deal with the violation of natural justice that would be caused if the President's acts could be impugned without the President being named a party to the action. This reasoning appeared to take no notice of the court's previous decisions permitting the review of presidential acts. It also meant that while naming of the President as a respondent would result in the dismissal of the case on account of Article 35, the failure to do so would also result in dismissal for reason of non-joinder.

In the case of *Victor Ivan v. Hon. Sarath N. Silva*,[17] the petitioners sought to apply the reasoning in *Visuvalingam's* case that Article 35 permitted challenges against any person invoking an act or decision of the President in support of his own act or decision, by instituting a fundamental rights action against the newly appointed Chief Justice on the ground that he was the 'beneficiary' of the appointment of the President. In this way, the petitioners sought to place the Chief Justice in the position of 'invoking' the President's act as his own justification for holding office. The unanimous judgement of the five-judge bench authored by Justice Wadugodapitiya, in which leave to proceed was refused, considered the existing authorities, but held that the holding of office of Chief Justice by the 1st Respondent was not an 'executive or administrative action.' Thus, the matter could not be pursued through the remedy provided by Articles 17 and 126, which apply to violations of fundamental rights. Justice Wadugodapitiya concluded that, in effect, the only act the petitioners had alleged to have infringed their rights was the act of

[16] Ibid: p.99.
[17] *Victor Ivan v. Hon. Sarath Silva* (1998) 1 SLR 320.

appointment by the President, who in turn had immunity from suit and could not be named as a respondent.

In involving a challenge to the appointment of a Chief Justice, Justice Wadugodapitiya held that the appointment of a Chief Justice could not be canvassed through the limited space created by *Karunatilake's* case, stating:

> "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."[18]

In *Senasinghe v. Karunatilleke*,[19] the petitioner alleged that his fundamental rights were violated by the actions of the police, who claimed they were acting under and in terms of Section 45 of the Referendum Act in refusing to allow a political procession to proceed. Justice Fernando writing for all three judges held that the excess of force used on the petitioner was violative of the constitution, but also went a step further in striking down the referendum order issued by the President, on the grounds that the police were purportedly acting in terms of Section 45 of the Referendum Act. The court held that the President's act was justiciable since the respondents were 'taking refuge' in that act.

It appears therefore from the foregoing analysis that judges will not entertain actions where the incumbent President's acts are impugned indirectly. To question presidential acts successfully – other than through the exceptions created by Article 35(3) – there must necessarily be a secondary mischief, which enables a collateral challenge. At that stage, if the person alleged to have committed the secondary mischief invokes an act of the President

[18] *Silva v. Bandaranayake* (1997) 1 SLR 92 at 326.
[19] *Senasinghe v. Karunatilleke* (2003) 1 SLR 172.

to explain her act, the court may inquire into the legality of the presidential act upon which reliance is placed.

Thus it may be possible to identify the following rules on presidential immunity that have emerged through the interpretation of Article 35 by the judiciary:

1. The person of the President enjoys absolute immunity in respect of all acts or omissions in respect of private or official matters done by him during his tenure of office, although such immunity will not preclude actions against a former President in respect of acts done by him during his tenure of office.
2. All pending civil and criminal actions against the President must be suspended until the person ceases to hold the office of President, subject to the proviso that the period of suspension will not be considered in computing time limits or prescription relating to such actions.
3. No fresh civil or criminal actions can be instituted against the President during his tenure of office in respect of acts or omissions done by him prior to assuming office. Such actions can be instituted only after the person has ceased to hold the office of President.
4. The only exceptions to the above rules are to be found in Article 35(3) of the constitution.
5. Article 35 shields the doer and not the act. Thus, any person invoking the act of a President to justify her actions is imposed with the burden of proving the validity of the President's acts. In the event the President's act is found to be invalid, the court may deem it void.

Presidential Immunity in the United States and France

The United States

Unlike the Sri Lankan Constitution of 1978, the doctrine of presidential immunity finds no explicit mention in the text of the constitution of the United States. However, historical factors and the judicial branch's deference to executive power have shaped the emergence of the doctrine over time. The absence of a

codified text on immunity results in some uncertainty in the United States as to the precise contours of the scope of immunity. However, since the doctrine has been developed gradually by the judiciary, its development has been crafted in recognition of constitutional first principles such as the separation of powers doctrine and the rule of law. Given the contestation on the degree to which a President must be immune, there has been extensive discussion by academics and practitioners alike on the first principles of law that conceptually underpin the grant of immunity to the President.

The case of *Marbury v. Madison*[20] paved the way for the emergence of the immunity doctrine. Chief Justice Marshall's historic judgment introduced the idea of judicial review of legislation for the first time, and drew, in respect of executive acts, a distinction between 'ministerial acts' and 'political and executive acts.' The term 'ministerial acts' was defined to be those where an executive actor is bound by law to perform an act; whereas 'political and executive acts' are those where the actor is provided a measure of discretion in determining whether or not, and how, he will perform the act. *Marbury* ruled that the court possesses the jurisdiction to compel performance of a 'ministerial act', while it would defer to the executive in relation to 'political and executive' acts.

This distinction then became critical to the 1867 decision of *Mississippi v. Johnson*,[21] where the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers which were 'political and executive'. The question of whether the court would exercise its jurisdiction in relation to acts that were 'purely ministerial' was left open. In this case, the state of Mississippi had sought to restrain the President from enforcing the Reconstruction Acts passed by Congress that the state alleged to be unconstitutional. The court expressed deep reservations about restraining or compelling the performance of a 'political' act, explaining that the harmonious relationship between the three arms of government would be disrupted if the court were to restrain the President in the manner prayed. The

[20] *Marbury v. Madison* 5 U.S (1 Cranch) 137.
[21] *Mississippi v. Johnson* 71 U.S. (4 Wall) 475.

court argued that in the event the injunction were issued, Congress might move to impeach the President for non-performance of his functions, and the court would then be placed in the unenviable position of having to protect the President by interfering with proceedings in Congress. This, the Court said, would be a catastrophic blow to comity between the coordinate branches of government and separation of powers.

In the 1974 *Watergate* case,[22] the Supreme Court held that the President was amenable to subpoena to produce evidence for use in a criminal case. The court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." The court went on to say that the primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and that to accept the President's argument would disturb the separation of powers function of achieving "a workable government." Thus, the court recognised the importance of balancing recognition of the immunity of the President with the imperative to ensure that no person was above the law. What is clear therefore is that the separation of powers doctrine "is not a mantra whose incantation will automatically discredit a practice. Backed however, by other principles […] the separation of powers is a useful and potent instrument for jurisprudential analysis."[23]

In the landmark case of *Nixon v. Fitzgerald*,[24] the Supreme Court extended presidential immunity from civil suit for acts performed within the 'outer perimeter' of his official duties. The question as to what constituted acts outside the 'outer perimeter' of his official duties was not answered clearly. The court divided five – four, and the majority decision was based on what it considered to be the President's "unique position in the constitutional scheme" and the,

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[22] *United States v. Nixon*, (1974).418 U.S. 683.
[23] D. Wells, '*Current Challenges to the Doctrine of the Separation of Powers – The Ghosts in the Machinery of Government*' (2006) ***Queensland University of Technology Law and Justice Journal*** 6(1): p.105
[24] *Nixon v. Fitzgerald* (1982) 457 U.S 731.

> "… policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."

The majority argued that immunity was "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." While the court's decision recognised that the separation of powers doctrine and the position of the President within the scheme of the constitution alone did not entail absolute immunity in relation to all legal proceedings, it contended that only a sufficiently broad public interest would serve to limit the immunity of the President. Thus even though the Supreme Court had previously held that the President was amenable to a subpoena in a criminal trial in the *Watergate* case, it held in *Nixon v, Fitzgerald* that "mere private suits for damages based on a President's official acts" fell short of the interest required to override immunity.

It is useful to note that the Supreme Court had already extended absolute immunity from civil suits to other state actors before the *Fitzgerald* decision.[25] However in *Mitchell v. Forsyth*,[26] the Supreme Court limited the absolute immunity afforded government officials by declaring that immunity did not extend to nongovernmental duties. Instead, the court ruled that a government official has qualified immunity when engaging in unofficial government actions. The principle on which reliance was placed to determine whether a government official is entitled to absolute immunity was the nexus between the conduct and the government agent's official duties.

In relation to civil liability for suit relating to a person's private acts before he becomes President, the Supreme Court in *Clinton v.*

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[25] *Stump v. Sparkman,* (1978) 435 U.S 349; *Pierson v. Ray,* 386 U.S. 547, 554 (1967).;*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Tenney,* 341 U.S. at 372, 377; *Butz v. Economou,* 438 U.S. 478, 508-17 (1978).
[26] *Mitchell v. Forsyth* (1985) 475 U.S. 511.

Jones[27] denied the President's application for qualified temporary immunity that would stay the trial until the President ceased to hold office. Justice John Paul Stevens writing for the majority held that the doctrine of separation of powers was intended to protect one branch of government from intruding into the domain of the other, and that a trial judge performing his judicial duties did not interfere with the authority of the President. Justice Breyer's concurrence expressed the view that the President would have the benefit of immunity only if he would be able to show that the process of court would substantially interfere with the constitutionally assigned duties of the President.

Thus, the *Clinton* and the *Watergate* cases taken cumulatively appear to suggest that a President would not be entitled to immunity from criminal process or civil trial for private acts. The question as to whether the President would be immune from a criminal charge as opposed to mere criminal process – such as a subpoena to hand over material evidence – has hitherto not been addressed by the Supreme Court. It is also not certain as to whether the President is entitled to qualified (temporary) immunity from civil trial caused by acts performed while he was in office as President. The reasoning in the *Watergate* and *Clinton* cases would, however, appear to suggest that there is no fundamental distinction between immunity for acts committed prior to assuming office and immunity for acts committed while in office.

The court's judgment in both these cases only seek to balance the disruption that could potentially be caused to the executive arm of government with the need to ensure just government. Significantly, there is no indication of the existence of absolute immunity for acts committed by a sitting President while in office. With the expanding scope of judicial review and increasing limitations on the discretion of the executive in all developed public law jurisdictions, the distinction between ministerial acts and political acts appears to have eroded over time. In its place, the distinction between constitutional review and the broader scope of administrative procedures has taken central importance.

[27] *Clinton v. Jones* (1997) 520 U.S. 681.

Thus, in the case of *Franklin v. Massachusetts*,[28] Justice Sandra Day O'Connor's majority opinion held that a President's act cannot be questioned for abuse of discretion under the Administrative Procedures Act (APA). She argued that because the Act was silent on the question of immunity, that silence could not impute to the legislature the intention to waive the immunity of the President in relation the Act. However, she acknowledged, in deference to existing authority, that his actions may be reviewable for their constitutionality. Prior to *Franklin,* two decisions by the Supreme Court had held presidential acts to be unconstitutional in suits which had been brought against subordinates of the President who carried out his orders.[29]

The foregoing analysis of the development of the doctrine in the constitutional jurisprudence of the United States reveals that immunity has been affirmatively extended only to acts within the 'outer perimeter' of the President's duties, cases challenging exercises of power under the APA, and another class of cases where civil proceedings would substantially interfere with the ability of the President to fulfil his constitutional duties.

France

The constitution of the Fifth Republic envisaged a powerful President, albeit one somewhat removed from the day-to-day administration of the affairs of government. This was the design of Charles de Gaulle who asserted the need for a strong and stable leadership by an executive head of state. Thus, the constitution as it was originally designed contained an immunity clause in Article 68, which read:

> "The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical votes in open ballots and by

[28] *Franklin v. Massachusetts* (1991) 505 U.S. 778.
[29] See *Panama Refining Co. v. Ryan* (1935) 293 U.S 388; *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S 579.

> an absolute majority of their members ; he shall be tried by the High Court of Justice."

The Constitution however was amended after public outcry over alleged abuses of power by President Chirac and on 19th February 2007, the constitution was amended to limit the grant of immunity. The amended Article 67 reads:

> "The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 and 68 hereof. Throughout his term of office, the President shall not be required to testify and shall not be the object of any criminal or civil proceedings, nor of any preferring of charges or investigatory measures. All limitation periods shall be suspended for the duration of said term of office. All actions and proceedings thus stayed may be reactivated or brought against the President no sooner than one month after the end of his term of office."

Thus, the amendment limits the absolute immunity afforded to the President of France only in respect of acts carried out in his official capacity, while his person enjoys qualified or temporary immunity from criminal and civil process during his tenure in office in respect of acts done before or after he assumed office. However, the Conseil d'Etat – the administrative court - is empowered to hear recourses against decrees and other executive actions, rendering the acts of a President jusiticiable in a court of law.

Notably however, in France, it is the Prime Minister who, in terms of Article 20, directs the actions of the government, assumes responsibility for national defence, ensures implementation of legislation, promulgates regulations and is responsible for civil and military appointments. In contrast, the President's powers include those in relation to the appointment of Prime Minister, the passage of laws, appointments to the superior courts, and the dissolution of the legislature. He also has a central role in the conduct of foreign affairs. Thus, the immunity granted to the President in France must be viewed in the light of the fact that the preponderant powers over general governance are

reposed in the Prime Minister, with the President entrusted only with certain important constitutional functions and the conduct of foreign relations.

Article 35 in light of Immunity Provisions Elsewhere

The historical antecedent of Article 35 of the 1978 Constitution – Article 23 of the 1972 Constitution – read:

> (1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.
>
> (2) Where provision is made by law limiting the 'time' within which proceedings of any description may be brought against any person, a period of time during which such person holds the Office of President of the Republic of Sri Lanka shall not be taken into account in calculating any period of time prescribed by that law.

Article 35 of the Second Republican Constitution was thus a near verbatim reproduction of the text concerning the immunity of the President in its predecessor constitution. However, while Article 23 of the First Republican Constitution granted immunity in respect of 'civil or criminal proceedings', Article 35 mandates that 'no proceedings' shall be instituted against the President. The matter of judicial review of administrative action was therefore left unaddressed in Article 23, whereas Article 35 clearly precludes all administrative or constitutional suits. The later constitution is thus, at least facially, wider in its grant of immunity than its predecessor.

More notably, however, while the President under the 1972 Constitution was the Head of State, Head of the Executive, and the Commander-in-Chief of the armed forces, Article 27 of that constitution mandated that the President "shall always except as otherwise provided by the Constitution, act on the advice of the

Prime Minister, or of such other Minister to whom the Prime Minister may have given authority to advise the President on any particular function assigned to that Minister." In fact, under Article 25, it was the Prime Minister who nominated a person to the office of President, and could even initiate a resolution to have the President removed from office by a simple majority of the National State Assembly. Thus, wholly unlike the overmighty President under the 1978 Constitution, the President under the 1972 Constitution did not exercise any discretionary executive power. Those powers were in fact exercised by the Prime Minister and his Cabinet. Furthermore, Article 5 declared the National State Assembly to be the supreme instrument of state power of the republic, exercising the legislative, executive, and judicial power of the people. Thus, the 1972 Constitution established a presidency that was a titular head of state. Given this, the logic behind presidential immunity in the 1972 Constitution appears not to have been animated by a desire to ensure effective government, since the President wielded no real executive power that could potentially have been disrupted by litigation. Given that the Prime Minister and the Cabinet of Minister were not immune, immunity under Article 23 was certainly not established with the intention of precluding public law suits against the government.

Historically, besides the argument of executive convenience, two other specific justifications have been forwarded to rationalise the grant of immunity to a head of state. These may have some relevance to the 1972 Constitution's provision on immunity. First, given that the constitution bound the President to act according to the advice of the Prime Minister or a member of the Cabinet of Ministers, exposure of the President to litigation for decisions made in his name and acts performed in his name, but over which he had no legal control, would cause injustice to the President. This reasoning could apply to the grant of immunity in Article 361 of the Indian Constitution to the President of the Union – and Governors of States – for "the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties." Since the courts have

recognised, since *Shamsher Singh v. Punjab*,[30] that the President of the Union and Governor's of States were bound to follow the 'aid and advice' of the Council of Ministers of the Union and State respectively, rendering the President or a Governor liable for decisions made by others would result in injustice.

Second, the argument is sometimes made that the President, being the Head of State and the symbol of the dignity of the state, should be immune from judicial process for as long as he continues to hold the office of the Head of State. In such cases, where provision is made for judicial proceedings in respect of presidential acts to be instituted against the state, the prejudicial effect of immunity on those aggrieved by presidential acts is alleviated. For instance, the proviso to Article 361 of the Indian Constitution clearly provides that "nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State."

In his treatment of the doctrine of immunity in the light of the separation of powers doctrine articulated by Montesquieu, Joseph Rodgers draws from Montesquieu's conception of republican virtues as the source of government legitimacy.[31] He claims that the preservation of the 'honour' of the ruler through retaining privileges unavailable to normal citizens in antithetical to the notion of a republican state, as it is a manifestation of a monarchical attempt at asserting legitimacy. Explaining further, he states:

> "[p]ut simply, a putative monarchy can only successfully exist in an environment in which the sovereign is quite literally understood to be above his subjects and of a noble descent. Honour is not necessarily the result of devotion to community or love of country. Quite the contrary, "it is the nature of honour to aspire to preferments and titles, [and] it is properly placed in this

[30] *Shamsher Singh v. Punjab* (1974) AIR 2192
[31] J.P. Rodgers, '*Suspending the Rule of Law? Temporary immunity as violative of Montesquieu's Republican virtue as embodied in George Washington*' (1997) ***Cleveland State Law Review*** 45: p.301

> government." It is expected that these individuals will work to institutionalize mechanisms to continually protect their own honour and privilege. Without privilege, a monarchy sacrifices its nature."[32]

In light of the discussion above, I argue that neither of the arguments that would possibly have been used to justify Article 23 in the 1972 Constitution have any application to Article 35 in the 1978 Constitution. On the one hand, in terms of the 1978 Constitution, the President wields wide and pervasive control over the government and state, and no prejudice or injustice would be caused to him if he were to be answerable for his own actions. Secondly, while the desire to preserve the 'honour' and 'dignity' of the state could perhaps be understandable in the case of a titular head of state, where real republican executive power is wielded by the head of state as in the case of Sri Lanka under the Second Republican Constitution, any grant of immunity for the purpose of maintaining the 'honour' or dignity of that person undermines the republican nature of the state. Thus, even though the textual formulation of Article 35 is near identical to Article 23 in the 1972 Constitution, the justifications potentially applicable to immunity provisions in the 1972 Constitution or the Indian Constitution do not apply to Article 35.

The central argument that sustains the presidential immunity doctrine in the United States is that based on a particular interpretation of the separation of powers doctrine. The argument posits that the course of government and ability of the executive to govern will be impeded if the President would be vulnerable to litigation. In Jefferson's words:

> "[b]ut would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly

[32] Ibid: p.316.

> trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?"[33]

Defending temporary immunity to a sitting President for acts done in his private capacity, Akhil Amar and Neal Katyal argue that the protection of the President also protects the people whom he serves.[34] They suggest that bedrock constitutional principles of separation of powers provide a 'sturdy constitutional basis for temporary immunity.' The argument has echoed in the judgments of Sri Lanka's Supreme Court. In *Mallikarachchi,* Chief Justice Sharvananda states:

> "…it is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. 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."[35]

However, it is not clear that the separation of powers doctrine necessarily supports the grant of immunity, particularly when such immunity is pervasive. In a critique of the essentialist understanding of the separation of powers, Laurence Claus argues that Montesquieu's separation was based on the fundamental tenet of maximising the liberty of the subject. This, he contends, is possible by "apportioning power among political actors in a way that minimises opportunities for those actors to determine conclusively the reach of their own powers."[36]An essentialist separation of powers would manifestly fail to achieve the goal of preventing those actors from determining conclusively the reach of their powers, because the mutual exclusivity

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[33]*Nixon v Fitzgerald* (1982) 457 U.S 731 at p.750, quoting letter from Thomas Jefferson to George Hay (20th June 1807) in P.L. Ford (Ed.) (1905) ***The Works of Thomas Jefferson*** (New York: G.P. Putnam's Sons): p.404.
[34]A.R. Amar & N.K. Katyal, '*Executive privileges and immunities: The Nixon and Clinton cases*' (1995) ***Harvard Law Review*** 108: p.701.
[35]*Mallikarachchi*, fn.6 supra: p.78.
[36] L. Claus, '*Montesquieu's Mistakes and the True Meaning of Separation*' (2005) ***Oxford Journal of Legal Studis*** 25: p.419.

engendered by an essentialist understanding would support rather than oppose arbitrary decisions on the boundaries of one's own power. Of the executive, he says: "if the adjudicator of disputes between the executive government and the citizen were not separate from the executive government, then that government would conclusively determine the reach of its powers, and could do as it pleased."[37] The independence of the judiciary and the power of the judiciary to maintain a check on the executive is thus an essential feature of any separation of powers regime. After an exhaustive treatment of Madison's writings on the separation of power, Gavin Drewry concludes:

> "[t]he founding fathers linked their perception of the need to avoid combining the legislative and executive functions to their concerns about preserving the Rule of Law. If the same institution/ruler makes the laws and interprets/applies them, then those laws can be redefined according to the whim and caprice of that ruler…"[38]

Thus, the doctrine of the separation of powers lends itself to arguments in favour and in opposition to presidential immunity. It is not a bludgeon that determines the propriety of any given legal formulation. While it does not countenance a grant of blanket immunity, it does appear to provide some space for a narrow, temporary immunity in the interest of preventing debilitating litigation. Even where presidential immunity is granted, the general principle ought to be that judicial scrutiny of all executive action including the acts or omissions of the President must be ensured, save to the extent that such demonstrably interferes with the proper and lawful fulfilment of the lawful duties of the President.

Further, blanket immunity in respect of a president violates two dimensions of the rule of law as identified by Dicey. First, by the grant of blanket immunity, the President acquires wide, discretionary powers that cannot be reviewed, and thus opens the

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[37] Ibid: p.425.
[38] G. Drewry, '*The Executive: Towards Accountable Government and Effective Governance?'* in J. Jowell & D. Oliver (Eds.) (2007) ***The Changing Constitution*** (Oxford: OUP): p.188.

door to arbitrary rule. Secondly and more importantly, presidential immunity violates the idea of equal subjection of all classes to one law. As Dicey wrote: "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[39] Article 12 of the Sri Lankan Constitution also contains an expansion of this basic idea. While reasonable classification arguments can be made in this regard, the exclusion of an individual from answerability to the judiciary for the entire tenure of his office clearly appears to violate the fundamental precepts of equal treatment and equal protection.

Conclusion

The foregoing analysis reveals that when Article 35 is compared with other provisions in respect of presidential immunity – whether in previous Sri Lankan constitutions or in notable jurisdictions which provide for presidential immunity – Article 35 is an outlier in terms of the sheer scope of the immunity provided. In fact, the blanket immunity provided by Article 35 is only consistent with immunity provisions applicable to titular heads of state who wield little or no political power. However, in countries such as the United States and France where presidential power is significant, the scope of immunity is much narrower than the formulation in Article 35. Most importantly, while there may be provision for immunity in respect of civil and criminal liability in those jurisdictions, no such immunity is applicable in public law proceedings challenging the constitutional or other validity of an exercise of discretionary power by the President. More modern constitutions like the South African Constitution go further, and are silent on the question of immunity, potentially opening the door to even criminal prosecutions against incumbent Presidents. In contrast, Sri Lanka's grant of presidential immunity is a blunt instrument designed to shield an already powerful institution from judicial scrutiny; ensuring that the person of the President presides powerfully over governance in the country, undermining

[39] Cited in J. Jowell, '*The Rule of Law and its underlying values*' 'in Jowell & Oliver (2007): p.7.

the constitution's stated commitment to the rule of law and republican values.

6

An Eager Embrace: Emergency Rule and Authoritarianism in Republican Sri Lanka

Deepika Udagama

Introduction

Much of Sri Lanka's post-independence period has seen governance under states of emergency. The invocation of the Public Security Ordinance (PSO)[1] by successive governments was a common feature of political life and, indeed, an integral aspect of the political culture of the republic. Several generations of Sri Lankans have grown up and have been socialised into political and public life in an environment fashioned by states of exception replete with attendant symbols and imagery. Images of police with automatic weapons, military check-points, barbed wire, lengthy periods of detention (often administrative detention) mainly of the political 'other', the trauma of political violence and the ever-present sense of fear became the 'normal'. The state of exception has become the norm in Sri Lanka from the 1970s onwards.

The permanency of the state of exception was further consolidated when the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA) was converted into a permanent law in 1982.[2] Although not an emergency regulation, the PTA conferred extraordinary powers on the executive branch (e.g. powers of arrest and detention) to deal with what it recognised as acts of terrorism. That in combination with the ever-present emergency powers, which were sanctioned by the Constitution, provided a formidable legal framework to entrench the state of exception. The omnipotence of the executive presidency created by the second republican constitution (1978) amplified the potency of those exceptional powers.

Sri Lanka had become the quintessential 'National Security State', the vestiges of which have not been shaken off even five

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[1] The Public Security Ordinance, No. 25 of 1947 (as amended).

[2] Section 29 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 declared that the law will be operative only for three years from the date of commencement. However, that provision was repealed by the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No.10 of 1982.

years after the end of the civil war in the north-east in May 2009. In short, ruling under extraordinary powers has become the dominant ethos of governance in Sri Lanka. When many a country enacted anti-terrorism laws in the aftermath of 9/11, Sri Lanka could boast of the dubious distinction of being an experienced 'elder' state in such matters with a substantial corpus of extraordinary laws, attendant state practice, and jurisprudence.

Nearly fifteen years ago, i.e. when rule under emergency in Sri Lanka had reached close to twenty years of existence, I published an article examining judicial responses to state violence emanating from the prevailing states of exception.[3] There I argued that the Supreme Court, after an initial period of deference to the executive, had gradually changed its original stance and had by the late 1980s become an advocate for establishing the rule of law within the context of emergency. Witness to the continuing states of emergency and the accompanying abuse of authority, the court began to strictly scrutinise executive use of emergency powers. In a string of fundamental rights judgments, the court laid down limits on the restriction of constitutional rights under emergency powers. Admittedly, the court had the advantage of a greater degree of judicial independence then and the incumbency of a few activist justices, in particular the late Justice Mark Fernando.

The objective of this essay is to expand the scope of enquiry by examining the evolution of the public security discourse in Sri Lanka's constitutional debates in the past century, and how the makers of both republican constitutions of Sri Lanka, *contra* the Independence Constitution (the Soulbury Constitution), embraced that debate and gave constitutional expression to states of exception. It will examine how constitutional provisions on public security were used instrumentally under both republican constitutions by successive political regimes and how such instrumentalisation negated fundamental tenets of democratic governance. The essay, however, will not engage in a study of specific legal technicalities pertaining to the operation of emergency powers.

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[3] D. Udagama, '*Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*' (1998) ***Harvard Human Rights Journal*** 11: pp.269-294.

First, I will place the evolving constitutional debate on public security in Sri Lanka in historical perspective. Thereafter, I will examine the three constitutions that have operated in post-independence Sri Lanka in relation to public security, and then move on to state practices that evolved in operationalising states of emergency. In order to place such provisions and practices in broader relief, those will be assessed against the yardstick of international human rights law obligations of Sri Lanka. The discussion will then move on to whether the anticipated system of checks and balances operated satisfactorily to blunt the force of this exceptionalism. In particular, judicial scrutiny of emergency measures will be focused on. The final part of the chapter will set out conclusions and prognostications.

Historical Perspectives: An Ironic Legacy

Republicanism and States of Emergency

One of the major ironies of republicanism in Sri Lanka is that rule under states of emergency, or rule by exception, became the norm in the republican era than during any other period of modern political history, British rule included. While the British colonial authorities too used exceptional laws to good measure in order to deal with dissent, as in the case of declaring martial law during the 1848 riots in the Kandyan regions, there was a quick return to the *status quo ante*. That episode saw the colonial authorities court martial and execute several persons and banish others among the harsh measures taken to quell the rebellion. However, as Kumari Jayawardena points out, the high-handed policies of the administration gave rise to vehement protests by some officials who went so far as to demand the recall of Governor Torrington. Eventually, the colonial government's policies were subject to a Parliamentary Committee of Enquiry whose members included future Prime Ministers Gladstone and Disraeli.[4] While the injustices perpetrated by and the harshness of colonial rule cannot be gainsaid, it also has to be recognised that there often were

[4] K. Jayawardena (2010) ***Perpetual Ferment: Popular Revolts in Sri Lanka in the 18th and 19th Centuries*** (Colombo: Social Scientists' Association): pp.105-109.

corrective countervailing checks from within the official system and through protests of anti-colonial elements in British civil society.

A state of emergency was already in existence when the Republic of Sri Lanka was declared on 22nd May 1972 with the adoption of the first republican constitution.[5] On 16th March 1971, a state of emergency was declared under the PSO by the left-leaning United Front (UF) government[6] of Prime Minister Sirima R. D. Bandaranaike to deal with the growing insurgency of the Janatha Vimukthi Peramuna (JVP).[7] What is not common knowledge, however, is that a state of emergency had been declared a few months prior to that by the UF government for purposes of demonetisation. It was a policy spear headed by the then Minister of Finance Dr N. M. Perera, a stalwart of the Trotskyite Lanka Sama Samaja Party (LSSP). The Emergency Regulations (ERs) adopted on 26th October 1970[8] for that purpose required the invalidation and surrender of existing currency notes. The demonetisation policy was adopted in pursuance of the socialist reform agenda of the government with the objective of flushing out 'black money' in the market. Although the Prevention of the Avoidance of Tax Act came into effect on 1st November 1970, the emergency was extended on 25th November for another month.[9] That emergency powers were resorted to for such a regular purpose, and that too by a règime with strong Marxist partners, gives an insight into the governing ethos of the strongly republican UF coalition. The Left's embrace of the PSO while in office is palpably ironical in that left-wing political parties in Sri Lanka had consistently opposed the adoption and operation of the PSO.[10]

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[5] In general see S. Wickremasinghe, '*Emergency Rule in the Early Seventies*' in A.R.B. Amerasinghe & S.S. Wijeratne (Eds.) (2005) ***Human Rights: Theory to Practice*** (Colombo: Legal Aid Commission): p.375.

[6] The United Front government comprised the left of centre Sri Lanka Freedom Party headed by Prime Minister Bandaranaike, the Trotskyite Lanka Sama Samaja Party (LSSP) and the Communist Party of Ceylon (Moscow Wing).

[7] See Prime Minister's statement in Parliament explaining the reasons for the declaration of a state of emergency on 16th March 1972 in the Hansard, Vol.93: Col.2207 – 2211 (23rd March 1971).

[8] Gazette No.14929/9 of 26th October 1970.

[9] Wickremasinghe in Amerasinghe & Wijeratne (2005): p.378.

[10] Further developed below.

The state of emergency declared on 16th March 1971 was already in operation when the first JVP insurrection took place on 5th April 1971. The insurrection was quickly crushed using extraordinary powers under emergency, giving rise to widespread allegations of serious human rights violations including prolonged (often administrative) detention, torture, and involuntary disappearances.[11] It was, in fact, in the aftermath of that violence that the Civil Rights Movement (CRM), the first non-governmental human rights organisation in the country, was formed. It was to consistently question abusive actions of the UF government and its successors under continuing states of emergency.[12] The CRM and other subsequently formed human rights organisations had work cut out for them in the coming decades. States of emergency continued to operate in the island from the early 1970s until September 2011 with only brief interludes.

There was a long interregnum between July 2001 and August 2005 during which rule by emergency powers lapsed. The loss of the parliamentary majority of the People's Alliance (PA) government headed by incumbent President Chandrika Bandaranaike Kumaratunga paved the way for the lapse of emergency on 4th July 2001.[13] That month there was no motion presented to parliament to extend the existing state of emergency. However, a series of regulations under the PTA were gazetted commencing on the same date to compensate for that gap in extraordinary powers, one of which proscribed the Liberation Tigers of Tamil Eelam (LTTE). Additionally, the President using powers under Part III of the PSO called out the armed forces to maintain public order in specified areas and also designated certain services as essential services within the meaning of PSO.[14] Arrests and detention pertaining to the security situation were covered by provisions of the PTA.

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[11] See Amnesty International, *Report on a Visit to Ceylon*, September 1971.
[12] See for CRM interventions in its early years S. Wickremasinghe & M. Fonseka (Eds.) (1993) ***21 Years of CRM*** (Colombo: Civil Rights Movement publication).
[13] L. Nasry, '*Emergency Exit*', ***The Sunday Times***, 8th July 2001.
[14] Parliament of Sri Lanka (2001) '*Maintenance of Public Order: Orders and Regulations*' in Hansard, Col.1707 (6th July 2001).

Thereafter, the Norwegian brokered ceasefire between the government of Sri Lanka and the LTTE came into effect in February 2002, and lasted until August 2005. Under the Ceasefire Agreement 2002,[15] the PTA was to cease application and arrests were to be made under the normal law (clause 2.12). However, a state of emergency was again declared in August 2005 consequent to the assassination of Foreign Minister Lakshman Kadirgamar.[16] Although at that time the Ceasefire Agreement was technically in force, for all practical purposes it had irretrievably broken down much earlier. The Ceasefire Agreement itself was officially abrogated in January 2008[17] by the government of President Mahinda Rajapaksa and the government's military offensive to crush the LTTE intensified.

The prolonged states of exception lasting nearly four decades were justified by successive governments primarily on the basis of political violence and uprisings, both in the south and in the north-east of the country. Emergency powers were also used from time to time to crush labour unrest.[18] The JVP uprisings in the south (1971 and 1987-88) were spearheaded by disgruntled Sinhala youth of the majority ethnic community. The uprising in the north and the east, which eventually metamorphosed into a civil war that lasted 26 years, was launched by disgruntled Tamil

[15] The Ceasefire Agreement (2002), available at: http://peaceinsrilanka.lk/negotiations/cfa (accessed 23rd December 2014).
[16] The proclamation of the state of emergency was published in Gazette No.1405/13 of 13th August 2005. ERs under that state of emergency were published in Gazette No.1405/14 of 13th August 2005.
[17] The Government of Sri Lanka officially announced its intention to withdraw from the Ceasefire Agreement (2000) on 2nd January 2008. The Agreement stood terminated on 16th January 2008. For '*Statement by the Ministry of Foreign Affairs*' in that regard see: http://www.priu.gov.lk/news_update/Current_Affairs/ca200801/20080118cfa_stands_terminated.htm (accessed 23rd December 2014).
[18] For example, President J.R. Jayewardene invoked emergency powers on 16th July 1980 to deal with a general strike. The Emergency Regulations promulgated for that purpose included the death penalty for some offences, admission of confessions made to police officers and the freezing of trade union accounts. Eventually, approximately 40,000 workers lost their jobs as they were deemed to have vacated their jobs. The July 1980 strike is considered to be a turning point in trade unionism in Sri Lanka. The CRM issued a statement urging the government not to use emergency powers as a weapon to oppose legitimate trade union rights of trade unions. See Wickremasinghe & Fonseka (1993): para.119.

youth of the major minority ethnic community in the country. That universal sense of disquiet and disgruntlement, stemming from a sense of marginalisation based on reasons that vary (class, caste, ethnicity), reflect the inability of the political elite to engage in effective nation-building after the grant of independence in 1948. In *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*[19] provides ample discussion and in-depth analyses on the failure of the 1972 Constitution to establish an inclusive form of republicanism. It is trite that the constitution itself exacerbated existing ethnic cleavages and suspicions by adopting a strong majoritarian orientation.

The ensuing political fragmentation set in motion violent opposition to the state. The state in turn, unfortunately, thought fit to respond violently through the entrenchment of rule by exception rather than through attempts to find effective solutions via consultative democratic processes. Thus, this vicious cycle continued for decades with the violations caused by extraordinary laws adding to and amplifying the original set of grievances. Even though emergency is no longer in force, the overpowering impact that rule by extraordinary powers has had on the collective psyche and political imagination of Sri Lankans will continue to haunt the nation for quite a long time to come. Militarisation of many spheres of civilian activity has become the norm at present.[20]

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[19] A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at Forty: Reflections on Constitutional History, Theory and Practice***, Vols. I & II (Colombo: Centre for Policy Alternatives).

[20] For example, at present the subject of urban development comes under the Ministry of Defence. The powerful Secretary of Defence, Gotabhaya Rajapakse, brother of President Rajapakse oversees urban development activities. More significantly, all students who have qualified to enter the public university system in the country have to follow a mandatory two week "Leadership Training Program" conducted by the military in military camps across the country. "Leadership Training" programs for principals of public schools are also being conducted in military camps. Upon completion of such trainings they have been conferred with the military title of "Brevet Colonel". The recent death of such a trainee principal brought out torrents of protests from the public. However, the late principal had thought that by securing a military title he could attract more attention to the school. See report at: '*Writing on the Blackboard for Military Principals*', ***The Independent*** <http://www.theindependent.lk/news2/375-writing-on-the-blackboard-for-military-principals>. The military strategy that secured victory over the LTTE in 2009 is officially idealized as the model for success in all spheres of activity.

If republican politics spawned an era of rule by exception, that political irony was clearly portended by the manner in which local politicians who were agitating for self-rule readily embraced a strict public security regime on the eve of independence from British rule. The PSO was rushed through the State Council (the legislature under the Donoughmore Constitution of 1931) and adopted on 11th June 1947.[21] Ceylon gained independence a few months later, on 4th February 1948. All political parties which formed governments in independent Sri Lanka have displayed a ready inclination to govern under the law of the exception. Particularly ironical was the eventual reliance on the PSO by the left politicians when they later assumed political power as coalition partners of the UF government in 1970.[22] All Marxist parties in Sri Lanka, whether represented in the State Council or not, were avowedly against the adoption of the PSO. They consistently saw it as a 'reactionary' piece of legislation calculated to crush the left parties and the labour movement.[23]

The popular perception is that the PSO was a product of the colonial British establishment adopted to crush political activism of its 'native' colonial subjects. On the contrary, it was essentially a creature of 'native' politics masterminded by the local political elite then waiting in the wings to replace the British. The primary motive for its adoption appears to be the crushing of radical activism of the Marxist parties. When the PSO was adopted the State Council was led by D.S. Senanayake, who went on to become the first Prime Minister of independent Ceylon a few months later.

Under the progressive constitutional reforms proposed by the Donoughmore Commission, the previous Legislative Council of Ceylon was replaced by a State Council consisting of 50 locally elected representatives, eight nominees of the Governor and three

[21] The legislative debate accompanying the adoption of the PSO is most enlightening. Hansard, Vol.1: Col.1980-2026 (1947).

[22] See, *supra,* text at fns.8-9, which describes how Dr. N. M. Perera (LSSP), Minister of Finance of the United Front government implemented a policy of demonetization under a state of emergency in 1970.

[23] See debate in Parliament on the amendment of the PSO in March 1949. Hansard, Vol.5: Col.2012-2026 (1948-1949).

Officers of the State (Chief Secretary, Legal Secretary, and Financial Secretary). The local representatives were to be elected on the basis of universal adult franchise that the Donoughmore Constitution (1931) had introduced. Aside from the historic granting of the vote to all adults, the new constitution had done away with the previous communally-based election system. Even though the new constitutional scheme conferred overriding powers to the Governor, in practice the Board of Ministers elected by the State Council wielded considerable authority.[24]

When the PSO was debated at bill stage in the State Council in June 1947, leading political figures in the independence movement such as D.S. Senanayake, S.W.R.D. Bandaranaike, and George E. de Silva were its major defenders. Efforts by fellow Council Members Bernard Aluwihare and Dr A.P. de Zoysa to introduce amendments to the bill that would make the proposed public security regime less harsh were consistently defeated by the bill's proponents. Mr. Aluwihare's attempts to introduce amendments that would cap the duration of a proclamation of emergency, require approval of such a proclamation by the State Council, and remove a clause that excluded judicial review of executive action under a state of emergency were all defeated by majority vote. So was an attempt made by Dr de Zoysa to remove a clause that permitted the suspension or amendment of existing laws through emergency regulations. Eventually, the Bill was adopted 33-7.[25] The following pithy comment of W. Dahanayake, Member for Bibile perhaps best captured the irony of the move:

> "I say that this Bill is something which no civilized society would consent to, least of all an Assembly of hon. Members. Yet I would conclude my remarks by saying that those who have approved this Bill are all honourable men."[26]

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[24] J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Sumathi Publishers): pp.25-29.

[25] The State Councilors who opposed the Bill were: B.H. Aluwihare, W. Dahanayake, A.P. de Zoysa, R.E. Jayatilaka, V. Nalliah, G.G. Ponnambalam, and S.A. Wickremasinghe. Hansard, Vol.1: Col.2025 (1947). Members of the Board of Ministers voted for the Bill.

[26] Ibid.

During the debate in the State Council the opponents of the bill chided the government for adopting such drastic measures because of their fear of political opponents (the Marxists) and the threat of widespread strikes (orchestrated by them).[27] Historian K.M. de Silva confirms those as the underlying reasons for the hasty passage of the bill. He points out that D.S. Senanayake "… paid exaggerated importance to the presumed threat from the left and took extraordinary steps to meet it."[28] The wave of general strikes and industrial agitation that took place in the period 1945-47 under the leadership of the LSSP had shaken the political establishment. The passage of the PSO and also the Trade Union (Amendment) Act , No. 15 of 1948, which tightened up rules in regard to registration of trade unions, were in response to that perceived threat.[29] That the left parties were serious political contenders at the 1947 general election held in August-September that year is a vital factor that cannot be overlooked.[30] Rather than serve British colonial interests, the adoption of the PSO, from all indications, appears to have been a home and home affair.

The PSO was subsequently amended several times.[31] In the context of the above discussion of the politics of the era, it is of interest that the government of Prime Minister D.S. Senanayake – now firmly ensconced as the first government in independent Ceylon – moved amendments to the PSO in 1949 to soften or 'democratise' the PSO by accommodating certain amendments that were previously suggested by the likes of Aluwihare and de Zoysa back in 1947. Among some of the improvements were the requirement that a proclamation of emergency had to be communicated to Parliament for its approval within ten days and also the removal of the extraordinary power of arrest without warrants. The left parties, while welcoming the relaxation of some

[27] See, in particular, speeches of Dr A.P. de Zoysa and Dr S.A. Wickramasinghe during the debate on 11th June 1947. Hansard, Vol.1: Col.2022-2023 (1947).
[28] K.M. de Silva (2005) ***A History of Sri Lanka*** (Vijitha Yapa & Penguin Books): p.605.
[29] Ibid: p.605-606.
[30] Ibid: p.606-607. In fact, the left-wing parties did so well at the 1947 general election that eventually the leader of the LSSP Dr N.M. Perera became the first Leader of the Opposition in independent Ceylon.
[31] The Public Security Ordinance No.25 of 1947 was amended by Acts No.22 of 1949, No.34 of 1953, No.8 of 1959, No.28 of 1988 and Law No.6 of 1978.

harsh provisions, nonetheless voted against the amendments citing their abiding disapproval of the PSO as a 'reactionary' piece of legislation aimed at silencing political opponents.[32]

The PSO was again amended in 1953 and 1959. Both amendments were subsequent to political violence experienced in the country. A successful left-led *hartal* (stoppage of work) which took place in 1953 in response to the curbing of food subsidies ended in violence with several losing their lives. Again, in 1958 there were ethnic riots in the backdrop of the rising tide of ethno-nationalism in national politics.[33] Predictably, emergency powers were widened in the aftermath of those violent incidents. For example, under the 1953 amendment a state of emergency could be declared by the Governor-General in view of an 'imminent' public emergency. Part III of the PSO, which provides extraordinary powers to the executive, such as calling out the armed forces even without declaring a state of emergency, was introduced by Act No. 8 of 1959.

In January 1978 the government of the then Prime Minister J.R. Jayewardene moved extensive amendments to the PSO incorporating several safeguards citing abuse of emergency powers by the previous United Front government[34] which governed the country under states of emergency from March 1971 – February 1977.[35] The 1978 amendments were mainly focused on increasing legislative oversight over the declaration and continuation of states of emergency. The requirement of parliamentary approval for extending a state of emergency beyond thirty days was introduced by Law No. 6 of 1978. While the 1978 amendments were salutary, their significance was lost in practice as Parliament became nothing more than a rubberstamp of the powerful executive presidency under the 1978 Constitution.

Despite the adoption of progressive amendments to the PSO in 1978, in July 1979 the government of President J.R. Jayewardene rushed the Prevention of Terrorism (Temporary Provisions) Bill

[32] Hansard, Vol.5: Col.2012-2026 (1948-1949) (debate held on 29th March 1949).
[33] de Silva (2005) at pp.608-612 and 626-638.
[34] Hansard, Vol.26: Col.616-618 (1978) (debate held on 31st January 1978).
[35] See Wickremasinghe & Fonseka (1993): p.19.

through Parliament as an 'urgent bill', denying public comment or, indeed, adequate study of and comment by the parliamentary opposition. The legislative move was justified by the government, citing increasing radicalisation of Tamil political groups in the north. It was the turn of the Sri Lanka Freedom Party (SLFP) (the main constituent party of the previous UF government) now in the parliamentary opposition to protest the adoption of that harsh law.[36] The PTA did not define 'terrorism' inasmuch as the PSO failed to define a 'public emergency.' It did confer extraordinary powers of arrest and detention by the police; permit administrative detention for up to 18 months and admission of confessions; impose a restrictive bail regime and punishments including forfeiture of property; and permit the prohibition of publications. The PTA was made permanent in 1982.[37] With the imposition of emergency rule on 18th May 1983 (one month before the ethnic pogrom of July 1983) and its continuation[38] through the years of the armed conflict in the north and east, the combined force of the PTA and emergency powers made for a lethal legal framework permitting governance under the law of exception.

It is abundantly clear that from its inception the PSO – and indeed the public security discourse in the country – were used in a politically instrumental manner by successive governments. The once principled opponent in the political opposition saw infinite merit in the relevance of the PSO when in power. As observed above, the most notable exemplars of this cynical trend were the left parties while serving as coalition members of the UF government in the early 1970s. The public security regime was continually used for purposes of consolidating political power in the guise of protecting the public from various 'threats.' Politics of

[36] See statement made by Maithripala Senanayake, MP (SLFP) during the debate on the Prevention of Terrorism (Temporary Provisions) Bill held on 19th July 1979 reproduced in B. Bastiampillai, R. Edrisinghe & N. Kandasamy (Eds.) (2008) ***Sri Lanka Prevention of Terrorism Act (PTA): A Critical Analysis*** (Colombo: CHRD): pp.273-277.

[37] See, *supra*, fn.2.

[38] It is noteworthy that a 1988 amendment to the PSO facilitated the continued operation of emergency regulations. Public Security (Amendment) Act No. 28 of 1988 provided for Emergency Regulations made under one state of emergency to continue under a subsequently proclaimed state of emergency.

fear, with a perpetual enemy around the corner, has become the norm. In fact today, contrary to justifiable expectations of a resurgence of liberal politics throughout the post-war years, dissent is identified and chastised by the political establishment as 'conspiracies.' Given the parochial political predilections of parties from the political right to the left, the fashioning of a principled public security regime in Sri Lanka with attendant liberal safeguards seems too high an ideal to realise.

The political history of the PSO typifies the ubiquitous tendency in Sri Lankan politics to instrumentalise liberal principles and systems. While on the one hand there is a seeming reliance on liberal democratic principles of governance, there is, on the other hand, the constant spectre of illiberal subversions with scant regard for accountability. This vastly compromised liberal ethos is at the heart of political crises in Sri Lanka. Senator Dr Naganathan succinctly pointed to that disjuncture during the 1949 Senate debate on the PSO:[39]

> "I want to emphasize again the fact that this Government, when copying provisions from the various emergency laws existing in the world, have omitted those very necessary safeguards which are contained in those laws … Under the British Emergency Powers Act [1920] … those regulations [emergency regulations] cannot be passed without the knowledge of Parliament … Here they have full power for one month to pass any kind of regulation and do anything they like."

[39] Hansard, Vol.2: Col.2623 (1948-1949) (debate on 19th May 1949). See also speech made by Senator Jayasena in the same debate in Col.2623-2624. In an impassioned speech made during the debate on proposed amendments to the PSO in 1953, Bernard Aluvihare, MP, a consistent opponent of the PSO, pointed to the famous Bracegirdle case (1937) 39 NLR 193, in which the attempts of the colonial government of Ceylon to expel an Australian planter with radical political ideas were stalled by judicial fiat. Pursuant to an application for a writ of habeas corpus filed by the LSSP, the colonial Supreme Court found Bracegirdle's detention and deportation to be illegal as the legal basis of the executive action was found to be faulty. Aluwihare pointed to the irony that the PSO adopted by local politicians had a clause which removed judicial review of executive action under emergency powers. Hansard, Vol.xv : Col.682-688 (1953-1954) (debate held on 18th August 1953).

The Post-Independence Constitutions and States of Exception

The public security regimes under the three successive post-independence constitutions of Sri Lanka provide further confirmation of a political legacy redolent with ironies. Unlike the Independence Constitution, both Republican Constitutions (1972 and 1978) gave constitutional recognition to the PSO and provided a constitutional framework in regard to public security. While on principle that may be salutary, the dilution of checks and balances in those two constitutions, in particular in the 1972 Constitution, made for a harsh public security regime. Even though the 1978 Constitution enjoys the infamy of creating the omnipotent executive presidency, at the inception it nevertheless had better safeguards on public security powers than its predecessor. Eventually, however, the political culture that evolved in the backdrop of an increasingly autocratic executive presidency had scant regard for such liberal niceties. Overall, the republican constitutional and political dispensations in Sri Lanka had not put much stock in liberal principles and practices. Constitutionalism continues to be a constant casualty of that variety of republicanism.

The Soulbury Constitution (Independence Constitution)

The Soulbury Constitution (Orders-in-Council, 1946/47)[40] adopted by the British colonial authorities on behalf of the soon-to-be independent Ceylon did not contain provision for situations of public emergency. Sir Ivor Jennings, widely acknowledged as the architect of that constitution, in his seminal publication on the Soulbury Constitution makes no mention of discussions or attempts to provide a constitutional framework in that regard.[41] The PSO adopted by the State Council in 1947 was invoked from time to time during the operation of that constitution. The Governor-General was required by the constitution to exercise

[40] The Soulbury Constitution refers to The Ceylon (Constitution) Order in Council (1946) read together with the Ceylon Independence Act (1947) and The Ceylon (Independence) Order in Council (1947).
[41] I. Jennings (1949) ***The Constitution of Ceylon*** (London: Oxford University Press).

powers of office "in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty…"[42] As the Governor-General was the authority which could make a proclamation of emergency under the PSO, it followed then that such powers could be exercised only on the advice of the Prime Minister in terms of British constitutional conventions.

The 1972 Constitution

As pointed out earlier, the first republican constitution of Sri Lanka (1972) was drafted, debated and finally adopted on 22nd May 1972 by the Constituent Assembly during an on-going state of emergency. The state of emergency, which was declared on 16th March 1971 to deal with the JVP insurgency, was still in operation then.[43]

The constitution which was adopted as an autochthonous instrument had explicit provision for giving constitutional recognition to the PSO and was deemed to be a law enacted by the newly created National State Assembly (legislature). It further provided that the titular President should act only on the advice of the Prime Minister in matters pertaining to a state of emergency.[44] What is significant here is not only that this was the first autochthonous constitution of independent Sri Lanka, but that the two leading Marxist parties in the country (The Communist Party of Ceylon and the LSSP) played a pivotal role in its formulation as influential coalition partners of the UF government. As discussed above, they were avowedly against the PSO as a 'reactionary' piece of legislation while in the political opposition but saw it as a useful tool while in political office.

Unlike other subjects of importance, the constitutional recognition of the PSO was not a subject that was put to a committee of the Constituent Assembly for further scrutiny and reporting back.

[42] The Soulbury Constitution: Section 4(2).
[43] See *supra* text at fns.5-7.
[44] The Constitution of Sri Lanka (1972): Article 134.

When the draft constitution was presented to the Assembly for adoption, an emotionally charged lone voice, assembly member Prins Gunasekera, questioned the 'double-faced' stance of the left on the PSO. Another, assembly member R. Premadasa, wondered why the PSO had to be singled out for special recognition when there was an omnibus provision in the draft (Article 12) which provided continuity for all existing written and unwritten laws. The explanation given by the Minister of Constitutional Affairs (a member of LSSP) was that as the PSO's operation had implications for other constitutional provisions, including legislative powers of the proposed National State Assembly, its recognition as a law 'deemed' to be adopted by that Assembly was necessary in order to avoid an interruption (note that a state of emergency was in operation at that time). Eventually, draft Article 134 on public security was adopted by a vote of 29-2 by the Constituent Assembly without amendment.[45]

The Sri Lankan Republic at 40[46] exhaustively maps and analyses the illiberal trajectories of the 1972 Constitution, which need not be repeated here. Suffice, however, to point out that features of the 1972 Constitution that considerably weakened the independence of the judiciary and the rule of law[47] denied sufficient checks on the public security regime. That constitutional framework did not provide for legislative oversight of public security measures. In fact, there is no evidence of the states of emergency being debated in the National State Assembly although emergency rule extended for approximately six consecutive years beginning in March 1971. Also, while the constitution's chapter on fundamental rights and freedoms did guarantee freedom from arbitrary arrest and detention and also the right to life, liberty, and security of the

[45] Constituent Assembly of Sri Lanka, *Official Report*, Vol.2: Col. 854-863.
[46] Welikala (2012).
[47] The 1972 Constitution provided a prominent role for the Cabinet of Ministers in matters involving the appointment and disciplinary matters pertaining to the judiciary and the civil service. Similarly, judicial review of legislation, which was permitted under the Soulbury Constitution, was removed. A Constitutional Court was established with powers to review legislative bills if challenged by the public within a week of being placed before the National State Assembly. That right of petition was lost if the Cabinet deemed a Bill to be 'urgent in the national interest.' In general see D. Udagama, '*The Fragmented Republic: Reflections on the 1972 Constitution*' (2013) ***The Sri Lanka Journal of the Humanities*** 39: p.93.

person, they were subjected to a vaguely-worded limitation regime 'in the interests of' national security and public order among other grounds. The constitution did not provide for a specific constitutional remedy to redress violations of fundamental rights.

The regression of democratic guarantees in the 1972 Constitution stood in stark contrast to the idealism with which autochthony was sought to be established by its creators. They were intent on the new constitution being adopted as an autochthonous constitution severing legal links with its predecessor, the Soulbury Constitution. One of the main points of contention in that regard was the perceived entrenchment of Section 29 (2) of the Soulbury Constitution which imposed limitations on legislative powers of parliament in order to prevent religion or community based discrimination. Asanga Welikala has discussed this matter *in extenso* concluding that, in fact, Article 29 (2) was not entrenched, thereby rendering the entire exercise of severing links with the Soulbury Constitution superfluous.[48] Whether there was a misreading of the Soulbury constitutional scheme or not,[49] the issue that needs to be addressed is why the 'constitutional revolution' that was launched to create the new republic was quick to adopt regressive measures when it was resolute in its rejection of a provision such as Section 29 (2) of the Soulbury Constitution which held out much potential for nation-building.

The 1978 Constitution and the Executive Presidency

The second republican constitution (1978) was paradoxical in its approach to governance. Although it did seem to be bent on

[48] A. Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution*' in Welikala (2012): p.145.

[49] The architect of the 1972 Constitution, Dr Colvin R. de Silva, later admitted that he did not think that Section 29 (2) was entrenched. See C.R. de Silva '*Safeguards for the Minorities in the 1972 Constitution*', a lecture delivered at the Marga Institute, Colombo on 20th November 1986 (A Young Socialist Publication, 1987): p.7.

correcting the assault on checks and balances by its predecessor, the introduction of an all-powerful executive presidency which was not effectively accountable to other branches of government extensively negated those good intentions.

The constitution incorporated a chapter on fundamental rights[50] which was more detailed than its previous counterpart.[51] Significantly, it introduced a constitutional remedy for violations or imminent violations of fundamental rights.[52] The right to seek that remedy was also recognised as a distinct right.[53] The remedy, however, was limited in scope in that it could challenge only executive or administrative action, had to be brought within a month of the alleged violation, and did not expressly recognise public interest litigation. Nonetheless, it was an improvement over the 1972 scheme and, as we shall see in part 5 of this essay, proved to be the main means of challenging excesses under emergency rule. It is also the case that progressive judgments of the Supreme Court, particularly in the latter part of the 1980s and throughout the 1990s, broadened the scope of the remedy.[54]

The constitution also strengthened the independence of the judiciary by establishing an independent Judicial Services Commission. Previously, the cabinet had a powerful say over the appointment, transfer, dismissal, and disciplinary action over the lower judiciary.[55] The 1978 Constitution was strengthened in regard to judicial independence with the adoption of the Seventeenth Amendment to the Constitution in October 2001 (adopted with rare unanimity among all political parties represented in Parliament). It established an independent Constitutional Council without the approval of which the President could not appoint justices to the superior courts.

[50] The Constitution of the Democratic Socialist Republic of Sri Lanka (1978): Ch.III.
[51] However, the right to life guaranteed by the 1972 Constitution was mysteriously dropped from the 1978 Constitution. Freedom from torture, which was conspicuous by its absence in the 1972 Constitution was guaranteed by its successor (Article 11 of the 1978 Constitution) and was also recognised as an entrenched clause (Article 83).
[52] The Constitution of Sri Lanka (1978): Article 126.
[53] Ibid: Article 17.
[54] Udagama (1998).
[55] The Constitution of Sri Lanka (1972): Sections 124-130.

Similarly, members of the Judicial Services Commission (other than the Chief Justice who chairs the Commission) could not be appointed by the President without the approval of the Constitutional Council.[56] Those features of the 1978 Constitution were vast improvements over the scheme of the 1972 Constitution and provided a relatively strong countervailing framework in checking abuse of authority through judicial review.[57]

Chapter XVIII of the 1978 Constitution, which is entirely on the subject of public security, provides for legislative oversight of states of emergency – a feature absent in the previous constitution. In early 1978 (i.e. before the enactment of the 1978 Constitution) the Jayewardene government made significant amendments to the PSO with the stated intention of introducing liberal safeguards to the public security regime.[58] To a great extent, the constitutional chapter reflects the 1978 amendments to the PSO.

Under the constitutional chapter on public security, the PSO (as amended) is given constitutional recognition. A proclamation made by the President under the PSO declaring a state of emergency is required to be communicated to Parliament 'forthwith.' Such a resolution will lapse in 14 days unless approved by Parliament. The resolution once approved will be valid for a period of 30 days from its making unless revoked earlier. Provision is also made to ensure legislative approval in situations where Parliament is either dissolved, adjourned, or prorogued, by requiring its summoning. Originally, the chapter contained a provision that required a two-thirds majority of all members (including those not present) for approval of a proclamation of emergency made when a state of emergency had been in force for a total of 90 days within a consecutive period of six months. However, that provision was removed by the Tenth Amendment to the Constitution adopted in August 1986,

[56] The Seventeenth Amendment to the Constitution (2001): Article 41 (c).
[57] It is significant that the Civil Rights Movement of Sri Lanka in a strongly worded public statement (No. 4/8/82) opposed calls made in 1982 by opposition circles for a restoration of the 1972 Constitution. Wickremasinghe & Fonseka (1993): para.155 at p. 41.
[58] See *supra* text at fn.32.

permitting the extension of an already lengthy period of emergency by a simple majority. [59]

When ethnic violence broke out in Colombo in July 1983, the country was already under the state of emergency declared on 18th May that year. Violence in the north-east intensified thereafter and metamorphosed into a three-decade long civil war. The country was continuously under a state of emergency from then onward with a brief interlude in January 1989 and a longer one between July 2001 and August 2005.[60] The Tenth Amendment facilitated the prolongation of emergency with greater ease.

Despite the constitutional safeguards and the initial declaration of good intentions by the Jayewardene regime, a culture of authoritarianism, political violence, and governance by extraordinary means was soon institutionalised. An incumbent president[61] who had the privilege of fashioning a constitution according to his own will – and thereby powers of his office – coupled with a parliamentary majority of five-sixths obtained under the first-past-the-post election system of the 1972 Constitution,[62] proved to be a ready recipe for authoritarianism. Negative features of the 1978 Constitution itself wrought part of the damage. For example, under Article 163 all judges of the

[59] See for '*History of Amendments to the 1978 Constitution'*, http://www.priu.gov.lk/Cons/1978Constitution/ConstitutionalReforms.htm (accessed 23rd December 2014).

[60] See Wickremasinghe & Fonseka (1993): pp.45-57. Also, see *supra* text at fns. 13 and 14.

[61] By the time the 1978 Constitution was adopted, the executive presidency had already been established by the Second Amendment to the 1972 Constitution. The amendment was orchestrated by the government of then Prime Minister J.R. Jayewardene who was elected into office at the 1977 general election. Jayewardene took oaths as the first executive president on 4th February 1978. The 1978 Constitution was adopted on 17th August 1978. See Cooray (1995): pp.75-81.

[62] A general election was not held immediately after the adoption of the 1978 Constitution. In fact, President Jayewardene sought to prolong the term of the Parliament elected in 1977 under the 1972 Constitution via a referendum. The 1982 referendum is remembered as one of the most violent electoral events held in Sri Lanka. The government declared that it had won the referendum and the incumbent Parliament continued for another six years. The first general election under the 1978 Constitution was held only in 1989.

Supreme Court and the High Courts who held office immediately before the constitution entered into force ceased to hold office. The President then dropped 13 of the former judges and appointed a group of 8 new justices and retained some others.[63] The new Chief Justice, Neville Samarakoon, was appointed to that position directly from the bar, ignoring the principle of seniority. Justice Samarakoon who asserted the independence of the judiciary once on the bench was later to be infamously impeached by Parliament through presidential fiat.[64] Again in September 1983, judges of the Supreme Court and the Court of Appeal were locked out from courtrooms on the basis that they had allegedly failed to take an oath under the Sixth Amendment to the Constitution (which outlawed separatism).[65] The effectiveness of the much-heralded constitutional remedy on fundamental rights was also seriously undermined by governmental actions in the early 1980s, which blatantly defied judicial orders.[66]

Aside from the rapid erosion of independence of the judiciary, the early 1980s also witnessed the rapid rise of sectarian violence (e.g. the burning of the Jaffna Library in May 1981 in the run-up to the District Development Council election in Jaffna) and the phenomenon of politically affiliated goon squads attacking trade unionists, students and the like who were thought to be anti-government. The practice of rushing crucial legislative bills through Parliament also came to be a common feature during this period. The PTA was one such bill that was rushed through in 1979 as an urgent bill, thereby denying public commentary. The legislative process was instrumentalised to achieve existential political goals of the United National Party (UNP) in power such as the deprivation of civic rights of former Prime Minister Sirima

[63] See Wickremasinghe & Fonseka (1993): p.24. The best catalogue of political events during the 1980s and early 1990s is to be found in this publication.
[64] Ibid: p.47.
[65] Ibid: p.46.
[66] E.g., a senior police officer against whom the Supreme Court had made a finding in a fundamental rights case was promoted by the government and in another instance homes of Supreme Court judges who had rendered a judgment against governmental interests were attacked by groups of thugs who appeared to have state patronage.

Bandaranaike who was also thereby denied the right to participate in presidential and parliamentary elections. As opposition to anti-democratic measures mounted, emergency powers were used to crush such moves whether in the north (in the context of deepening ethnic conflict) or the south (as in the crushing of the July 1980 strike).

The nature of presidential politics of the early 1980s set the tone for the future of the presidency. Democratic institutions and processes were subverted for narrow political ends, and so also the law relating to states of exception. The adoption in September 2010 of the controversial Eighteenth Amendment to the 1978 Constitution on the imprimatur of incumbent President Mahinda Rajapakse – which vastly increased presidential powers in the triumphalist aftermath of the end of the civil war – is the brash and unapologetic culmination of the 1980s brand of presidential politics.

The Eighteenth Amendment replaced the consultative model of governance introduced by the Seventeenth Amendment. It made the President the sole authority in charge of appointing judges to the superior courts and, indeed, members to independent bodies, such as the Judicial Services Commission, the Human Rights Commission and the Police Commission. The President has to seek only the 'observations' of the Parliamentary Council (as opposed to a binding consultative process as under the Seventeenth Amendment) in matters relating to those appointments. Significantly, the two-term limit of the presidency imposed by the 1978 Constitution was abolished.[67] An already extraordinarily powerful presidency, made more so by a weak democratic political culture, was thus made constitutionally monolithic. The amendment was rushed through Parliament as an urgent bill and was adopted by a two-thirds majority. That majority was obtained by several opposition MPs crossing over to government ranks prior to the vote. The Supreme Court too sanctioned the bill, with the Chief Justice delivering the unanimous judgment of the Court.[68]

[67] The Constitution of Sri Lanka (1978): Article 31(2).
[68] See the Eighteenth Amendment judgment of the Supreme Court, S.C. (S.D.) No. 01/2010, Supreme Court Minutes, 31st August 2010. The reproduction of the

The manner in which the presidential form of government has evolved in Sri Lanka through cycles of political violence and rule by exception gives rise to a legitimate question as to whether, even in the absence of a formal state of emergency, governance is defined more by the rule of exception than the norm. A political ethos that views the constitution, laws and systems as existential tools; that privileges political patronage over meritocracy; extra-legal measures over democratic processes, and views liberal concepts such as the rule of law and checks and balances as inconvenient impediments, is certainly one which has internalised an exceptionalist view of governance.

Major Features of Rule by Exception in Sri Lanka

As pointed out in the introductory part, this essay does not intend to discuss the legal technicalities associated with the adoption or implementation of emergency measures in Sri Lanka. There is already a strong body of literature in that regard.[69] The Nadesan Centre based in Colombo has engaged in sustained work archiving and analysing emergency regulations.[70] What is

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judgment in Hansard can be accessed at: http://www.scribd.com/doc/37191734/SC-Decision-on-Bill-of-18th-Amendment (accessed 23rd December 2014). It is of interest that the judgment, *inter alia,* took the position that the removal of the term limits of the presidency enhances the right to the franchise of the people (as part of the people's sovereign rights articulated under Articles 3 and 4 (e) of the 1978 Constitution) as it gives people the opportunity to re-elect a person of their choice without restriction. The court did not discuss the theoretical underpinnings or practice relating to constitutional term limits. The judgment was all the more problematic as there already was concern that the Chief Justice's spouse had accepted a lucrative political appointment offered by the incumbent government.

[69] Chapters on emergency rule in the annual ***State of Human Rights in Sri Lanka*** published by the Law & Society Trust beginning in 1993 provided analyses and annual updates. In addition, reports by Amnesty International, Human Rights Watch, and the International Commission of Jurists provided important analyses on human rights issues emerging from prolonged rule by emergency. For a theoretical analysis, see A. Welikala (2008) ***A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*** (Colombo: Center for Policy Alternatives).

[70] See the Nadesan Centre, *Emergency Law*, DOCINFORM No. 31 (1992), No. 41 (1992) & No. 65 (1994) and the Nadesan Centre (2009) *Emergency Law*, Vol.4 & 5 (Colombo: the Nadesan Centre)). The chapters analysing the

intended to achieve in this part of the essay is two fold: first, it will highlight the salient features of the emergency regimes that were in operation from the early 1970s until the lifting of the last state of emergency in August 2011, and secondly to discuss the impact of emergency measures on human rights and liberal principles of governance. Eventually, the discussion will focus on the manner in which the exception, which is meant to be temporary, fashioned the norm.

Beginning in 1971, proclamations of emergency were continually made by successive regimes under provisions of the PSO empowering the President to do so *in the interests of* "public security and the preservation of public order or for the suppression of mutiny, riot or civil commotion or for the maintenance of essential supplies and services essential to the life of the community" (Section 2). As there are no specific criteria provided to determine the existence of a state of emergency nor a definition of a public emergency, such proclamations can be made on the subjective assessment of the President. As pointed to above, unlike under the 1972 Constitution, proclamations of emergency were presented for parliamentary approval under the 1978 Constitution. However, with its near absolute deference to presidential authority, Parliament ritually approved the renewal of the existing state of emergency every 30 days without meaningful scrutiny of its necessity. It must be admitted that except for a brief period commencing in 2001 successive Presidents have commanded a majority in Parliament. Even then, a robust legislative tradition could have provided a measure of effective scrutiny.

Having made a Proclamation of Emergency invoking Part II of the PSO, by virtue of Section 5 (1) the President could then 'legislate' via the adoption of Emergency Regulations (ERs) "as appears to him (*sic*) to be necessary or expedient in the interests" of securing the purposes for which a state of emergency was proclaimed. Section 5 (2) (d) permits the President, *inter alia,* to adopt ERs which would "provide for amending any law, for

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operation of emergency laws published in the ***State of Human Rights in Sri Lanka*** referred to in fn.69, *supra*, were contributed by Nadesan Centre researchers.

suspending the operation of any law and for applying any law with or without modification." However, Article 155 of the 1978 Constitution provides that no ER can be in contravention of the constitution. That constitutional stricture paved the way for judicial review of ERs.[71]

From the early 1970s the practice was that after the declaration of a state of emergency, Emergency (Miscellaneous Powers & Provisions) Regulations (EMPPR) would be adopted providing for wide executive powers covering many areas of activity. Individual ERs would then be added on as and when the President thought necessary. The ERs empowered various officials, such as the Secretary to the Ministry of Defence or specially appointed Competent Authorities, to make emergency orders in order to operationalise emergency powers (Section 6 of the PSO).

Generally, an EMPPR would contain provision for extraordinary powers of arrest and detention that would include arrest without warrant, prolonged detention in police custody, and administrative detention. Most EMPPRs have permitted preventive detention whereby a person could be administratively detained for a lengthy period purely on the basis that the authorised official fears that such person could engage in behaviour inimical to public security *in the future*. While judicial scrutiny of detention was minimal under ERs, they also usually restricted the granting of bail to detainees by ousting traditional judicial discretion in bail matters. ERs also permitted wide powers of search and seizure. Those extraordinary powers paved the way for arbitrary arrests and detention, widespread torture, involuntary disappearances, and custodial deaths.[72] As Suriya Wickremasinghe observes, emergency powers of arrest and detention were often used against political opponents on flimsy grounds.[73] Continuing with that tradition, today dissent is viewed

[71] See *infra* discussion in Part 5.
[72] A large number of reports by both local and international human rights organisations have documented the impact of emergency laws on human rights and governance in general, see fn.69. See, in particular, International Commission of Jurists (2009) ***Sri Lanka: Briefing Paper, Emergency Laws and International Standards***.
[73] Wickremasinghe in Amerasinghe & Wijeratne (2005): pp.382-383.

as a security threat (often referred to as 'political conspiracies' in the current political lexicon) than a legitimate democratic right.

EMPPRs also altered rules of evidence and criminal procedure in regard to emergency detainees. For example, confessions would be admissible as evidence when the Evidence Ordinance (normal law) would not permit it. Similarly, provisions of the Prisons Ordinance which regulated entitlements of prisoners, such as those which permitted visitation rights and the right to meet lawyers or engage in correspondence, would be deemed inapplicable to categories of detainees. Another particularly sinister ER was that which permitted the police to take charge of dead bodies and dispose of them disregarding normal legal provisions relating to inquests or any other formality. Custodial deaths, for example, went unchecked under those provisions.

EMPPRs also provided for censorship, usually with a Competent Authority being appointed as the official censor. The types of censored news (e.g. news about the civil war) or banned publications would vary from time to time. Trade union rights constantly came under heavy restrictions under ERs. As pointed out above, the PSO, from its inception, was constantly used to crush strikes. Such heavy-handed measures were universally used by both conservative governments as well as left-oriented ones. So, for example, while President Jayewardene crushed the general strike of 1980 using emergency powers and rendered thousands of striking public sector workers jobless, the UF government with Marxist parties as coalition partners similarly crushed the bank clerks' strike launched in 1972 demanding higher pay and dismissed the striking workers under emergency powers.[74] The angle that is used in such instances is the extraordinary powers granted during emergencies for the provision of essential services and supplies. If any service is deemed essential in the public interest under an ER, then drastic measures can be taken under emergency powers including the forfeiture of property of striking workers. During the Rajapaksa government, labour strikes and trade union activity critical of the political *status quo* were increasingly characterised as political threats to the regime than the legitimate exercise of democratic rights.

[74] Ibid: pp.387-388.

The PTA too contains similar provisions, although as part of regular legislation. In other words, it is a 'normal' piece of legislation that permits extraordinary measures in contravention of other existing legislation. The PTA permits, *inter alia*, arrest, search and seizures without warrant; remanding of detainees in police custody; administrative detention up to 18 months and also house arrest; detainees to be kept in *any* 'authorised' place; limits judicial discretion over bail; alters normal rules of evidence and procedure including permitting the admissibility of confessions; and permits censorship of specified news and prohibition of publications. The provisions of PTA are to prevail over any other legislation (Section 28).

When emergency rule prevailed in the country there were three parallel systems under which law enforcement was possible: the normal law, the emergency regime, and the PTA regime. The wide choice of powers available added a new flavour to law enforcement. Officials (not only police officers but others including military personnel authorised by exceptional laws) could strategically pick and choose the legal regime under which action was to be taken. For example, arrest and detention under one regime could technically be converted to an arrest and detention under another as was thought expedient by the authorities, and in that way prolong a person's detention without trial.

As rule by emergency extended for years and then decades, incumbent presidents appear to have treated the use of emergency powers in a routine, if not casual, manner for purposes of general governance. A study conducted in 1993 by the Centre for the Study of Human Rights (University of Colombo) and the Nadesan Centre,[75] analysing ERs in operation at that time in regard to their compliance with human rights standards, revealed startling executive practices. It was found that subjects such as quality control of salt, setting up of school boards, banking, and forestry were regulated by the President through ERs.[76] What

[75] The principal researchers of the study were Suriya Wickramasinghe of the Nadesan Centre and the present author.

[76] Centre for the Study of Human Rights & Nadesan Centre (1993) ***Review of Emergency Regulations*** (Colombo: University of Colombo): pp.6-7. The following subjects which had no relation to a state of emergency were found to

emerged was that ruling via fiat of emergency powers had become a habit. Governing in that manner was obviously more convenient than following normal democratic processes, which required time and extensive consultations. Such tendencies give credence to Carl Schmitt's absolutist theory on states of exception, which posits that such situations are beyond the pale of law; they are determined by sovereign authority and are governed purely by the political.[77]

It was also the case that although ERs were gazetted for public notification, there was no central or comprehensive official compilation of ERs. Therefore, it was extremely difficult to identify all operative ERs and also those ERs which had been revoked. The researchers in the 1993 study had to spend a great deal of time attempting to locate all the operative ERs, discovering with dismay that not even the Attorney General's Department – which had considerable powers over detainees under the ERs – had a comprehensive compilation. The primary casualties of that irregularity were obviously the rule of law and democratic governance.

The last state of emergency was permitted to lapse on 31st August 2011, just over two years after the ending of the civil war in May 2009. It was permitted to lapse only after the President had issued regulations under Section 27 of the PTA facilitating executive powers, particularly over detainees, remandees and surrendees.[78]

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be regulated by ERs: encroachment on state and private land, adoption of children, banking, commissions of inquiry (including on subjects not relating to emergency), customs, edible salt, finance companies, forestry, issue of driving licenses and validation of driving licenses, prevention of subversive political activity (ER very broadly couched to include non-emergency situations), school development boards and provincial boards of education). The ERs in operation at that time also amended the Monetary Law Act and the Universities Act.

[77] C. Schmitt (1985) ***Political Theology: Four Chapters on the Concept of Sovereignty*** (MIT Press).

[78] Just before the state of emergency lapsed on 31st August 2011, the following regulations made under the PTA were officially proclaimed by President Rajapaksa: Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam), Regulation and Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) Nos. 1 & 2 of 2011, published in Gazette No.1721/2 of 29th August 2011; Prevention of Terrorism (Extension of Application) Regulations No.3 of 2011, published in Gazette No.1721/3 of 29th August 2011; Prevention of Terrorism (Detainees and Remandees) Regulations

The PTA regulations were similar in scope to the lapsed ERs. Additionally, the President could invoke powers under Part III of the PSO to call out the armed forces even in the absence of a state of emergency.

Sri Lanka does not seem to be able to shake off the legacy of rule by exception. As pointed out earlier, that legacy has made an indelible mark in the governing political ethos. For example, in a recent criminal investigation concerning the murder of a businessman, the suspects, among whom is a Deputy Inspector General of Police, were detained under the PTA.[79] The case is clearly one which ought to be governed by the ordinary criminal law and criminal procedure. As the PTA does not provide a definition of terrorism, but only a catalogue of offences falling within its purview, there does not appear to be a technical barrier to using the PTA in this instance other than, of course, respect for basic features of the rule of law. The choice of law in this case well

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No.4 of 2011, published in Gazette No.1721/4 of 29th August 2011; Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No.5 of 2011, published in Gazette No.1721/5 of 29th August 2011. It is interesting to note that under Section 27 of the PTA it is the minister, and not the President, who is authorised to issue regulations. Under the PTA Regulation No. 4 of 2011, those who were remanded into custody by a Magistrate under ERs could, upon the expiration of the ERs, be held under the PTA. Similarly, a person who was initially detained under ERs could now be detained under a detention order made under the PTA. See comments of the UN Committee Against Torture in its Concluding Observations on Sri Lanka's combined third and fourth periodic report under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/LKA/CO/3-4 (8th December 2011): para.10. The Committee Against Torture which monitors the implementation of the Torture Convention by its States Parties (which includes Sri Lanka) was very critical of the adoption of the PTA regulations before the state of emergency lapsed. It also pointed out that the PTA regulations took away some of the safeguards which had gradually been built into the emergency regime.

[79] '*90 day dentetnion for DIG Vaas*', ***Ceylon Today***, 12th June 2013, available at: http://www.ceylontoday.lk/27-34772-news-detail-90-day-detention-for-dig-vass.html (accessed 23rd December 2014). See also '*Arrest Warrant on DIG's Son*', ***The Sunday Times***, 13th July 2013, available at: http://www.sundaytimes.lk/130714/news/arrest-warrant-on-digs-son-52937.html (accessed 23rd December 2014). In the latter news report, lawyers for the detainee were quoted expressing confusion over whether the criminal investigation of the case against their client was conducted under the normal law as the detention was under the PTA.

illustrates the ordinary tendency of the authorities to use extraordinary measures if it is thought expedient to do so.

The Judiciary and Rule by Exception

The Legal Framework

As previously discussed, the 1978 Constitution put in place certain safeguards to prevent the abuse of emergency powers. One safeguard was parliamentary oversight over the proclamation and extension of a state of emergency. However, the expected check did not materialise as Parliament became a rubberstamp of the executive presidency. The other safeguard was that ERs were subject to provisions of the constitution (Article 155 (2)). It was that constitutional provision which paved the way for judicial review of emergency measures[80] (both ERs and executive orders made under ERs) notwithstanding any statutory or other bar which excluded such review.[81] Challenges to emergency measures were mounted mainly via the constitutional remedy for violations of fundamental rights over which the Supreme Court has sole and exclusive jurisdiction (Article 126). It is equally possible to challenge emergency measures through the writ jurisdiction over which the Court of Appeal is conferred with jurisdiction by the constitution (Article 140). In fact, before the introduction of the fundamental rights jurisdiction of the Supreme Court under the 1978 Constitution, challenges to the use of emergency powers were made under the writ jurisdiction of courts (e.g. through applications for the writ of *habeas corpus)*.

Even though early fundamental rights jurisprudence of the Supreme Court displayed a great deal of conservatism, by the latter part of the 1980s the Court, through a few activist justices, displayed a bolder approach in interpreting rights. The strong rights-oriented interpretation of emergency powers that emerged during that period (and which extended to the 1990s) made a significant contribution to reining in abuse of emergency

[80] See *Joseph Perera v. Attorney-General* (1992) 1 SLR 199.
[81] Section 8 of the PSO removed judicial review of ERs.

powers.[82] What is significant about that judicial trend is that it emerged during the tenure of President Premadasa who is widely considered to have governed in a high-handed manner.

Before discussing constitutional jurisprudence on emergency measures, it is important to point out that the legality of such exceptional measures cannot be evaluated only with reference to domestic legal standards. Modern legal systems are compelled to operate harmonising internal and external dimensions of legal obligations of the state. Sri Lanka, having undertaken international legal obligations under international human rights law must necessarily ensure that all measures taken, including measures taken during states of exception, comply with those obligations. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) specifically stipulates clear principles in that regard. As a state party to that treaty,[83] Sri Lanka is bound under international law to comply with those principles.

Article 4 of the ICCPR spells out the international law framework on the protection of human rights during periods of emergency. The fundamental principles of that framework are:[84]

a) That a state of emergency can be declared only when there is a 'threat to the life of the nation';
b) The existence of a state of emergency must be officially proclaimed;

[82] See Udagama (1998).
[83] Sri Lanka acceded to the International Covenant on Civil and Political Rights on 11th June 1980. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', U.N. Doc. E/CN. 4/1985/4, Annex (1985), and 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information', U.N. Doc. E/CN. 4/ 1996/39 (1996), are bodies of principles offering non-binding yet persuasive standards on derogation of human rights during states of emergency. Although not officially formulated by the UN, they have been recognised by the organisation as providing useful guidance on protection of human rights during periods of exception.
[84] The authoritative commentary (interpretation) of Article 4 of the ICCPR is provided by the UN Human Rights Committee, the body of independent experts set up under the Covenant as a supervisory mechanism. See General Comment No. 29: Art. 4: Derogation during a state of emergency (adopted by the Human Rights Committee at its 1950th meeting on 24th July 2001, UN Doc. HRI/GEN/1/Rev. 9 (Vol.1).

c) Derogation (temporary suspension) from human rights obligations recognised by the ICCPR is permitted during an emergency only 'to the extent strictly required by the exigencies of the situation.' Which rights could be derogated from during an emergency and the extent of derogation are both to be guided by that principle;

d) Such measures, however, cannot be inconsistent with other international law obligations of states parties and cannot be discriminatory on the grounds of race, sex, language, religion or social origin;

e) No derogation is permitted from the right to life, freedom from torture, freedom from slavery and servitude, freedom from imprisonment for civil matters, freedom from retroactive penal legislation, the right to recognition everywhere as a person before the law, and the freedom of thought, conscience and religion; [85]

f) The existence of a state of emergency must be communicated to all other states parties through the intermediary of the UN Secretary-General**.**

The ICCPR legally obligates states parties to ensure the rights recognized by it to all on its territory and to take measures, including legislative measures, to give effect to those rights at the national level (Article 2). Similarly, when the rights are breached by a state party there must be provision in the national legal system to provide an effective remedy, including judicial remedies. The enforcement of remedies must also be ensured. Under general principles of international law, failure to comply with international law obligations undertaken by a state will attract international scrutiny and commensurate international sanctions. Thus, the obligation lies with a state party to ensure that its derogation regime during a period of emergency is in line with its international law obligations.

[85] Ibid. The original list of non-derogable rights has been expansively interpreted by the UN Human Rights Committee in its General Comment No.29.

The requirement of international human rights law obligations having to be operationalised through national legal systems can be effectively discharged only if it possesses the requisite legal provisions, institutions and safeguards. Such a scheme would necessarily require adequate checks and balances, for without that feature systemic oversight and remedies would not be forthcoming. As the centralisation of powers in the executive is the single most threat to human liberties during public emergencies, there must be adequate provisions in the national legal system for checking excesses by the executive. The PSO, however, has expressly excluded judicial review of a declaration of a state of emergency by the President. The Supreme Court too has been very deferential to executive authority in that regard. In *Yasapala v. Wickremasinghe*,[86] a fundamental rights case decided in 1980, the court was of the opinion that it could not substitute its own view for that of the President who is conferred with the discretion to decide on the necessity to declare a state of emergency in a given situation. It appears that in the court's view, such a decision essentially involves a political question. In the absence of evidence of bad faith or ulterior motive the court's jurisdiction is excluded.[87]

The unanimous judgment of a three judge bench went on to point out that the President is not under a constitutional obligation to disclose the reasons for an emergency proclamation: "Quick and effective action must be the essence of those powers of the President charged with the duty of maintaining law and order."[88] The court then went on to refer to the presumption *omnia praesumuntur rite esse acta* (all things are presumed to be done in due form[89]), a principle of English public law pertaining to official acts. Whether that presumption essentially rooted in the specificities of the English political and legal culture would have universal validity is questionable. Anyhow, the judgment is very

[86] *Yasapala v. Wickramasinghe* (1980) 1 Fundamental Rights Reports 143.
[87] Ibid: pp.154-156.
[88] Ibid: p.155.
[89] A definition of *omnia praesumuntur rite esse acta* is available at: http://legal-dictionary.thefreedictionary.com/Omnia+praesumuntur+rite+esse+acta (accessed 23rd December 2014).

symptomatic of the position of the court in the early years of emergency review when one could observe a great degree of deference to the executive. The apex court did appear to place faith in the good intentions of the executive, particularly when a state of emergency had been declared. According to the judgment the burden of proof is on the petitioner to establish bad faith or an ulterior motive on the part of the President.

Commencing in the early 1970s, the Supreme Court permitted challenges to orders made under ERs, but only to determine whether they were made within the confines of what it deemed to be the law and whether there is no bad faith on the part of the executive.[90] Further inquiry by the court to determine reasonableness of the orders or review of policy based on an objective test was not thought to be within the province of judicial powers.[91] In *Hirdaramani v. Ratnavale*, the court took the position that once an emergency detention order was valid on the face of it, then it was for the detainee to establish a *prima facie* case against the good faith of the issuing authority.[92] This line of judgments was influenced by the controversial wartime British House of Lords judgment in *Liversidge v. Anderson*[93] which held that where a defence regulation permits the Home Secretary to order the detention of certain categories of persons, the courts then could not go into why the Secretary formed an opinion to detain a person as it was completely within executive discretion. But the courts could inquire into bad faith or mistaken identity.

That judgment has now been rejected[94] in favour of the celebrated dissenting opinion of Lord Atkin in *Liversidge* which was to the effect that in English law every detention is *prima facie* unlawful until proved to be lawful by the detaining authority.[95] Lord Atkin had taken the same legal position in a previous case

[90] See Cooray (1995): Ch.31.
[91] See *Kumaratunga v. Samarasinghe* (2) Fundamental Rights Digest 347; *Hirdaramani v. Ratnavale* (1971) 75 NLR 67; *Gunasekara v. Ratnavale* (1972) 76 NLR 316; *Gunasekera v. De Fonseka* (1972) 75 NLR 246.
[92] *Hirdaramani*, ibid.
[93] *Liversidge v. Anderson* (1942) AC 206.
[94] See *R. v. Inland Revenue Commissioner, Ex parte Rossminster Ltd.* (1980) AC 952.
[95] Ibid: p.23.

whereby the onus of proving the reasons for depriving a British subject of liberty or property was found to be with the authority ordering such action.[96] The latter judgment was cited with approval by the colonial Supreme Court of Ceylon in the landmark *Bracegirdle* judgment.[97] In that case the petitioner, a radical Australian labour activist, was detained and ordered to be deported by the British colonial Governor. A writ of *habeas corpus* was sought on behalf of Bracegirdle challenging the detention and deportation orders. The court found that the Governor's powers of arrest, detention and deportation under the law could be exercised only during a state of emergency and in normal times a person could be deprived of liberty only by the judicial process. Accordingly, Bracegirdle was released. However, it is worthy of note that the republican Supreme Court of Sri Lanka was content to follow the stateist approach taken by the majority in *Liversidge v. Anderson* in the decisive decades of the 1970s and early 1980s when the country was ruled more under the law of the exception than not.

That conservative streak of the Supreme Court eventually dissipated and swung in favour of a rights-based approach beginning in the latter part of the 1980s in the face of years of rule by exception. Continuous states of emergency together with the concurrent operation of the PTA saw Sri Lanka's human rights record plummet to an unprecedented low level, particularly in the aftermath of the 1983 ethnic pogrom. Widespread arbitrary arrests and prolonged detention, enforced disappearances, and incidents of torture were reported during that period.[98] The critical human rights situation in the country was reflected in the large number of arbitrarily disappeared persons. In a report issued in 1992 pursuant to a visit to Sri Lanka, the UN Working Group on Enforced or Involuntary Disappearances estimated that the number of such disappearances recorded between 1983-1992 amounted to approximately 12,000. Going by that estimate, thought by human rights activists to be very conservative, it

[96] *Eshugbayi Eleko v. Government of Nigeria* (1931) AC 662.
[97] *In re Bracegirdle* (1937) 39 NLR 193.
[98] See, Wickremasinghe & Fonseka (1993); also see Asia Watch (1987) ***Cycles of Violence: Human Rights in Sri Lanka Since the Indo-Sri Lanka Agreement***. Numerous reports compiled by Amnesty International during that period documented the human rights situation in the country.

concluded that that was by far the "highest number of disappearances reported from any country."[99]

Joseph Perera v. Attorney-General,[100] the path-breaking judgment which authoritatively articulated the constitutional framework in regard to limits on emergency powers was delivered by the Supreme Court in 1987. A five judge bench pointed out that ERs had to be in compliance with the constitution *per* Article 155 (2). It was opined that, therefore, the court has the power to review the constitutionality of ERs when it was alleged that they violate fundamental rights. Section 8 of the PSO, which ousted judicial review of ERs and emergency orders, therefore, itself is ousted by the constitution. For an ER to be valid, the court must be satisfied through an objective test that it was indeed necessary in the interests of public security, public order and such other grounds specified in the PSO. It must be established that the restrictions imposed by an ER on fundamental rights had a proximate or rational nexus with the objective sought to be achieved by that ER. The burden of proof is on the state to establish that the ER satisfied those criteria. Further, it was held that presidential immunity under Article 80 (3) of the constitution covers only the subjective decision of the President that the promulgation of a particular ER is necessary in the interests of public security/order. The constitutionality of the ER itself, however, is subject to judicial review in terms of the constitution.

The ER in question in the *Joseph Perera* case prohibited the public display and distribution of *any* poster, handbill or leaflet without prior permission of the police. The petitioners, who had organised a meeting on education, and had distributed handbills advertising that event, were eventually arrested. They claimed that they did not have to obtain permission for distribution of the handbill because of the innocuous content. The court agreed holding that prior restraint imposed on freedom of expression by the ER was overbroad in that it impacted on *every* poster, handbill or leaflet irrespective of their characteristics and thereby exceeded the

[99] 'Report on a visit to Sri Lanka by three members of the Working Group on Enforced or Involuntary Disappearances' UN Doc. E/CN.4/1992/18/Add. : para.192.
[100] *Joseph Perera*, op.cit.

limitations permitted by the constitution. The state had failed to establish that the prior-restraint on freedom of expression was proximate to or had a rational nexus to the objective to be sought by the ER. The ER was, therefore, found to be in violation of the constitutional right to freedom of expression (Article 14 (1) (a)). It was also found to be in violation of the right to equality (Article 12 (1)), as it paved the way for arbitrary executive action. The court pointed out that "[a]ny system of pre-censorship which confers unguided and unfettered discretion upon an executive authority to guide the official is unconstitutional."[101]

Eleven years later, in another celebrated judgment[102] the Supreme Court struck down an ER which sought to postpone an election. This time the ER was found to be *ultra vires* (outside the powers of) the PSO. Significantly, the court found that the state had failed to establish there was a threat to public security or public order at the time the ER was promulgated. In light of this judgment it is possible to argue that even though the court has refused to review the legality of a proclamation of a state of emergency by the President,[103] it can still vitiate *the effects* of a state of emergency by striking down ERs if the state fails to satisfy the court that, indeed, at the material time there was no threat to public security/order.

In addition to those judgments which struck down ERs, there is a strong body of jurisprudence of the Supreme Court which questioned and voided many emergency orders made under the authority conferred by ERs by various public officials as being violative of fundamental rights. Such orders included those relating to arrest and detention, censorship, and curtailment of freedom of movement. As the 1978 Constitution does not contain a derogation clause which sets out the limits of derogation of rights during periods of emergency, the court has had to contend with the normal limitations attaching to fundamental rights (Article 15 (7)) which permit, *inter alia,* restriction of rights on the ground of national security and public order. Such restrictions have to be imposed in the 'interests' of permitted grounds of

[101] Ibid: p.230.
[102] *Karunatiaka v. Dayananda Dissanayake* [1999] 1 SLR 157.
[103] See text at notes 87-90, *supra.*

limitation and should be 'prescribed by law.' 'Law' for that purpose includes ERs. The court has had to, therefore, examine whether restrictions on rights imposed under ERs are constitutionally permissible or not. In that regard the rational nexus test stipulated in *Joseph Perera* by the court to determine whether an ER is within constitutional limits has proved to be of vital importance.

What is significant about the judicial reasoning employed in that body of jurisprudence is that – unlike the previous deferential approach of the Court – the onus of proving constitutionality of executive action under emergency powers shifted to the state (e.g. that there were reasonable grounds to issue a detention order).[104] That position is contrary to the court's previous reliance on the presumption *omnia praesumuntur rite esse acta.* The burden of proof then was on the petitioner who claimed a violation of rights to prove that the authorities had acted in bad faith. This shift in judicial reasoning is of great significance. The judiciary clearly seemed reluctant to have faith in the executive as rule by exception continued for decades, taking a great toll on human rights and the rule of law. The role of the judiciary in reining in executive abuse and excesses under emergency powers in that manner was of pivotal public importance. In many respects, it was the only effective check available to the public under domestic law.

The following two judgments are illustrative of judicial concern about the law of exception becoming the norm and consequent attempts at restoring the 'normal norm.' In *Sunil Rodrigo v. Chandananda de Silva*[105] (decided in 1997) the Supreme Court held that the right of a person to be informed of reasons for arrest at the time of arrest, and the right of a detenue to be produced before a judicial authority within a reasonable period of time, could not be overlooked even though the arrest and detention may pertain to preventive detention under ERs. Both those rights, hitherto statutory rights under the Criminal Procedure Code (normal law), were thus elevated to constitutional rights through

[104] See Udagama (1998) for a discussion on this point.
[105] *Sunil Rodrigo (on behalf of Sirisena Cooray) v. Chandananda De Silva* (1997) 3 SLR 265.

Article 13 (1) and (2) of the 1978 Constitution. The court's position was a recognition of the argument that there was nothing to suggest that emergency provisions had permitted the restriction of those rights.

In *Sunil Rodrigo*, the petitioner was an opposition politician who had been arrested and detained under an emergency order issued by the Secretary to the Ministry of Defence using preventive detention powers under operative ERs. The petitioner was not told of the reason for his arrest at the time of arrest and neither was he produced before a judicial officer within twenty-four hours of arrest as is normally required by law. The court found that the Defence Secretary had mechanically issued the detention order without reasonably satisfying himself that the arrest and detention were justifiable. Accordingly, the court voided the Secretary's order as it violated Article 13 (1) and (2) of the Constitution. Justice Amerasinghe pointed out on behalf of the court that it was the bounden duty of the judiciary under Article 4 (d) of the constitution to 'respect, secure and advance' fundamental rights.

In *Rodrigo v. Imalka SI, Kirulapone*[106] the Supreme Court found *permanent* check-points set up under emergency powers to be unconstitutional as they violated the freedom of movement (Article 14 (1) (h)), and the right to equal protection of the law (Article 12 (1)). Permanent check-points had become staple fare for the public during the decades under emergency rule, causing severe inconvenience to the public (including harassment by the security forces[107]) although the effectiveness of such security measures were seriously in doubt because of the absence of the element of surprise. Further, the court, engaging in judicial activism, issued guidelines for the setting up of security check-points.

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[106] *Rodrigo v. Imalka SI, Kirulapone* SC (FR) No. 297/2007 S.C. Minute of 03.12.2007.

[107] In *Sarjun v. Kamaldeen* SC (FR) No. 559/03 S.C. Minute of 31.07.2007, it was alleged that the petitioner had been arrested at a check-point and tortured for not paying a bribe that was demanded by the security personnel on duty. The Court found in favour of the petitioner stating that while security concerns must be addressed, action in that regard should be taken with the highest concern and respect for human dignity.

It is noteworthy that in the body of jurisprudence referred to above, the Supreme Court did not refer to the international human rights law framework relating to public emergencies. Even though Sri Lanka has a dualist legal system – and therefore international law has to be transformed into domestic law by the legislature in order to be domestically operative – the Supreme Court had developed a body of jurisprudence in which international human rights law norms were used as persuasive authorities in interpreting fundamental rights.[108] Jurisprudence relating to the use of exceptional powers would have been further refined and enriched from a rights perspective by the use of international norms. It is perhaps some consolation that the 'rational nexus test' used in *Joseph Perera* to test the constitutionality of an ER is somewhat akin to the proportionality test employed by international law (*viz*., derogations of rights have to be 'strictly required by the exigencies of the situation' *per* Article 4 of the ICCPR).

UN human rights bodies have regularly assessed the use of exceptional laws in Sri Lanka in the course of overseeing Sri Lanka's compliance with its international human rights law obligations. In *Nallaratnam Singarasa v. Sri Lanka*,[109] the UN Human Rights Committee[110] was presented with an individual communication (petition) submitted to it by the author (petitioner) under the First Optional Protocol to the ICCPR. The communication alleged that Singarasa was convicted of an offence under the PTA on the basis of a confession and was sentenced to 35 years of imprisonment in violation of Sri Lanka's legal obligations under the ICCPR and that he had exhausted all possible legal remedies under the law of Sri Lanka. It was further

[108] See, e.g., judgments of the Supreme Court in *Weerawansa v. A.G.,* SC (FR) No.730/96, SC Minute of 3.08.2000; *Bulankulama v. Secretary, Ministry of Interior Development* [2000] 3 SLR 243.
[109] *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (views adopted in July 2004).
[110] The UN Human Rights Committee is established under Article 28 of the ICCPR as a body of independent experts, which is tasked with supervising the implementation of the treaty by States which have legally accepted the treaty.

alleged that under the PTA the burden was on a petitioner to prove that a confession obtained by the authorities was obtained under duress. The committee expressed the view that Sri Lanka was indeed in violation of its legal obligations under the ICCPR and recommended that Singarasa be released or retried. It specifically called for the repeal of provisions of the PTA that made confessions to law enforcement authorities admissible into evidence and which placed the burden of proving that the confession was not voluntary on the detainee.

The Supreme Court was petitioned on behalf of Singarasa when he was neither released nor given a retrial by the authorities in Sri Lanka as called for by the UN body. It was a petition which called for the revision of the previous judgment of the Supreme Court which denied Singarasa a final appeal to review his conviction and sentence (it was pursuant to that denial that Singarasa approached the UN Committee). The revision petition to the court was based on several legal grounds including the ground that the petitioner had a legitimate expectation of being retried or released as the UN Human Rights Committee had made a recommendation to Sri Lanka to that effect. A five judge bench of the court presided over by Chief Justice Sarath N. Silva rejected Singarasa's application,[111] holding that (a) provisions of the ICCPR were not applicable in Sri Lanka as its legal system was dualist and there was an absence of incorporating legislation, and (b) that the President's ratification of the Optional Protocol to the ICCPR was unconstitutional as it usurped the sovereign judicial powers of the people by recognising the judicial powers of the UN Human Rights Committee. A critique of this controversial judgment requires a separate effort. Suffice to say here that the final result diluted the domestic application of the ICCPR.[112]

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[111] *Nallaratnam Singarasa v. Attorney-General* SC Spl(LA) No.182/99, SC Minute of 15.09.2006. The judgment can be accessed at: http://www.srilankahr.net/pdf/sc_judgement1.pdf (accessed on 23rd December 2014).

[112] See R. Edrisinha & A. Welikala, '*GSP Plus and Sri Lanka: A Critical Appraisal of the Government of Sri Lanka in respect of Compliance Requirements*' in A. Welikala (Ed.) (2008) ***GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues*** (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung).

Less than two years later, however, Chief Justice Silva delivered a judgment to the effect that all the rights recognised by the ICCPR were indeed now part of the domestic law of Sri Lanka.[113] The opinion of the court was sought by the President under Article 129 of the constitution on the domestic legal status of the ICCPR rights in Sri Lanka. The ICCPR Act No. 56 of 2007, was enacted in September that year by Parliament mainly as a response to human rights queries of the European Union in regard to awarding tariff concessions (GSP Plus) to Sri Lanka. The Act incorporated only a few rights recognised by the ICCPR and provided for a remedy by the High Court in the instance of violation of those rights. That stands in contrast to the constitutional remedy provided by the Supreme Court in regard to violations of constitutionally recognised civil and political rights. In March 2008, a five judge bench of the Supreme Court presided over once again by Chief Justice Silva, accepting arguments by the Attorney General on behalf of the state, found that the constitution, statutes (including the ICCPR Act No. 56 of 2007), and judicial decisions of superior courts have given 'adequate recognition' in Sri Lanka to the rights in the ICCPR. Further, the court was of the view that those rights are justiciable (actionable in courts) in Sri Lanka under constitutional and statutory provisions.

The combined outcome of Act No. 56 of 2007 and the above judgment was to bifurcate the recognition and protection of civil and political rights in Sri Lanka into constitutional and statutory realms. Hence, some rights are elevated to constitutional heights, while others have the ignominy of languishing in the statutory plane. The latter group of rights faces the distinct possibility of diminution or nullification through the ordinary legislative process. Also, as the state's submissions are not made a part of the judgment, it is hard to know how each ICCPR right is given recognition in Sri Lanka. Nevertheless, the judgment gives the benefit of claiming ICCPR rights in Sri Lanka "adhering to the general premise of the Covenant". Consequently, one can compellingly argue that Article 4 of the ICCPR pertaining to

[113] SC Ref. No.1/2008, SC Minute of 17.03.2008. The judgment can be accessed at: http://www.nation.lk/2008/03/30/special3.htm (accessed on 23rd December 2014).

rights protection during public emergencies is also now a part of the law of Sri Lanka.

It is noteworthy that a Draft Charter of Rights finalised in 2009 by a panel of experts that was established under the aegis of the previous Ministry of Constitutional Affairs and National Integration contains a carefully crafted derogation clause incorporating safeguards required by international law.[114] Overall, the Draft Charter contains an expansive set of human rights guarantees drawing inspiration from international human rights law and also comparative jurisprudence from progressive jurisdictions such as India and South Africa. Although the Charter was drafted pursuant to a pledge given by the *Mahinda Chinthana*[115] – the 2005 election manifesto of President Mahinda Rajapaksa – it still awaits adoption.

Conclusion

The use of the law of exception in post-independence Sri Lanka is a phenomenon replete with counter-intuitive realities and huge political ironies. Overall, it raises many questions about the orientation of the political establishment, in particular about the commitment to liberal democracy. Two critical questions which arise are: whether extended rule under states of emergency by successive governments created an authoritarian political culture or whether innate illiberal political tendencies and orientation of the political establishment paved the way for entrenching rule by exception. Perhaps both questions can be answered in the positive. It is possible to argue that a relatively weak liberal political orientation at independence, that viewed democracy in a Kautilyan or Machiavellian manner, eventually paved the way for both the causes that seemingly justified the use of laws of

[114] Available at: http://www.peaceinsrilanka.lk/human-rights/bill-of-rights-final-draft (accessed on 23rd December 2014). For fuller details see: http://www.srilankabrief.org/2012/12/2009-fundamental-right-chapter.html (accessed on 23rd December 2014).

[115] *Victory for Sri Lanka, Presidential Election 2005: Mahinda Chinthana, towards a new Sri Lanka*: p.98, available at: http://www.priu.gov.lk/mahindachinthana/MahindaChinthanaEnglish.pdf (accessed on 23rd December 2014).

exception and also the abuse of such laws. Poor nation building after independence and weak governance saw the entrenchment of majoritarianism and authoritarianism as essential features of the Sri Lankan state. Cycles of political violence ensued in the form of a nearly three decade old secessionist civil war in the north and two violent insurrections in the south of the country. The prolonged use and abuse of the law of exception in response to that violence, in turn, has entrenched a political ethos that does not put a political premium on liberal safeguards such as checks and balances and independent institutions.

The political environment which prompted the enactment of the PSO on the eve of independence from the British and the manner of its subsequent use by successive political regimes in Sri Lanka amply demonstrate the political instrumentalisation of the law of the exception. Although borrowed from the British, the idea of the law of the exception in practice in post-independent Sri Lanka was and is largely shorn of the accompanying liberal safeguards. Parliamentarians who opposed the inclusion of provisions in the PSO that would pave the way for arbitrariness constantly lamented that gap. What is particularly ironical about the abuse of the law of exception in Sri Lanka is that political parties of every shade of opinion thought fit to do so when holding reins of power. The Marxist parties, for example, which saw the PSO as an instrument of imperialism when used by detractors to quell their political activities, were equally prone to using it when in political office.

A general assumption in regard to rule by exception in Sri Lanka is that emergency rule got entrenched and abused with the advent of the executive presidential system under the 1978 Constitution. However, emergency rule began to define governance and public life in a sustained manner in the early 1970s under the left-leaning United Front government. Although first proclaimed to deal with demonetisation and then with security issues posed by the insurrectionist activities of the JVP in 1971 in the south, emergency rule continued till 1977. There were no safeguards attaching to rule by emergency powers under the 1972 Constitution although it enthroned the legislature as the body with supreme sovereign powers. There is no evidence that the continuing state of emergency was debated in the National State

Assembly (Parliament) during that period. It is indeed a major political irony that strong legal restraints were imposed on emergency rule under the 1978 Constitution running parallel to the introduction of the all-powerful executive presidency. Restraints were introduced through the constitution's chapter on public security by requiring parliamentary approval of a proclamation of a state of emergency, coupled with parliamentary oversight over the continuation of a state of emergency. The constitutional requirement that ERs had to be in compliance with the provisions of the constitution paved the way for judicial oversight of emergency measures. A few months before the constitutional safeguards were enacted, statutory restraints were introduced by amending the PSO in order to introduce parliamentary oversight over the proclamation and extension of emergency. The incumbent UNP admittedly was keen to prevent abuse that they witnessed during the previous UF government. Notwithstanding those good intentions, however, executive practice constantly departed from the salutary aims of the reforms, giving rise to serious human rights violations. Equally problematic was the use of emergency powers to deal with subjects that had no relationship with public security, conveniently avoiding democratic decision-making processes for executive expedience. In short, rule by emergency had become a habit.

The rising tide of human rights violations in the backdrop of extended emergency rule saw the higher judiciary taking a proactive stance in order to protect individual liberties. Legislative oversight on the other hand, although a main feature of the 1978 reforms, came to naught with the subservience of Parliament to the executive presidency. The progressive body of jurisprudence developed by the Supreme Court, beginning in the late 1980s, saw the court reverse its previous deferential stance to the executive during periods of emergency. The court actively interrogated executive action under emergency powers, including the constitutionality of ERs, based on the premise that it was for the state to establish the lawfulness of its actions. As emergency rule became the norm, coupled with the operation of the PTA, the court's efforts to treat measures under such laws as ordinary state action deserving no special consideration by the judiciary is a striking development. However, it has to be noted that such

jurisprudence came about in the backdrop of a relatively high level of judicial independence.

Even though emergency rule lapsed a couple of years after the ending of the civil war in Sri Lanka, the habit of using laws of exception appears hard to shed. The promulgation of regulations under the PTA conferring on the executive some of the extraordinary powers which were previously exercised under emergency rule, and the use of the PTA to deal with ordinary crime coupled with a strong militarising approach *vis-à-vis* various civilian sectors, are strong indicators of such a tendency. The manner in which the political culture in Sri Lanka has evolved does suggest that irrespective of the form of government, whether parliamentary or presidential, rule by exception remains an attractive proposition to the political establishment.

How the apex court will at present respond to possible challenges against the use of PTA or PSO remains to be seen. Needless to say, a robustly independent judiciary has to provide the required checks in order to propel governance toward constitutionalism in this post-war period. Recent troubling events relating to the independence of the judiciary (including a politically-motivated impeachment of the 43rd Chief Justice), however, give much reason for concern.[116] One cannot entertain much hope that the passivity of the legislature will change any time soon. In short, the expectation of a return to 'normalcy' after years of rule under extraordinary laws through systemic rectification or self-correction that one would generally expect from a liberal democratic system may be too ambitious an expectation in Sri Lanka given the political realities.

It is eventually public opinion that will have to wean the political establishment out of its national security ethos. There cannot be a better substitute for robust public opinion demanding restoration of constitutionalism, in particular the *de facto* operation of the separation of powers and checks and balances (including separation of civilian and military functions), and a focus on the

[116] See International Bar Association (2013) ***A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayaka and the Erosion of the Rule of Law in Sri Lanka*** (London: IBA).

primacy of rights and liberties of the people. To the extent that even in this post-war phase public security is viewed through the parochial prism of ethno-nationalism, and hence as a means of defending majoritarianism, the chances of that happening are slim. But if the rejection of majoritarian parties by the electorate at the recently held provincial council elections (September 2014) is anything to go by, there is hope that some degree of liberal normalcy will be demanded even in the south. Although Carl Schmitt's thesis of the permanent state of crisis has been proven right many a time, particularly so by the history of states of exception in Sri Lanka, still it is a worthy challenge to prove that the spirit of human liberties could trump primordial authoritarian compulsions.

7

Human Rights and the 1978 Constitution

Laksiri Fernando

If one takes 1978 as a landmark in dividing the post-independence history in Sri Lanka into two periods, three decades before (1948-1978) and three decades after (1978-2008), the latter may mark as satisfactory in human rights legal codification, the fundamental rights chapter in the 1978 Constitution as the forerunner, but abysmally horrendous in human rights violations in almost all spheres of national and international importance. The former was far better and salubrious, in comparison, although there was very little in terms of human rights codification. This irony indicates the importance of multitude of other socio-political factors as well as the overall constitutional conditions that affect a human rights situation in a country other than or irrespective of a fundamental rights chapter and other legal codifications which is the main message of this chapter. The overall constitutional conditions may mean the nature of the governmental system and whether the system is parliamentary or presidential to be more precise, other than the operation of the democratic rule of law in general.

Karel Vasak argued that *de jure* state is the first requirement for human rights to become a legal reality.[1] By legal reality, he didn't mean the mere existence of human rights in written law, but its actual legal practice through the whole gamut of rule of law. He explained that "Without entering into theoretical discussions, it may simply be said that a *de jure* State is one in which all the authorities and all individuals are bound by pre-established general and impersonal rules, in a word, by *law*." It may only be added that 'rule of law' should be 'democratic rule of law' as Filip Spagnolihas emphasised.[2]

There can be many arguments against the 1978 Constitution that created conditions to the detriment of the human rights situation in the country that was already fragile due to similar or other reasons.[3] But the 1978 Constitution can be unreservedly marked as a turning point in constitutionally diluting the democratic rule

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[1] K. Vasak, '*Human Rights: As a Legal Reality*' in K. Vasak (Ed.) (1982) ***The International Dimensions of Human Rights*** (Paris: UNESCO).

[2] F. Spagnoli (2003) ***Homo Democraticus: On the Universal Desirability and the Not So Universal Possibility of Democracy and Human Rights*** (Buckinghamshire: Cambridge Scholars Press): p.117.

[3] Among these reasons was the 1972 Constitution, which clearly diluted the independence of the judiciary among other infringements.

of law by instituting Presidential powers that cannot be challenged in courts of law.[4] With impunity for the President, or under his/her direct authority, 'all authorities' could not be considered as 'bound by the pre-established general and impersonal rules' that Vasak talked about. What started as seemingly a benign growth in 1978 increasingly spread as a malignant tumour and today constitutes one of the dangerous cancers in the body politic. That is primarily the breakdown of democratic rule of law.

Based on Karel Vasak and other sources, and primarily based on empirical evidence of the human rights trajectory since 1978, this chapter argues that there has been an inevitable dichotomy between human rights and the 1978 Constitution, which is one of the most authoritarian forms of presidential systems. As Vasak said:

> "Although in our time the law is hardly the expression of the general will, as Rousseau contended, it remains the most effective practical means for citizens to preserve the sphere of human rights from the executive, through the role which they play in choosing their legislative body. In other words, the law, insofar as it is the work of a parliament elected by the citizens, constitutes the sole possible legal basis for human rights. It is for this reason that human rights are bound to be more likely to exist in countries with parliamentary tradition."[5]

Political Background

The parliamentary general election in 1977 was already delayed by two years, the election that paved the way for the 1978 Constitution, which in itself signified a major aberration in the

[4] Article 35(1) governs the impunity of the President. More than its legality, the impression was created that the President is virtually above the law.

[5] Vasak (1982): p.6. Vasak implicitly of the view that human rights are more vulnerable under presidential systems than parliamentary democracies while also highlighting the importance of what he called 'political, economic and social democracy' for the human rights preservation. In a more critical study on the subject, M.S. Shugart & J.M. Carey (1992) ***Presidents and Assemblies*** (Cambridge: Cambridge University Press) offered the same conclusion but in a more analytical manner.

democratic system. The previous United Front (UF) government had already taken the advantage of the new constitution that they promulgated in 1972 to extend the tenure of the Parliament. Otherwise the election should have been held in 1975 and not in 1977, under the 1947 Constitution, which fairly supplied a framework for the country's democratic system and human rights to function for nearly two and a half decades. The opposition led by the UNP also did not oppose the extension strong enough as if there was an implicit agreement between the two major parties, the SLFP and the UNP, to manipulate the democratic system in order that they acquire and remain in power alternatively.

The ruthless suppression of the 1971 youth insurrection was in the background and the youth unrest in the North was on the ascendancy with emergency laws being used for its suppression almost continuously until the election time. The traditional left, the LSSP and the CP, and the trade union movement had become virtually impotent by that time as a viable democratic opposition to the two major parties by being accessories to the UF and the 1972 Constitution. From the beginning of the democratic system in Sri Lanka, if the introduction of the universal franchise in 1931 could be taken as the main landmark, the left and the trade union movement played a decisive role in safeguarding democracy and people's rights, but in the 1970s this was not the case any longer.

The election and election results in 1977 also had a direct bearing on human rights. It was the last general election held under the first-past-the post (FPP) system. In the election results, what could be seen is a major imbalance created in the competitive party system. The UNP received 50.92 per cent of total votes polled and 140 seats in the 168 member parliament, gaining a 5/6 majority, while the previous ruling party, the SLFP, being reduced to 8 seats irrespective of receiving 29.72 per cent of the votes polled. Apart from the FPP system, sharp de-legitimisation process of the previous government due to unpopular and anti-rights policies were responsible for this major shift. The SLFP failed to become the alternative government or the official opposition in Parliament and the leader of the opposition was selected from the TULF, winning 18 seats but only 6.75 per cent of votes. The TULF was not aiming at an alternative government

but a separate state or self-autonomy to the regions that they represented as declared in 1976.[6]

The 1977 election was a classic example of a hegemonic political party (UNP) ingeniously utilising the people's unarticulated grievances on human rights issues to come into power but not fulfilling the underlying aspirations as these aspirations themselves are not firmly held by the civil society due to multitude of reasons. By this time, the notions of human rights were quite new to Sri Lanka except the rights advocated by the labour or the minorities. The rights of the labour or the minorities, on the other hand, were formulated in terms of left wing or other ideologies (i.e. nationalism) and not so much on the basis of universal human rights. The first human rights organisation, the Civil Rights Movement (CRM), was formed in 1971 aftermath of the youth insurrection, first as purely a humanitarian organisation. Most of the civil society organisations by this time were of welfare or religious nature. If intelligentsia could be considered as a major or necessary catalyst for human rights, they have not yet been attracted by this new philosophy of human rights on a professional basis.[7]

Sri Lanka saw major postelection violence in July-August 1977 with considerable death, casualties and property destruction. During the elections, the UNP leader declared that he would give 'one week holiday for the police in order that the people could celebrate the victory' to mean that the winning party could take revenge against the defeated.[8] Obviously, the UF supporters had taken revenge from their UNP opponents when they were in

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[6] See Vaddukoddai Resolution, 1976; S.I. Keethaponcalan (2009) ***Conflict and Peace in Sri Lanka: Major Documents*** (Colombo: Kumaran Book House): pp.38-45.

[7] One exception, however, was the request of the Ceylon Rationalist Association (CRA) to incorporate fundamental rights as laid down in the Universal Declaration of Human Rights in the proposed 1972 Constitution in a Memorandum sent to the Minister of Constitutional Affairs in September 1970.

[8] University Teachers for Human Rights (Jaffna), '*July 1983: Planned by the State or Spontaneous Mob Action?*': http://www.uthr.org/Book/CHA11.htm (accessed 30th December 2014); Also see for electoral violence S. Pinnawala, '*Damming the Flood of Violence and Shoring Up of Civil Society*' in S.H. Hasbullah & B.M. Morrison (Ed.) (2004) ***Sri Lankan Society in an Era of Globalization*** (London: Sage Publications): p.262.

power (1970-77). Ironically the leftist supporters of the UF were the major casualties in the initial days facing arson attacks, which spread against the Tamils in the hill country for not so obvious reasons. What was underneath was the Sinhalese resentment that the main Tamil organisation, the TULF, was asking for a separate state and had won 18 seats becoming the main opposition party in Parliament. The riots also commenced in Jaffna when the police started clashing with the civilians on 21 August triggered by a carnival incident. During the spate of violence throughout the country, 300 were killed mainly Tamils and over 1,000 became injured with homeless over 4,000.[9]

Most tragic was what the new Prime Minister, J. R. Jayewardene, who became the President later, told in Parliament on 18 August 1977 in response to what was happening particularly in the Jaffna Peninsula: "If you [Tamils] want to fight, let there be fight. If it is peace, let there be peace."[10] He added that "It is not what I am saying. The people of Sri Lanka will say that."

Philosophy Behind 1978

There was some idealism behind the 1972 Constitution, but in contrast, the 1978 Constitution was more pragmatic or crafty. The idealism of the 1972 was drawn from a mixture of tradition, socialism, nationalism and utilitarian constitutionalism. While the 1978 Constitution incorporating most of these aspects for convenience, turned the main governing structure upside down placing it on its head. If "what the 1972 Constitution did was to strengthen the legislature," as Nihal Jayawickrama has asserted,[11]

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[9] R. Kearney, '*Ethnic Conflict and the Tamil Separatist Movement in Sri Lanka*' (1985) ***Asian Survey*** 25: p.9.

[10] Quoted by D.L. Horowitz (2001) ***The Deadly Ethnic Riot*** (Berkeley: University of California Press): p.91. Jayewardene was paraphrasing the Kandyan King Vimaladharmasuriya against the Dutch in early 17th century.

[11] N. Jayawickrama, '*The Philosophy and Legitimacy of Sri Lanka's Republican Constitution*', Keynote Address, Dr Colvin R. de Silva Lecture, Ministry of Constitutional Affairs (1st March 2008): http://www.sangam.org/2008/03/Republican_Constitution.php (accessed 30th December 2014).

the 1978 Constitution strengthened the Executive; and that was a new type of an Executive.

To understand this 'constitutional coup,' rendering constitutional idealism to the backburner within six years, one needs to focus on the historic speech made by its creator J. R. Jayewardene on 14 December 1966 before the Ceylon Association for the Advancement of Sciences (CAAS) proposing a presidential system of government for the first time.[12] The title of his speech was "Science and Politics," if that were any indication of the approach. He said that "I am advocating a scientific approach to the study of some of our political questions." "Though there are different spheres of scientific study, science has a common method and approach to the subjects under its review. The scientific approach always seeks to gain and verify knowledge by exact observation and correct thinking," he further elaborated.

What were his exact observations and thinking? The main observation was in relation to Ceylon's failure to achieve economic progress or more precisely economic growth. "When we look back in retrospect over these 18 years [since independence in 1948] we find a record of achievement in some and failure in others," he noted. Then he said, "Yet the rate of growth of our population exceeds the rate of growth of our material resources so that, in very broad terms, the per capita wealth of our people has not kept pace with similar progress among the peoples of the developed nations of the world." There is no question that his observation was by and large correct but not necessarily his prescribed solution. There are many interpretations as to why Sri Lanka failed in its economic progress compared to, for example, Singapore or Malaysia, and there was a failure on his part to look at the conditions necessary for economic progress as a comprehensive package.[13] Instead, he was looking at or exaggerating some of the weaknesses in the

[12] J.R. Jayewardene (2000) ***Selected Speeches of Hon J. R. Jayewardene, 1944-1973*** (Colombo: Jayewardene Centre): pp.89-93. This speech was delivered a few days after a major pruning of a welfare measure (rice ration cut). Jayewardene was the Minister of State in an uneasy cabinet of four parties. All quotations in this section are from that speech.

[13] In the same year a prominent economist perceived the country's economic problems in a more structural context. D.R. Sondgrass (1966) ***Ceylon: An Export Economy in Transition*** (Homewood: R. D. Irwin).

democratic structure mainly based on his own liking as a conservative and authoritarian politician and this particular thinking had many adverse future consequences on the human rights situation in Sri Lanka.

J. R. Jayewardene had clear misgivings about popular democracy in the country. He said "It is argued that the politicians in power know what is wrong in the economy, they are aware of the remedy, but the desire to be popular and to secure a majority of votes at a general election prevents them taking the correct remedial measures." He added that "It should, however, be remembered that among the emerging nations in the continents of Africa and Asia, only two countries, India and Ceylon, have preserved the democratic system of Government intact…" He said the following questioning the relevance of human rights in terms of 'human satisfaction.'

> "A democratic system of Government includes what are termed democratic freedoms, the freedom to vote, freedom of opposition, freedom of speech and writing, and the rule of law, among other freedoms. Do these freedoms alone satisfy the people? I do not think so."

His question and answer were most important: 'Do these freedoms alone satisfy the people?' He very clearly stated that 'he didn't think so.' The answer could mean, under a different context, that he was emphasising the economic and social rights instead of purely civil and political rights. But that was not completely the case.[14] Apart from his emphasis on 'per capita wealth' he did talk about "the failure to provide material comforts" in which he included "lower cost of living, employment, housing facilities and adequate leisure." However, his road map for achieving them was rigmarole and doubtful. Instead of ensuring those rights to the people, he was advocating a restricted democratic system where in the long run those 'material comforts'

[14] The controversy over the primacy of economic/social rights vs. civil/political rights was very much alive during this time. However, H. Shue (1980) ***Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*** (Princeton: Princeton University Press) disputed the strict dichotomy and A. Sen (1999) ***Development as Freedom*** (Oxford: Oxford University Press) offered a new dimension to the understanding.

might be achieved but not necessarily on an equitable basis. What he emphasised was economic growth on the basis of pure or unfettered 'free economy, private enterprise and profit making.'[15]

As a senior politician, he was however careful not to reject democratic freedoms altogether. He summarised to say, "While counting the preservation of democratic freedoms as one of our achievements since Independence, we have not achieved the economic freedom that our people are entitled to. This has been our major failure." The following was his blue print for constitutional reform.

> "If then the democratic government has failed in some aspects, we should not hesitate to think of changes and amendments in that system where necessary. Parliament intends to examine the whole system of democratic government in our country, and while maintaining the *basic freedoms of democracy*, which in my opinion have not failed and need no change, adopt such reforms as would help the nation to solve its problems *effectively and expeditiously*." (My emphasis)

This was the first time that a national leader proposed to dilute the democratic system in the country. The reason given was the 'failure of democratic government,' and as he said, 'in some aspects.' He wanted to maintain only the 'basic freedoms of democracy' but not all. Even that was quite reluctantly, as it is clear from the language that he used. The dilution of democracy, in his opinion, "would help the nation to solve its problems effectively and expeditiously."

Jayewardene proposed more precisely two major changes that became the cornerstones of the 1978 Constitution. First was the dilution of the representative system through an ambiguous PR system and the second was the introduction of an executive presidential system instead of the prevailing parliamentary system, both with considerable repercussions on the human rights

[15] A major casualty when this policy was applied in 1977 was the trade union movement. L. Fernando, '*The Challenge of the Open Economy: Trade Unionism in Sri Lanka*' in R. Southall (Ed.) (1988) ***Trade Unions and New Industrialization of the Third World*** (London: Zed Press).

situation in the country. On the issue of representation he first said, "Universal franchise and free exercise of the vote are necessary prerequisites of democracy" and then added "however." He was not happy that the electors elect their representatives directly. He instead wanted the voters to vote for a party and then the party decides whom to select from a list. "The electoral system which prevails here today, where the electors elect his legislator according to defined electoral areas, is not necessarily the best for our country," he said. Then he focused on a different system saying, "In some democratic countries political parties put forward a list of names of candidates seeking election; the legislators are then chosen from this list, the number depending on the votes cast for each party."

As it was correctly understood those days, his proposal was a 'list system' and proportional representation was only an appendage or an icing to the cake. He wanted to abolish the 'electorates' and that abolition eventually spelled disaster to the democratic system that the people were accustomed to since 1931. More precisely, he wanted to unplug the legislators from the voter base saying "There are no electorates. The voter votes for the Party and not for a particular candidate." He did have a particular logic or a concern when he said, "Today's electoral system in our country precludes the best equipped men and women from taking part in our political life." However, the proposed 'solution' was worse than the existing problem. The introduced PR system under the 1978 Constitution, with preferential voting for party candidates on the district basis, in fact produced a breed of legislators who were neither responsible to the voters nor even to the political parties.

Jayewardene saw, more importantly, fault with the cabinet system of government that Sri Lanka has been used to since 1947 and even before in a prototype.[16] "Our Cabinet, the executive government, is chosen from the Legislature and throughout its life is dependent on it maintaining a majority therein," he said. Then

[16] In 1931, a Committee System was introduced primarily for internal self-government. The Chairmen of these Committees, seven in number, were Ministers and the Council of Ministers evolved quite akin to a modern Cabinet system after 1936. See I.D.S. Weerawardena (1951) ***The Government and Politics in Ceylon, 1931-1946*** (Colombo: Economic Research Association).

he contrasted that with the systems in the USA and France. He concluded the following which became the philosophy and the blueprint of the 1978 Constitution.[17]

> "Such an executive is a strong executive seated in power for a fixed number of years, not subject to the *whims and fancies of an elected legislature*; not afraid to take correct but unpopular decisions because of *censure from its parliamentary party*. This seems to me a very necessary requirement in a developing country faced with grave problems such as we are faced with today." (My emphasis)

Jayewardene was not only talking about 'whims and fancies of an elected legislature' but also the undesirable 'censure from its parliamentary party.'

Fundamental Rights

The 1978 Constitution attempted to assure what Jayewardene considered as 'basic freedoms of democracy' in a fundamental rights chapter (Chapter III). From a legal or a constitutional point of view, the rights enshrined in the chapter appeared quite impressive primarily in the sphere of civil rights except in certain areas.[18] For example, the most fundamental of all rights, the right to life was not covered in this chapter. One may argue that it is obvious or implicit in the recognition of other rights. But a clear recognition as an individual as well as a 'collective right' could have delivered a potent message in a country where the right to

[17] During an interview with President Jayewardene by the present author in April 1993, he pointed out that the idea of having a strong rule, or 'Gaullist System' as he said, first became prominent during the race riots in 1958. This is confirmed by T. Vittachi (1958) ***Emergency '58: The Story of the Ceylon Race Riots*** (London: Andre Deutsch). 'Do a de Gaulle, do a de Gaulle' was the outcry for Bandaranaike while Oliver Goonetilleke, the Governor-General, in fact acting like an executive president or a 'de Gaulle' during the riots.

[18] Even the formulations could be considered quite advanced or refined compared to for example the fundamental rights chapter in India.

life became so easily extinguished in hordes even menial to the rights of animals.[19]

In addition to the fundamental rights chapter, there was a chapter on language (Chapter IV) purported to cover 'language rights' but not so much of other cultural rights. It was assumed that the political rights would be covered in the chapter on 'the people, the state and sovereignty' (Chapter 1) in addition to the chapter on franchise and elections (Chapter XIV). There was no explicit attempt to cover economic, social or even cultural rights as fundamental rights in the 1978 Constitution, except the 'free choice for an occupation' in Article 14 (1) (g). Nevertheless, some general formulations in this respect appear under the 'directive principles of state policy' along with 'fundamental duties' in Chapter VI.

There cannot be much doubt that incorporation of human rights as fundamental rights in a national constitution emerges primarily from international obligations of countries today as members of the United Nations although in the initial stages of human rights development in the world, for example in France (1789) or the United States (1791), they were national developments.[20]The incorporation of fundamental rights under international influence, however, cannot succeed unless there are commensurate national processes.[21] What could be seen by the time of the 1978 Constitution is an immense contradiction between these two processes, the international influence and the national commitment or processes. It has also to be noted that although the two international covenants on 'civil and political rights' (ICCPR) and 'economic, social and cultural rights' (ICESCR) were adopted by the United Nations in 1966, they became enforceable only in 1976 and Sri Lanka acceded to them only in January 1980. The two covenants also prescribed the state

[19] An individual killing of a person is well covered in law, but 'collective killings' of people are almost unnoticed without remedy. In 1971, the killings were in thousands, in 1983 or 1987/89 in ten thousands, and thereafter, the cumulative killings in the war well exceeded hundred thousand on the part of both parties to the ethnic conflict, the armed forces and the LTTE.

[20] S.I. Skogly (2006) ***Beyond National Borders: State's Human Rights Obligations in International Cooperation*** (Oxford: Intersentia).

[21] L. Fernando (2002) ***Human Rights, Politics and States: Burma, Cambodia and Sri Lanka*** (Colombo: SSA).

obligations to human rights differently and therefore the leaving of economic and social rights to a chapter on directive principles was understandable particularly in 1978 although this is no longer the case currently. The traditional view that economic and social rights are not justiciable is not held by many experts today.[22] Leaving that argument aside, there was no justification at all not to address the issues of 'cultural rights' or the rights of communities or minorities in a more positive fashion in the constitution unless there were particular reasons to neglect them or simply apply different standards to different communities and religions.

The fundamental rights chapter with Article 10 began saying "Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice." There is no question that as passive individuals, every citizen was guaranteed freedom of religion, including adopting a religion of his or her choice. However, the said article or the article on the 'right to equality' (Article 12) failed to guarantee the much controversial equality between religions as communities or freedom therein. The latter article said "All persons are equal before the law and are entitled to the equal protection of the law" and "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds." Even here the 'equality before and protection of the law' was guaranteed to the individual but not to the religious community. The only feeble guarantee was in the article on 'freedom of speech, assembly and association' (Article 14) where it stated that "Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching."

Like in many other countries, there had been a close connection between the State and religion in traditional Sri Lankan society. Buddhism as the predominant religion in society was often accorded the foremost place by the State or the King. It was

[22] See Y. Ghai & J. Cottrell (Ed.) (2004) ***Economic, Social and Cultural Rights in Practice*** (London: Interights). This study particularly focuses on South Africa.

almost the state religion. What could be seen in the 1978 Constitution, in fact beginning with the 1972 Constitution, was a resurrection of this tradition. The Constitution has a single article chapter on Buddhism (Chapter III) which very clearly sates "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana" adding at the end "while assuring to all religions the rights granted by Articles 10 and 14(1)(e)." As we have seen before, Article 10 or Article 14 (1) (e) intends to protect an individual's right to practice religion and not so much of protecting the religious freedom on an equal basis. This cannot be the case while granting the 'foremost place' to one religion.[23]

It is a controversial matter whether Buddhism is strictly a state religion or not in Sri Lanka. It is usually classified as an ambiguous state on the issue of state religion. The formulation is more subtle than in countries where there is an explicit state religion but the state's religious affiliation is undeniable. The thinking behind the foremost place for Buddhism appears to be that this special position derives from 'history' and Buddhism being the 'religion of the majority.' Both notions however are irreconcilable with 'universality' and 'equality' of modern human rights.

The controversy regarding individual rights and group rights have many dimensions. When human rights became a major challenge for many developing countries which were still largely traditional, human rights were rejected or questioned as promoting individualism.[24] In Asia, including Sri Lanka, it was argued that the Asian values were different based on communitarian concerns. Therefore, group rights were emphasised instead of individual rights. In Sri Lanka, there is an extremely peculiar ideology that governs the human rights landscape which enthrones the group rights of the majority while relegating only individual rights to the minorities. In some growing opinion, even

[23] For a critical study of state religion relationship in contemporary societies from a human rights point of view see J. Temperman (2010) ***State-Religion Relationships and Human Rights Law*** (Leiden: Martinus Nijhoff). This study raises the question of a 'right to religiously neutral governance.'

[24] For a general penetrating discussion see Spagnoli (2003). For the particular issue see, ibid: p.230.

individual rights are not fully accorded to the minorities except that they could live rather submissively. A recent most statement in this respect has come from Ven. Kirama Wimalajothi Thera, Head of the Bodu Bala Sena (BBS) expressing their opposition to the provincial council system, saying "This is a Sinhala Buddhist country and others can also live here."

> "The provincial council system was forced upon us. Now certain foreign groups and NGOs have started to pry on us and introduce the system to the North where there are Tamil and Muslim nationals. If this power is given to these people it will be very dangerous. Even your children and the next generation will be affected badly by this. So we are telling the President, ministers and foreign forces that we are against the Thirteenth Amendment. *This is a Sinhala Buddhist country and others can also live here*. If in case they go ahead with it then they will have to introduce these powers to these areas over our dead bodies."[25](My emphasis)

In the first Independent Constitution of 1947, there was recognition of 'religions' and 'communities' as relevant rights holders within the democratic polity, although not in an elaborated fashion. This is clear from Article 29 (2). However, in that constitution which in fact was drafted even before the Universal Declaration of Human Rights (1948), there was no fundamental rights chapter. There is no doubt that even that constitution or the said Article 29 failed in defending the rights of the minorities in respect of the disenfranchisement of the Tamil plantation workers (1949) or the Sinhala Only Act (1956) due to the weaknesses of the judiciary. However, if we take the principles of Article 29 (2) seriously, it is very clear that both the chapter on Buddhism and the chapter on language are contrary to those principles. While Article 29 (1) saying "Parliament shall have power to make laws for the peace, order and good government of the Island" it also prescribed the following.

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[25] Political Editor, ***The Sunday Times***, 7th July 2013: http://www.sundaytimes.lk/130707/columns/rajapaksa-regime-bows-to-india-and-world-community-51931.html (accessed 30th December 2014).

> "No such law shall -(a) prohibit or restrict the free exercise of any religion; or(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions."

The original 1978 Constitution, exactly like the 1972 Constitution, conferred that "The Official Language of Sri Lanka shall be Sinhala" in Article 18. Only difference from the previous constitution was that it conferred a national language status to the Tamil language saying "The National Languages of Sri Lanka shall be Sinhala and Tamil" in Article 19. However it was not clear that what would constitute a 'national language.' It was initially confined mainly to the use of either Sinhalese or Tamil in parliamentary proceedings and the administrative use of both languages. It was the Sixteenth Amendment to the Constitution that clarified the matter to a great extent. The rights related to language however is an area where a considerable progress could be seen under the 1978 Constitution. There were 14 insertions and substitutions to the chapter on language. In contrast, there had been no amendments at all to the chapter on fundamental rights. However, some of the insertions were not only ambiguous but also demeaning. For example, the initial constitution said "The official language of Sri Lanka shall be Sinhala" and then the Thirteenth Amendment added that "Tamil shall also be an official language."[26]

Practice of Fundamental Rights

There is no dispute that there were good things in the fundamental rights chapter and for example, "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." However, torture is the most prevalent day to

[26] It was like saying, 'this is my wife' and saying with a chuckle 'this is also my wife.' There was still a hierarchical order between the languages of Sinhala and Tamil.

day human rights violation in Sri Lanka according to a number of human rights reports and irrespective of the fact that there is other legislation prohibiting the same, not to speak of 'cruel, inhuman or degrading treatment.' [27] The main perpetrator identified is obviously the police. In the implementation of the right to freedom from torture what could be mostly seen is the lack of political commitment on the part of political authorities in charge of the police and the armed forces. The efforts of the judiciary in this respect are largely hampered or circumscribed because of the negative interference and the defence of the perpetrators by the Attorney General's Department. This is irrespective Sri Lanka being party to the Convention Against Torture (CAT) since 1994 and has its own Convention Against Torture Act (1994).

The same goes for the "freedom from arbitrary arrest, detention and punishment." The article on the subject (Article 13), to appear in any constitution, is most comprehensive with seven sections. The principles enunciated are very close to what appears in the ICCPR or other international instruments. However, arbitrary arrest and detention are other two prevalent human rights violations in Sri Lanka apart from and leading to torture even after the end of the war in 2009. During the period of war between 1983 and 2009, there were legally sanctioned possibilities under the emergency laws and the much controversial Prevention of Terrorism Act (PTA) that made the provisions in the constitution only theoretical and abundantly redundant. The same Article 13 also prohibited 'retroactive penal legislation' which by and large Sri Lanka has complied with. However, on the other hand Article 16 validated the operation of "all existing written law and unwritten law…notwithstanding any inconsistency with the preceding provisions of this Chapter" to mean the fundamental rights chapter. Most of the legal ambiguities regarding the cases of torture or arbitrary arrest/detention came about because of the above 'indemnity.' The existing Police Ordinance for example allowed many

[27] Asian Human Rights Commission (AHRC) compiled a report of 1,500 cases of torture between 1998 and 2011, '*A Review of Sri Lanka's Compliance with the Obligations under CAT*', 8th July 2011. See other publications of AHRC including *Torture* magazine.

arbitrary actions including coerced treatment in the process of law enforcement.[28]

Article 14 of the fundamental rights chapter was quite wide ranging to include not only the 'freedom of speech, assembly and association' but also as it declared the "the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise," which in fact touched on economic rights. However, as it was couched within the other civil rights associated with the freedom of expression or association, its importance or relevance escaped the attention of even the judicious commentators. The article most importantly recognised (a) the freedom of speech and expression including publication; (b) the freedom of peaceful assembly; (c) the freedom of association; and (d) the freedom to form and join a trade union.

In all these areas, Sri Lanka had a strong tradition and even practice until these rights became increasingly impinged due to political circumstances or expediency in fact associated with the introduction of the presidential system. Otherwise Sri Lanka was one of the best countries that respected and allowed the entertainment of these rights unimpaired. The lives of governments previously largely depended on the acceptance of these rights. Two examples could be given conveniently. In 1953, a Prime Minister opted to resign consequence of 13 lives lost during trade union protest and civil disobedience. In 1964, a government was defeated in a parliament when it attempted to nationalise a major newspaper establishment, the Lake House.[29] On the other hand, these are the kinds of predicaments that J. R. Jayewardene wanted to terminate by introducing a presidential system in the country.

The major merit of the fundamental rights chapter of the 1978 Constitution was its justiciability compared to the 1972 Constitution, and according to which "every person shall be entitled to apply to the Supreme Court, as provided by Article

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[28] L. Fernando (2005) ***Police-Civil Relations for Good Governance*** (Colombo: SSA).

[29] For the general character of democracy during the period see J. Jupp (1978) ***Sri Lanka: Third World Democracy*** (London: Frank Cass).

126, in respect of the infringement or imminent infringement, by executive or administrative action." Article 126 in addition allowed the same procedure for the language rights recognised in Chapter III although this procedure has not been very much used.[30] The fundamental rights implementation procedure was obviously limited to the 'executive or administrative action' in the public sector (private sector excluded) although extended to the 'infringement or imminent infringement.' While there was no redress given if any fundamental or language right was infringed by the judiciary, the collective human rights violations related to events or incidents (i.e., burning of the Jaffna Library, July 1983 riots, Anuradhapura massacre by the LTTE or election violence) were completely beyond the purview of judicial investigation and determination.[31] In initial judgements it was also determined that only persons and not entities such as media institutions, companies or trade unions that could apply for redress. This was made flexible later.

Under the prevailing provisions, the most operational fundamental rights jurisdiction was related to the 'right to equality' under Article 12. Petitioners applied to the Supreme Court when their rights became infringed due to punishments, transfers, denial of promotion or other discriminatory action in the public sector including the police service, which could easily be handled by an Equal Opportunity Commission or even the current National Human Rights Commission, if it is constituted impartially and professionally.[32] Discrimination or denial of opportunity in education also became a prominent form of fundamental rights cases before the Supreme Court in recent times. The major fall out as a result was the escape of most important human rights violations from the judicial scrutiny. Media Reform Lanka linked to the Institute of Commonwealth Studies, University of London, however recorded selected 26

[30] See T. Rajan (1995) ***Tamil as Official Language: Retrospect and Prospect*** (Colombo: ICES).

[31] This author believes that constitutional provisions could be formulated to initiate compulsory judicial investigations into collective or mass killings or similar human rights violations.

[32] Although the appointments to the Human Rights Commission were done on an impartial basis prior to around 2005, in recent times partisan affiliations have become the main criteria of appointment.

cases related to the freedom of speech and expression and the following Table 1 gives a summary of these cases.[33]

Table 1

Selected Fundamental Rights Cases on Freedom of Speech and Expression 1983-2003

Case	Year	No	Violation	Verdict
1.Dr Neville Fernando et al vs. Liyanage et al	1983	SLR 214	Sealing of Press	Dismissed
2.Jayantha Finance et al vs. Liyanage et al	1983	SLR 111	Sealing of Press	Dismissed
3.Visualingam et al vs. Liyanage et al	1983	SLR 311	Prohibition to Print (Saturday Review)	Dismissed with Dissent
4.Visualingam et al vs. Liyanage et al	1984	SLR 305	Sealing of Press (Saturday Review)	Dismissed
5.Malalgodavs Attorney General and another	1982	SLR 777	Seizure of Book	Dismissed with Cost

[33] '*Excerpts from Relevant Sri Lankan Case Law on Freedom of Expression and freedom of the Media*': http://mediareformlanka.com/Cases.pdf (accessed 30th December 2014).

6.Hewamanne vs. De Silva and another	1983	SLR 1	Contempt of Court/Freedom of Expression	Mitigated
7.RatnasaraThero vs. Udugampola	1983	SLR 461	Speech and Expression	Upheld with Compensation
8.Mallawarachchi vs. OIC Kollupitiya	1992	SLR 181	Arbitrary Arrest/Freedom of Speech	Dismissed
9. Mahinda Rajapaksa vs. Kudahetti et al	1992	SLR 223	Freedom of Speech	Dismissed
10.Mohittige et al vs. Gunatilleke et al	1992	SLR 246	Freedom of Speech	Upheld with Compensation
11.Amaratunga vs. Sirimal at al (Jana Gosha)	1993	SLR 264	Speech and Expression	Upheld with Relief
12.ChannaPieris et al vs. Attorney General et al	1994	SLR 1	Illegal Arrest/Freedom of Expression (Ratawesi Peramuna)	Upheld with Relief

13.Abeyratne vs. Gunatilake et al	1994	SLR 294	Freedom of Speech	Upheld with Relief
14.Deshapriya et al vs. Municipal Council (N'Eliya)	1995	SLR 362	Freedom of Speech (Yukthiya)	Upheld with Relief
15.Wickremasinghe vs. Edmund Jayasinghe (Sec. Media)	1995	SLR 300	Freedom of Expression (Newspaper)	Leave to Proceed Refused
16.De Silva et al vs. Jeyaraj Fernandopulle et al	1996	SLR 22	Freedom of Occupation (Taxi at Airport)	Upheld with Dissent
17.Fernando vs. SLBC et al	1996	SLR 157	Speech and Expression	Upheld
18. Gamini Atukorala et al vs. IGP et al	1996	SLR 280	Speech and Expression (UNP May Day)	Upheld

19.Marian and another vs. Upasena	1998	SLR 177	Freedom of Expression	Upheld
20.Victor Ivon vs. Attorney General and another	1998	SLR 230	Freedom of Expression/Contempt of Court	Leave to Proceed Refused
21.Sumith Dias vs. Ranatunga et al	1998	SC 98/97	Speech and Expression	Upheld and Compensation Granted
22.Karunatilaka and another vs. Elections Commissioner	1999	SLR 151	Speech and Expression (Vote)	Upheld with Relief
23.Rathnayake vs. SLRC et al	1998	SC 867/96	Expression and Equality	Upheld with Compensation
24. Sunila Abeysekera vs. Competent Authority et al	2000	SC 994/99	Expression and Discrimination	Dismissed (under emergency)
25. Leader Publications vs. Competent Authority	2000	SC 362/2000	Expression/Publication	Upheld with Compensation
26.	2003	SC	Freedom of	Upheld

Sothilingum Thavaneethan (five applicants) vs. Elections Commissioner et al		20/2002	Expression (Vote)	with Compensation

Source: *Media Reform Sri Lanka*

The fundamental rights issues and cases have undoubtedly been a learning process for the country and the judiciary alike. Initially, there was a failure to grasp the fundamental rights within the broader framework of international human rights, or the organised entities as relevant rights holders. However, this position substantially became altered later. The Saturday Review was disadvantaged in 1984 on the basis that only individuals and not entities who could apply when it filed two petitions against the sealing of the press. But The Sunday Leader benefitted when the prohibition of publication by the Competent Authority was challenged in 2000. As our list shows, the first decade (1980s) shows a dismal prospect for fundamental rights cases perhaps due to the political climate as well judges being quite conservative or not so knowledgeable about human rights issues. Even their determinations were quite scanty and contradictory if you go through the determinations.

The situation however improved in the second decade (1990s). Although the involvement of the highest executive authorities in the infringements were continued to be the case, it did appear that the judiciary was quite confident in delivering their determinations independently. Some of the politically prominent cases of Jana Gosha, Ratawesi Peramuna, Yukthiya or the UNP May Day (Case Nos. 11, 12, 14 and 18 respectively in Table 1)

were determined in favour of the petitioners. Another positive development was to interpret the freedom of speech and expression as broadly as possible even to include the right to vote within its purview. The determinations of the judges also were quite extensive, yet these cases were an extremely small fraction of the incidents of systemic human rights violations going on in the country during the period.

Moreover they confined mainly to the rights of certain sections or individuals in the South as if the Northern parts of the country were completely debarred from the fundamental rights process. For some reason, not a single known case was filed under the language rights. As a whole, it appeared that the fundamental rights procedure was like trying to fish (or not to fish) big sharks with a small net. The major incidents of rights violations in July 1980, July 1983, 1987-89 or during the four Eelam wars including the last stages in 2009 have completely escaped any judicial scrutiny inside the country. No other mechanisms or devices were installed, except for few efforts such as the Commissions on Disappearances in 1995, as a way of ameliorating the on-going saga. None of the cases listed or others, as they were part of systemic and endemic nature, could be considered 'pilot cases' where the causes of violations were identified and instructed the state authorities to prevent those in the future suggesting necessary measures.[34] The reason for this situation was largely determined by the connection between the system of government and the human rights violations. No need to repeat that the Presidential System was by and large responsible.

[34] Since 2004 the European Court adopted a procedure to take up only 'pilot cases' or deliver 'pilot judgements' focusing on causes as well as recommendations to curtail systemic violations. See P. Leach et al (2010) ***Responding to Systemic Human Rights Violations*** (New York: Angus and Robertson). A similar procedure could have been or could be adopted by the Supreme Court in Sri Lanka leaving other cases for example to the Human Rights Commission or any other court.

Failure of a System

There was some flexibility in the state system before the 1978 Constitution or more precisely before the 1972 Constitution in dealing with the ethnic question or any other human rights issue. Moreover, the major violations during the period were few and far between.[35]But the state now became restrictively defined as a 'unitary state,' to mean centralised, vertical and even authoritarian.[36] The 'unitary state' has also become a frenzied slogan on the part of the extreme Sinhala nationalists. What became precluded were the development of horizontal democratic institutions and processes and even the implementation of devolution under the Thirteenth Amendment becoming subjected to continuous upheavals as a result.

On 'the people, the state and sovereignty,' (Chapter I) first the state was defined as 'free, sovereign and independent.' This may be necessary, though obvious, as freedom could exist only in a free state as Rousseau argued. Sri Lanka as a former colony, this was also necessary to assert its sovereignty and independence from the former colonial master or any other similar source. But the definition of the state as 'unitary' placed an untold internal restrictions from which it would be extremely difficult to extricate itself. The 1978 Constitution also added that Sri Lanka is a 'democratic socialist republic' whatever it meant. Even the 1972 Constitution did not have this characterisation although drafted by a group of socialists. The economic path that was taken in 1977 with the inauguration of an 'open economic policy' was hardly akin to any type of socialism. Only reason that can be adduced to this characterisation was that perhaps the founder of the constitution wanted to pass the message that democracy under the 1978 Constitution was only a qualified one. It was a known

[35] If the number of killings, unfortunately, were an indication of major human rights violations, then until 1971 it was relatively a period of calm. At a general strike in 1947, one was killed and 18 injured. In a Hartal in 1953, 13 were killed and over 200 were injured. During two racial riots in 1956 and 1958, 158 and over 500 were reported to be killed respectively. But in contrast, 1971 saw over 5,000 killed and 12,000 arrested. It was a story of escalation.

[36] For a discussion on the unitary state and for its evolution see A.J. Wilson (1988) ***The Break-Up of Sri Lanka: The Sinhalese-Tamil Conflict*** (London: C. Hurst).

fact that the 'democratic socialist' countries in Eastern Europe were prominently authoritarian not to speak of the East Asian socialist countries.

One of the advantages for any human rights movement in the country, however, was the broad and popular definition given to the notion of sovereignty. In the 1972 Constitution it said "In the Republic of Sri Lanka sovereignty is in the people and is inalienable" and then the 1978 Constitution added that "Sovereignty includes the powers of government, fundamental rights and the franchise." The new inclusion of 'fundamental rights and the franchise' within the purview of sovereignty perhaps indicated that the drafters of the constitution, including President Jayewardene, didn't consciously anticipate that the system of government that they were installing might go against the fundamental rights in the constitution. In addition to the inclusion of fundamental rights in the people's sovereignty it further said "the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

In view of the strong recognition of fundamental rights in the constitution it is puzzling to see how did the executive branch of the government (i.e. the police, the armed forces, the bureaucracy, competent authorities, attorney general's department etc.) could trample on human rights of the people or why did the other branches of the government (primarily the legislative and the judicial) or even the people allowed major violations to take place committed by both the state and non-state actors.[37] The answer to this question may need to take into consideration a host of factors and primarily, political,

[37] Some of the initial studies were: N. Jayawickrama (1976) ***Human Rights in Sri Lanka*** (Berkeley: University of California); P. Hyndman (1992) ***Human Rights Accountability in Sri Lanka*** (New York: Human Rights Watch). For a bibliography for the initial period, see K. Rupesinghe & B. Verstappen (1989) ***Ethnic Conflict and Human Rights in Sri Lanka: An Annotated Bibliography*** (Oslo: Hans Zell). There are extensive reports available from UTHR (J), CRM, INFORM, Amnesty International, Human Rights Watch, ICJ, Minority Rights Group, Article 19 etc.

constitutional and social. That kind of a broader analysis also requires different approaches encompassing ideological and even psychological. Then the question remains as to the failure of the international institutions and primarily the UN in protecting the rights of the people in Sri Lanka when the gross human rights violations took place.

To highlight one facet in respect of the social, it appears that major violations continued unopposed by the people depending on the ethnic, political, religious, class and even caste affiliations or biases. The passivity of the people in the midst of gross violations cannot be explained merely by the repressive nature of the government or the armed forces. While some of these biases encompassed the ideological sphere, some others were psychological. For example, when violations took place in the North, the people in the South were indifferent or rejoiced and vice versa. The same partialities or silence occurred on religious, political or other distinctions.[38] The same partialities or biases remained within the governing institutions and among the personnel who were manning those institutions. However, our effort in this chapter has been limited and primarily to identify the discernible constitutional factors in relation to the major violations of human rights during the period. All these factors together constitute a systemic failure in its broadest sense of the term.

There was a major dislocation in the representative democracy in Sri Lanka when the executive was separated and elevated from the Parliament with considerable implications on human rights. A widely elected parliament on the basis of universal franchise should not only be the legislative branch but also the base and 'mother' of the executive. The executive should sit in parliament and should answer, responsible and be accountable. Separation and full independence are necessary only for the judiciary to safeguard the constitutional rights of the people and administer justice. It may be argued that Baron Montesquieu got the priorities mixed up when he proposed a strict system of separation of powers in the mid-18th century. His reading of the English

[38] It is possible to speculate that many of the partialities and discrimination based on hierarchical thinking is a reincarnation of archaic caste system in the Sri Lankan society and tradition.

constitutional system was erroneous for the evolving reality than for the archaic past.[39] When the United States applied the separation of powers in its constitution, the purpose was not to create a strong executive or president but to institute separation between the three branches and also to create checks and balances. The initial Presidents of America were liberal leaders and a strong presidential system evolved much later.[40] However, this was not the case when France devised its own presidential system in 1958 under General Charles de Gaulle. The purpose was to install an authoritarian rule like the 'future Sri Lanka' and in fact J. R. Jayewardene took inspiration from the Gaullist system.[41] Another trace of the 1978 Constitution was the ancient monarchical system as Mervyn de Silva argued and this trait of monarchical thinking still prevails in the country.

> "Its main feature was an unparalleled concentration of power in the presidency. While foreign scholars termed the new system 'Bonapartist-Gaullist' or a 'benevolent authoritarianism,' its architect rejoiced, saying that he was 'more powerful than King Parakramabahu the Great."[42]

The sovereignty of the people however was the catch word to install the authoritarian system and Article 4 was the basic framework for its architecture. First it said "the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum." It should be noted, however, that although 'referendum' was named as a devise of exercising 'legislative power' of the people, there had been only one referendum so far in December 1982 which was alleged to be fraudulent and ironically that was to extend the term of the incumbent

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[39] Chapter 6 of Book XI of ***The Spirit of the Laws***.

[40] Woodrow Wilson was a major critic of separation of powers and the presidential system. Both his amateur work *Congressional Government* and the mature *Constitutional Government* develops the same line of thinking in appreciation of parliamentary system.

[41] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka 1978*** (London: Macmillan).

[42] '*Repression in the Guise of Stability*', ***International Herald Tribune***, 23rd April 1986.

parliament for another six years without holding the due parliamentary election in 1983.[43] The Parliament also was unicameral without any possibility of allowing the electorally unrepresented and deserving people to serve the country in legislative matters in a second chamber. For democracy to operate properly, it is always better to balance the functions of a house of representatives with a second chamber. Under the devolution of power to the provinces in 1987, a second chamber could have served as a conduit for power sharing at the centre. The Senate that operated under the first independent constitution until it was abolished in 1971 was a centre where public issues were debated beyond partisan politics and almost served as an informal human rights council.[44]

The following was what the Constitution said about the executive branch of government in the framework section (Chapter I).

> "The executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People."

Here there was no mentioning of a Cabinet or a Prime Minister and those provisions came in Chapter VIII clearly implying they were subordinate to the President. The purpose of the Cabinet of Ministers was to serve the President not as an independent body but as a subordinate entity. It further explained that the President "is the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces."

There is no dispute that the 1978 Constitution retained certain aspects of a parliamentary system not as a mixture like in France but side by side. This is clear from the provisions in Chapter VIII. This has been more beneficial for the preservation of some semblance of parliamentary democracy than a mixed system like in France. During December 2001 and April 2004, when the

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[43] While no election was held for the Parliament between 1977 and 1988, the local government system also was frozen during the same period with major consequences for the representative democracy.

[44] I.D.S. Weerawardena (1955) ***The Senate of Ceylon at Work*** (Peradeniya: University of Ceylon).

Parliament was elected from a different political party to that of the President, the country could revert back to almost a cabinet system of government. This could happen as the incumbent President, opted not to use her immense executive powers until the last moment. This was also the period of the peace process and the Ceasefire Agreement (CFA) when gross human rights violations became reduced although one could argue that the uncertainty and conflict between the President and the Prime Minister contributed to the failure of the peace process in addition to the LTTE abusing the peace process for their military objectives. This supports our main argument, however, that a cabinet system of government is more conducive to human rights and peace, if unhampered by any semblance of a presidential system.

The presidential system in Sri Lanka has been more authoritarian internally than most the other presidential systems in the world, particularly the US or France, and given the long tenure of office it could easily be abused. The term of office is six years and initially the terms were limited to two, until the Eighteenth Amendment in September 2010. Compared to the four-year term in the US, this meant that a President in Sri Lanka could serve (if elected of course) for a period similar to three terms in the US. Now the term limit is lifted and in theory one could become a lifetime president. In France, the period was seven years earlier but now limited to five and also prohibiting anyone serving more than two consecutive terms. In the US, although there was no two-term limit until the Twenty-Second Amendment in 1947, only four Presidents attempted to contest for more than two terms and only Franklin D. Roosevelt succeeded under the special circumstances of the war. Although in Russia the period of term is six years like in Sri Lanka, the office is limited to two consecutive terms. Moreover, the Russian President is not the head of the executive branch. In almost all countries, while the trend has been to limit the terms and even powers of the President, Sri Lanka is a country which has moved in the opposite direction. The Third Amendment to the Constitution made the matters much worse by allowing the President to seek a new mandate after the expiration of four years, nevertheless continuing the previous term for the full period and then commencing the current after that if elected.

This virtually meant that eight year period could be mandated by one election.

The Presidents also have acquired glory and power through convention and ideology.[45] In a country where the traditional kingship was suppressed by colonialism and many people still yearn for that traditional glory and myth, the position of the President was the only institution that it could be invoked. The first President J. R. Jayewardene fully benefitted from this aura whether he truly believed it or not. He claimed to be more powerful than some of the most powerful kings of the past and said he could do anything other than 'making a man a woman or woman a man.' The same invincibility is resurrected under the current President as well. This is partly because of the almost complete immunity given by the Constitution itself in Article 35 (1) which says, "While any person holds office as President, no proceedings shall he 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." Although constitutional analysts opined that this could not mean any immunity at least to breach the Constitution, in a situation of subdued judiciary it had extremely been difficult to challenge any of the actions of the Presidents in a court of law.[46] The President also cannot be removed during his/her tenure other than by an extremely difficult procedure of impeachment.

The main casualty under the presidential system was the independence of the judiciary with considerable human rights implications. The downturn started with the 1972 Constitution on a different trajectory. On the assumption of the supremacy of Parliament, the judiciary was made subordinate and even it retained some judicial power of its own. The retention continued under the 1978 Constitution although the Parliament was no longer supreme. The encroachment on the judiciary came in a different manner. In spite of the nominal Head of State, of course

[45] The situation is quite akin to Oriental Despotism that Wittfogel depicted. K. Wittfogel (1967) ***Oriental Despotism: A Comparative Study of Total Power*** (London: Yale University Press). See also L. Fernando, '*Karl Marx, Asiatic Despotism and Sri Lanka*', ***Colombo Telegraph***, 13th March 2013.

[46] See B. Fernando, '*Sri Lanka: The Need to Re-interpret the Executive President's Impunity under Article 35 (1)*', ***Asian Human Rights Commission***, 14th November 2012.

on the advice of the Prime Minister, appointing the judges of the superior courts, under the 1978 Constitution, the appointments of the Supreme Court and the Court of Appeal came under the direct discretion of the Executive President. Article 107 (1) said "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." It was under this article that all sitting judges of the superior courts had to resign and reappointed with a significant reshuffle. It was barely three years before in August 1985 that the UN enunciated the "Basic Principles on the Independence of the Judiciary" where the independence of the judiciary was emphasised in terms of rule of law and human rights in the Preamble as well as in the substantive articles. The most important principles were the following.

> "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[47]

Within months of the promulgation of the 1978 Constitution, the Special Presidential Commission Law no 7 of 1978 was enacted with the purpose depriving the former Prime Minister, Sirimavo Bandaranaike, of her civic rights. When the Court of Appeal declared, on an application, that the retrospective application of the law was null and void, the President decided to change the Constitution and make the purview of the Commission applicable retrospectively and also pruning the powers of the Court of Appeal. The deprivation of civic rights of Mrs Bandaranaike was the first major human rights issue under the 1978 Constitution. It is reported that President Jayewardene had said "the judiciary

[47] U.N. Doc. A/CONF. 121/22 Rev.1 at 59 (1985).

would pose difficulties for the executive if they are wholly outside anyone's control."[48]

There had been a trail of events since 1978 that accompanied the suppression of democracy, violation of human rights and silencing of the judiciary which went hand in hand. The attempt here is not to give a full record but highlight some initial key events. First it was the deprivation of civic rights of the foremost potential challenger to the presidential position in 1978 itself. Handpicked three judges were conveniently used in the exercise. In 1981, the Jaffna District Council election was blatantly manipulated with violence and that was a part and parcel of coercing the emerging minority opposition in the North.[49]Orders had been already given to General Tissa Weeratunga to 'eliminate terrorism completely from the Northern soil' with additional powers given under the draconian Prevention of Terrorism Act (1979). The confrontations continued with the full explosion of July 1983 violence against the ethnic Tamils with colossal damage to property, life and ethnic relations in the country. Nearly a million of Tamils were driven out of the country.[50] That was the beginning of the Eelam War I which lasted until 1985. The connection between the suppression of democracy, the violation of human rights and the silencing of the judiciary has continued until this day, the latest most example for the latter being the impeachment of the Chief Justice Dr Shirani Bandaranayake in 2012.

[48] A. Satkunanathan, '*Working of Democracy in Sri Lanka*', ***LST Monograph***: http://www.democracy-asia.org/qa/srilanka/Ambika (accessed 30th December 2014).
[49] See N. Murray, '*The State against Tamils*' (1984) ***Race & Class*** XXV: p.1.
[50] A.J. Wilson gave some direct evidence for the government involvement in the 1983 riots. Wilson (1988): p.173.

Conclusion

This chapter did not make any substantive effort to record the events and incidents of human rights violations during the period since the 1978 Constitution and these are available in a multitude of sources, national and international, as referred to before. Instead, the effort was to isolate the key constitutional factors that were primarily responsible, in author's opinion, for the protection and promotion of human rights violations within a context of increasing conflicts of ethnic and/or political nature.

If this chapter started with the hypothesis that parliamentary democracies in contrast to the presidential systems are more conducive to human rights protection based on the views of Karel Vasak, this hypothesis became substantially substantiated by the end of the chapter both on empirical and constitutional premises. The fundamental rights chapter in the 1978 Constitution could not hold water. On the empirical side of the equation, it is abundantly clear that major violations started to escalate under the Presidential rule, individual presidents making matters worse both by commission and omission although this second aspect was not pursued very much in this chapter given the space constraints. The Parliamentary period of the constitutional history of the country (1948-1978) in contrast was in fact was a 'golden age' except certain aberrations under the 1972 Constitution. This hypothesis again became confirmed by the fact that the period between 2001 and 2004 was largely favourable to human rights and peace when the system temporarily reverted back to the old system of Cabinet government as we have shown. This was also the period when the Independent Commissions existed under the Seventeenth Amendment.

Human rights violations primarily emerge in any country from the state apparatuses (or from movements driving towards creating such apparatuses i.e. the LTTE in Sri Lanka) if those apparatuses are not governed by democratic rule of law. Violators are not usually the civil society actors. As Karl Marx maintained:

> "Freedom consists in the conversion of the State from an organ superimposed on society into one completely

> subordinated to it, and today too, the forms of the State are more free or less free to the extent that they restrict the 'freedom' of the State."[51]

The state apparatuses encompass the armed forces, the police, the prisons and the bureaucracy in various forms and shapes. The handling of this 'monster' is primarily a task of the executive branch of the modern government and the best handling of this task conducive to human rights would be if the executive branch is directly and intimately responsible and accountable to an elected Parliament of the people and this means primarily a parliamentary system of government. While this is a necessary condition for the protection and promotion of human rights it is also not a sufficient condition. There are other socio-political, cultural, ideological and institutional conditions necessary although this study did not go into details of them.

As we could observe from our analysis and descriptions, when the executive branch of the government in the form of executive presidency became divorced from the legislator and in fact dominates both the legislator and the judiciary through various means that was not conducive to human rights. Much worse was the situation when the President received a separate mandate overriding the mandate of the Parliament and believed in authoritarian government for the sake ostensibly for developing the country economically in a situation where the understanding or resolve to defend human rights was not so high even within the civil society. This might not totally be the case if the presidential system was accompanied by extensive checks and balances and if the society or the economy is developed. But in a developing or a transitional country like in Sri Lanka, the presidential system did spell disaster for human rights and civil liberties as we could observe from the past experience. The main motivation to undertake this study was our observation of an evolving debate in Sri Lanka at present on the subject of whether the presidential or parliamentary democracy is the better system for human rights and democracy. However, as Matthew S. Shugart and John M. Carey said, "Most of the scholarly literature on the subject comes

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[51] Quoted by P. Anderson (1974) ***Lineages of the Absolutist State*** (London: Verso): p.11.

out quite squarely behind parliamentarism as the preferred alternative. However, among practicing politicians, the message is getting through slowly, if at all."[52]

[52] Shugart & Carey (1992): p.2.

8

The Executive and the Shadow State in Sri Lanka

Ambika Satkunanathan

Introduction

Executive presidentialism is the dominant feature of Sri Lanka's constitution as well as its political culture. The powerful executive created by the 1978 Constitution, and the absence of adequate checks and balances allows authoritarian and undemocratic acts of executive presidents, which have not only eroded the accountability and independence of the legislature and judiciary, but also the supremacy of the constitution itself.[1] Nearly six years after the end of armed conflict in May 2009, militarisation in Sri Lanka has become normalised and entrenched, and the military's extensive involvement in civilian affairs exceeds boundaries prescribed in a constitutional democracy. [2]

The aim of this chapter is to propose a conceptual framework to better understand the manner in which, in post-war Sri Lanka, the executive presidency, with few fetters and restrictions on its authority, has been used to enable and sustain militarisation through the securitisation of certain groups and identities. Securitisation is 'discourse that takes the form of presenting something as an existential threat to the referent object', which is then used to legitimise and justify extraordinary measures taken by the state that restrict rights.[3] Securitisation, and militarisation as the strategy used to deal with the securitised communities and identities, have led to the creation of unofficial structures and processes, which while existing alongside official and legal

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[1] In Sri Lanka, the executive has shown scant regard for the separation of powers. For instance, in January 2013 the President summoned the 43rd Chief Justice and judges of the Supreme Court prior to the court delivering an important decision on legislation that was the brainchild of Basil Rajapaksa, Minister of Economic Development and the brother of the President. The 44th Chief Justice, Mohan Peiris, who was appointed after the impeachment of the 43rd Chief Justice Shirani Bandaranayake despite Court of Appeal and Supreme Court rulings against it, has himself stated that the legislature, executive and judiciary are three different institutions only for "administrative purposes" and he believes the three institutions would be most public friendly if they function as a single mechanism.

[2] Although Mahinda Rajapaksa was defeated at the presidential elections held on 8 January 2015 as of February 2015 it is yet to be seen whether and to what extent the military complex will be dismantled.

[3] O. Waever, quoted in U. Abulof, *Deep Securitisation and Israel's "Demographic Demon"'* (2014) ***International Political Sociology*** 8:396.

institutions, laws and processes, usurp the latters' authority. The contours of this 'shadow state' will be sketched by drawing upon elements of three concepts: the 'deep state', the 'garrison state', and the 'dual state'.

This chapter will begin by setting the context and ways in which the executive created an environment conducive for securitisation and militarisation, mainly through the use of emergency powers which enabled the creation of unofficial rules and processes that remained even following the lapse of the state of emergency. Thereafter, the evolution of securitisation in post-war Sri Lanka, the use of militarisation as a strategy to deal with securitised identities and communities, and the utilisation of securitisation to justify militarisation will be examined. This section will also argue that the deification of the President who was portrayed as a paternal protector figure played a crucial role in securitisation and militarisation. The impact of the dual processes of securitisation and militarisation will be the focus of the following section, which will set out the deliberate strategy used to undermine and control political activism and activity in the conflict-affected areas. The final part of the chapter will use elements of the concepts of the deep state, the garrison state, and the dual state to illustrate the existence of a shadow state that came into being during the tenure of President Mahinda Rajapaksa.

The Presidency and the State of Exception: Creating a Conducive Environment for Securitisation and Militarisation

The President is the head of the armed forces and commander in chief.[4] He is also the Minister of Defence. Article 155 of the Constitution bestows upon the President the power to declare a state of emergency. The substantive powers brought into effect by the declaration of a state of emergency are found in the Public Security Ordinance No 25 of 1947 as amended (PSO). These wide-ranging powers, which include the power to promulgate emergency regulations and to call out the armed forces to maintain public order, place few fetters on the President. For

[4] The Constitution of Sri Lanka (1978): Article 30 (1).

instance, Section 12 of the PSO, which gives the President the power to call out the armed forces if 'circumstances endangering public security in any area have arisen or are imminent and the President is of the opinion that the police are inadequate' to deal with the situation, confers powers of search and arrest upon the armed forces. The Order is valid for one month from the date of publication in the gazette, and has to be re-issued at the end of that period. Unlike the declaration of a state of emergency, which requires parliamentary approval, the Presidential Order has to be only communicated to Parliament.[5] Any failure to communicate to Parliament does not affect the validity or operation of the Order. Further, any act done in good faith under a state of emergency is not subject to judicial oversight or review and hence Parliament becomes the sole oversight mechanism.

Due to a number of reasons, including the proportional representation electoral system, a weak parliamentary committee system, and a weak opposition plagued by internal strife, a scholar's warning more than 30 years ago that it will be possible to 'reproduce in time a group of Parliamentary representatives who do not represent the people but only the President'[6] became a reality in Sri Lanka. In particular, during the periods when the UNP commanded a five-sixth majority between 1977 and 1989, and the United People's Freedom Alliance (UPFA) gained a two-thirds majority in 2010, Parliament functioned more as an organ that rubber-stamped the decisions of the President, rather than as an oversight mechanism. In response to *The Straits Times* reporter's statement during an interview with President Mahinda Rajapaksa that the 'parliament will do what you tell them to do', Rajapaksa's response 'I know…or I hope so (laughing)'[7] is illustrative of this.

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[5] Public Security Ordinance No. 25 of 1947: Section 21 (2) and 2 (3).
[6] G. Obeyesekera, '*Political Violence and the Future of Democracy in Sri Lanka*', the Committee for Rational Development (1984) ***Sri Lanka: The Ethnic Conflict-Myths, Realities and Perspectives'*** (New Delhi: Navrang): p.49.
[7] R. Velloor, 'President Rajapaksa wants to be remembered as a man who loved his country, his people and did his best to serve them', ***Straits Times***, March 2010, available at http://transcurrents.com/tc/2010/03/president_rajapaksa_says_he_di.html (accessed on 15 February 2015).

Further, as Minister of Defence, the President is bestowed with considerable powers that curtail civil liberties through the Prevention of Terrorism Act (PTA). For instance, the PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court,[8] and thereafter for up to 18 months on the basis of a detention order issued by the Minister of Defence.[9] The lawfulness of a detention order issued by the Minister of Defence cannot be challenged in a court of law. The Minister of Defence does not have the power to create new offences, which can only be done either through new legislation passed by Parliament or by way of a proclamation of a state of emergency under the PSO. However, following the lapse of the state of emergency in August 2011 the President used the PTA, specifically Section 27 of the Act, which empowers the Minister of Defence to make regulations under the Act for the purpose of carrying out or giving effect to the principles and provisions of the Act, to re-introduce lapsed Emergency Regulations into the statute books through the PTA.

In Sri Lanka, national security considerations have been always given precedence in official rhetoric and action, which placed it above 'democratic values and policy decisions'.[10] Due to national security considerations, throughout the war certain populations and geographical areas were securitised. The executive's extended use of emergency powers to legislate during difficult times and bypassing elected representatives for an extended period, led to the state of exception remaining even after the state of emergency ceased to exist. The normalisation of the exception took place in stages with each precedent setting the bar higher for the next, thereby with the scope and nature of the powers being inflated after each successive emergency. This resulted in the government using 'the extraordinary powers and authority granted and exercised during previous emergencies' as the point of reference during the next emergency rather than 'normalcy'.[11] As Fionnuala Ni Aolain states, 'to recognise an emergency we must,

[8] Section 7 Prevention of Terrorism Act.
[9] Section 9 Prevention of Terrorism Act.
[10] A. Welikala (2008) ***A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*** (Colombo: Centre for Policy Alternatives): p. 20.
[11] Welikala (2008): p.102.

therefore, have the background of normalcy'.[12] Even after the lapse of the state of emergency, the regime used the legacy of the Emergency Regulations and the PTA as a template to implement its dual pronged project of securitisation and militarisation through unofficial rules and practices 'as well as a vocabulary of danger'.[13] Militarisation as a strategy was thereby justified as the only means to counter threats posed by the securitised areas and populations, which were deemed to continue to exist in post-war Sri Lanka. For instance, Tamil diaspora groups and the Tamil population in the conflict-affected areas, particularly young Tamil men, were presented as potential threats to the state as they were seen as groups that could revive the LTTE, thereby legitimating securitisation which could be dealt with only through militarisation.

The state of emergency enabled the creation of a number of unofficial rules and processes, which had/have no basis in law but have become the norm, if not at the macro level, most certainly at the micro level. These are rules and processes the military followed in the conflict-affected areas and which were known to the local populations, but most often not to those living outside. Although they are not in the statue books, they attained the status of formal rules, and were applied by those exercising power as formal rules at the expense of proper laws, regulations, and circulars. For example, following the end of the war in 2009, those deemed former LTTE members and sent to government-run rehabilitation centres were subjected to the process of signing-in at army camps and military-run 'civil affairs offices' following their release. This process, which has no legal basis, assumed the position of a formal process with Gotabhaya Rajapaksa often informing diplomats and visiting dignitaries that the process is in place due to the government's need to monitor the released former cadres. [14] Queries made to the Attorney-General's

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[12] F.Ni Aolain, '*Situating Women in Counter-Terrorism Discourses: Undulating Masculinities and Luminal Femininities'* (2013) ***Boston University Law Review*** 93: 172.

[13] E.M. Montano (2012) ***Citizenship in Times of Exception: The Turn to Security and the Politics of Human Rights in Valle del Cauca, Colombia*** (University of Massachusetts, Amherst) Dissertation. p. 43

[14] Gotabhaya Rajapaksa, President Mahinda Rajapaksa's brother and Secretary, Ministry of Defence, has played a key role in the process of militarization. The

Department by various diplomats and international organisations regarding the legal basis of this process elicited no response. While the creation and application of informal rules and processes are not particular to the Rajapaksa regime, it is during the Rajapaksa era that these informal rules and processes began to attain a formal status to the point where a context was created in which it was made clear that challenging them would lead to reprisals and punitive action by the state.

Is Militarisation Imperative to Deal with Securitised Groups or is Securitisation Employed to Justify Militarisation?

Militarisation is the primary strategy used to deal with securitised communities and identities, whereby the population, particularly in the conflict-affected areas, was 'subject to permanent managing and ordering' through multiple means.[15] One such process was regular registration, i.e., undertaking unofficial censuses of the population in the north, which was not implemented in all parts of the north nor was uniform procedure used in every area. Dissenters, human rights defenders, community leaders and political activists from opposition parties were amongst those who were 'constantly framed as actual or potential terrorists (or their collaborators)…' [16] and subject to military surveillance. For instance, the report of the army on the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC)[17] points out that for security reasons it is imperative to monitor the

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fact the President is the Minister of Defence enables Gotabhaya to assume a far broader role with more powers than an average secretary to a ministry. Although technically a government official he has functioned more as a politician or a parliamentary representative and exercised powers far exceeding his mandate and duties.

[15] Montano (2012): p. 100.

[16] D. Ojeda, '*War and Terrorism: The Banal Geographies of Security in Colombia's "Retaking"* (2013) ***Geopolitics*** 18 (4): p. 762.

[17] On 15 May 2010, in response to the Secretary-General and the President Rajapaksa's joint statement of commitment made in May 2009, the President appointed a Lessons Learnt and Reconciliation Commission (LLRC) to 'ascertain circumstances that led to failure of the ceasefire agreement of 22 February 2002, and the sequence of events that followed thereafter until 19 May 2009'.

activities of NGOs. While stating that there are no restrictions whatsoever on the activities of *bona fide* organisations, it recommends that screening and control of all international organisations, international non-governmental organisations, and non-governmental organisations be done under the supervision of the Ministry of Defence to ensure undesirable elements will not jeopardise national security.[18] This securitisation move was put into practice through numerous unofficial rules, including subjecting any gathering of more than a handful of people in the north and demanding civil society organisations provide prior notification to the army of any meeting or workshop.

Even though militarisation has been a feature of daily life in Sri Lanka, given the 30 year armed conflict and youth insurrections in the south, a distinction should be made between the process and form of militarisation that existed pre-May 2009, and militarisation that has become an entrenched and normalised part of life post-May 2009. Cynthia Enloe defines militarisation as a 'step-by-step process by which something becomes controlled by, dependent on, or derives its value from the military as an institution or militaristic criteria'. [19] Her warning that 'militarisation is such a pervasive process, and thus so hard to uproot, precisely because in its everyday form it scarcely looks life threatening', provides a useful framework that enables us to identify and understand strategies used to entrench militarisation by looking beyond the visible and most obvious to understand the insidious and rapid militarisation that has taken place since the end of the armed conflict, particularly in the north.[20] Prior to the end of the war, the military was not embedded in all aspects of civil administration and civilian life, as it is six years following the end of the war. Further, during the war, the impact of militarisation was felt mainly in the north and east where military action and (unofficial) rules shaped and dictated daily civilian life.

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[18] ***Full Report of the Army Board on LLRC Observations Released,*** April 2013, available at http://www.army.lk/docimages/image/LLRC_2013.pdf (accessed on 2 January 2015).
[19] C. Enloe (2000) ***Maneuvers: The International Politics of Militarizing Women's Lives*** (Berkeley, Los Angeles, London: University of California Press): p. 291.
[20] Ibid.

Following the end of the war systematic militarisation has been taking place throughout the country.

Like in Colombia where President Uribe introduced the concept of 'Democratic Security' which expected the participation of all citizens as agents of the state whereby security became a 'collective effort of all citizens',[21] in Sri Lanka too, particularly in the former conflict-affected areas, citizens were expected to function as informants which 'increases mistrust among communities and lowers the possibility of solidarity and political organisation'.[22] Civil security committees constituted of civilians and established by the police also function as surveillance bodies for the security agencies. These groups, that have been issued identity cards signed by the officer-in-charge (OIC) of the local police station, are asked to report on anything of significance that takes place in the village – whether a new visitor or an event held by civil society organisations. Including the general public in 'the projects and imperatives of the state' blurs the lines between the military and non-military sectors of society whereby the public become an active participant in the militarisation process.[23]

Former LTTE combatants in particular are securitised, which in turn is used to justify the monitoring and surveillance to which they are subjected. The surveillance and monitoring in turn creates suspicion within the community, which views them as potential threats not due to their previous (perceived or actual) involvement with the LTTE, but because they are constantly monitored and their movements restricted by the security forces. This constant interaction with the armed forces results in the general population viewing these persons as military informants. Hence, while the general population is led to believe the hyper-securitisation of former combatants creates a secure environment for the public, it results in creating insecurity for the combatants and within their communities.

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[21] C. Rojas, '*Securing the State and Developing Social Insecurities: The Securitisation and Citizenship in Contemporary Colombia* (2009) ***Third World Quarterly*** 30 (1): p. 232.
[22] Rojas (2009): p. 233.
[23] H. Lasswell quoted in R. M. Bernazzoli & C. Flint, *'Power, Place and Militarism: Toward a Comparative Geographic Analysis of Militarization'* (2010) ***Geography Compass*** 3(1): p. 160.

The 'militarisation of the social…assumes a pseudo-civilian form through the so-called civil-military relations'[24] which has been used as a means to minimise criticism of military involvement in civilian affairs, as well as the discomfort of the local population regarding military presence. Paradoxically, in Sri Lanka this has taken the form of the army's encroachment into civilian space to exercise further control over the population, particularly children and youth, illustrated by its involvement in the education sector in the north by engaging in philanthropic initiatives, ranging from providing scholarships and distributing books to students. The military has provided military training for civilians by enlisting school principals and state employees as volunteers in the forces, provided leadership training programmes for those about to enter tertiary education,[25] and organised educational tours in the south for northern school children.[26] In 2013, in Kilinochchi and Mullaitivu the Civil Security Department (CSD) even began managing pre-schools and recruiting teachers, who were then deployed to pre-schools as employees of the CSD.[27] Following the end of the war, the military became involved in civil administration and governance as well. Since 2009, the Ministry of Defence expanded considerably and became the institution that oversaw many activities and institutions that were previously within the purview of civilian authorities. The government also appointed numerous former military officers to positions in the administrative and foreign services. Until the change of government in January 2015, the Governors of the Northern and Eastern Provinces for instance were both former military personnel, as is the Government Agent of Trincomalee.

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[24] Montana (2012): p.110.
[25] '*Tamil leaders in the making at Kilinochchi'*, ***Asian Tribune,*** 29 January 2014, available at: http://www.asiantribune.com/news/2012/01/28/tamil-leaders-making-kilinochchi (accessed on 2 January 2015).
[26] '*Jaffna Students Make a Four Day Tour to Colombo'*, ***Ministry of Defence Website***, 11 March 2011, available at: http://www.defence.lk/new.asp?fname=20111103_06 (accessed on 2 January 2015).
[27] '*Navy Enlists 02 Females from Mullikulam as Teachers'*, ***Ministry of Defence Website,*** 15 January 2013, available at: http://www.defence.lk/new.asp?fname=Navy_enlists_02_Females_from_Mullikulum_as_Teachers_20130115_04 (accessed on 2 January 2015).

The role of the President in enabling and sustaining securitisation and militarisation was crucial. While depicting these processes as integral to safeguard the population, a paternalistic view was adopted whereby the country was portrayed as 'a big family living a fraternal co-existence under the care of "the father rather than the politician"'.[28] The analytical construct of the 'Asokan Persona' enables a better understanding of the non-rational core of the nation and the cult of personality that supports the creation of a paternalistic state. This is similar to other paradigms, such as in Colombia, where the state becomes the 'punitive father who has to protect his children while denying them the possibility to determine the terms of such protection'.[29] The Asokan Persona is 'a cultural paradigm which encapsulates a relationship between a superior and a subordinate; and which describes a superior who is regarded as a righteous exemplary, one who is expected to function as a source of benevolent largesse, an apical fountainhead of status and pontifical authority and, in effect, as a central and pivotal force'. [30] Michael Roberts states that 'Buddhism was constructed into a legitimating force and invested the Sinhala kings with immense authority...they were also constitutive acts of world renewal, in which the king-elect was transformed into a god or re-renewed as a god.'[31]

Parallels can be drawn between this description and President Rajapaksa's attempts to transform himself into a god-like figure with the help of poetry and songs which hailed him as the re-incarnation of a victorious historical king, and lavish ceremonies that sought to glorify him.[32] This god-king-father thence appealed to the loyalty of citizens to legitimise militarisation, which was deemed imperative due to the existence of the securitised communities. President Rajapaksa who constructed himself as such a figure also dispensed favours by 'helping' individuals and

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[28] Rojas (2009): p. 232.
[29] Montana (2012): p. 128.
[30] M. Roberts, '*Asokan Persona as a Cultural Disposition'* (1994) ***Exploring Confrontation- Sri Lanka: Politics, Culture and History*** (Chur: Harwood Academic Publishers): p.70. See also chapters by Roberts in this book.
[31] Roberts (1994): p. 68.
[32] At a musical show held in 2010 and organised and telecasted by the state run television station ITN, a boy sang 'Mahinda is our king…King Rajapaksa's name will be written in history in letters of gold…We owe Rajapaksa.'

groups seek redress from the repressive effects of militarisation in a show of benevolence and power that led to a loss of confidence 'in the institutions of the constitutional state and the associated representative and aggregative agencies of political society'.[33] Examples include the President ordering the immediate release of the leader of the Muslim-Tamil National Alliance (MTNA), Azath Salley, who was detained by the Criminal Investigation Department (CID) on suspicion of having committed offences under the Penal Code and the Prevention of Terrorism Act.[34] Sometimes this act of benevolence involved the recipient of the favour publicly repenting their errors, as if to a deity, and expressing gratitude to the executive. The students from Jaffna University who were arrested in December 2012 by the army and sent to a rehabilitation centre for allegedly celebrating LTTE heroes' day were released on the instructions of the President following personal appeals by the families to the President. One of the released students expressed his gratitude thus: "My mother met the honourable president. We wanted to be released. We are happy now. We will do our studies very well. We wish to thank the Honourable President.[35]

Political Cleansing: The Outcome of Securitisation and Militarisation?

The overt and insidious means through which securitisation and militarisation have taken place, with particular attention being paid to ensuring people could not gather together, preventing political parties from functioning freely and targeting activists who engage in social mobilisation, point to attempts to stifle, if not altogether prevent, political activity, particularly in the conflict-affected areas. Post-war, militarisation in the north and the east

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[33] R. Sakwa, '*The Dual State in Russia'* (2010) ***Post-Soviet Affairs*** 26(3): p. 200.

[34] Shamindra Ferdinando and Lal Gunasekera, '*President Rajapaksa Orders release of Azath Salley Before Departing on Official Visit to Uganda*', ***The Island****,* 10 May 2013.

[35] '*Two Jaffna Students Released after Parents Make Request to President'*, ***Centre for Human Rights & Research,*** 16 February 2013, available at http://www.chrsrilanka.com/_Two_Jaffna_University_students_released_after_parents_make_request_to_President-5-1821.html (accessed on 2 January 2015).

became progressively heavier, and as a result civic activism and social mobilisation became near-impossible with civil society organisations becoming reluctant to work on human rights issues as it would attract excessive monitoring by the security forces. In December 2014 in Kilinochchi even a Christmas staff party held by a civil society organisation at a co-op hall was visited by the military.

In Colombia, this form of 'political cleansing' was used with similar intent and 'once a region was considered "clean of politics"' paramilitary cadres were brought in to 'protect the population against guerrilla influence'. [36] Former LTTE combatants who were released from government-run rehabilitation centres reported that during the rehabilitation period they were instructed numerous times not to participate in politics or become involved with political parties following their release. These instructions clearly only referred to involvement with opposition parties, given that former cadres have been used by the military in the service of the ruling party to support their campaigns during the provincial and presidential elections.[37] At times opposition political parties have accused the government of using former cadres to disrupt or attack their political meetings. For example, in March 2013, a meeting held by the Tamil National Alliance (TNA) in Kilinochchi was attacked by a group of persons reportedly comprising former LTTE members employed in the Civil Defence Force, members attached to the Kilinochchi office of the Sri Lanka Freedom party (SLFP), and members of military and police intelligence in civilian clothing.[38]

While former cadres are being employed by the state to monitor dissenters, and even perpetrate violence and intimidate rights

[36] Rojas (2009): p.228.
[37] D.B.S. Jeyaraj, '*Gotabhaya Rajapaksa Discussed Northern Provincial Poll with Ex-LTTE Media Chief "Daya Master" on 23 Others at 52 Division Headquarters in Varani'*, ***dbsjeyraj.com,*** 23 April 2013, available at: http://dbsjeyraj.com/dbsj/archives/20522 (accessed on 2 January 2015).
[38] D.B.S. Jeyaraj, **'"***State Terrorists" Carrying Lion Flags Launch Stone Attack On TNA Meeting in Kilinochchi'*, ***Transcurrents,*** available at: http://dbsjeyaraj.com/dbsj/archives/19246 (accessed on 2 January 2015).

activists, at the same time the 'undead tiger'[39] – the ever-present LTTE threat – is resurrected regularly to justify crackdowns on legitimate political activity, which is portrayed as action that is aimed at renewing conflict in the conflict-affected areas. Constant surveillance, intimidation, and harassment by the military has resulted in self-censorship by the population who in order to avoid reprisals 'adopt silence or codes that protect them in this uncertain terrain'.[40] Militarisation has created the belief that an extensive and deep-seated surveillance mechanism exists in the north which would take punitive measures against those who are perceived to contravene the *diktats* of the military. This has enabled the military to control the behaviour of the population even in the absence of a visible physical uniformed military presence. Hence, 'the mobilization of fear' became 'fundamental to the state's security provision'.[41]

Fear was created very successfully amongst civil society and is ever-present everywhere in the north and east. During the Rajapaksa regime, activists feared their organisations would be either taken over by the state or closed down. They feared for the lives of their staff members and their families. They feared for the safety of the communities and individuals they supported, and those with whom they collaborated.

Social activism on human rights issues was most affected. For instance, a number of organisations reduced their field visits, which in turn limited their ability to build strong relationships with the community, without which documentation of human rights violations became impossible, in a repressive context in which, without trust, people do not share information. The deepening lack of trust within communities in the north and east was also caused by the presence of military informants within communities. Colombian President Uribe's statement that 'in order to support our armed forces the weapons we need as

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[39] The phrase used by Tisaranee Gunasekera in *'Re-defining patriotism as unquestioning loyalty to the ruling Rajapakse family,* ***Transcurrents,*** 12 March 2011 available at:
http://transcurrents.com/tc/2011/03/redefining_patriotism_as_unque.html (accessed on 2 January 2015).
[40] Montan (2012): p.106.
[41] Ojeda (2013): p. 769

citizens are love, trust and a cell phone' describes the situation in the north in particular, where the common strategy used by military informants was to dial the number of their handler and leave the phone line open to enable the person at the other end to listen to the proceedings. The reluctance of many local groups to work on issues considered controversial or likely to attract the attention of the security forces, for instance discussions on issues such as devolution of power, has led to the 'de-politicisation' of issues, most of the time adopted as a conscious survival strategy.

In this context, citizens, particularly those belonging to minority communities, became 'less inclined to claim his or her rights politically and more prone to "voluntary obedience" in return for protection'.[42] For instance, in Keppapulavu in Mullaitivu in the north, where private land was acquired by the military, it was a challenge to find owners to undertake legal action against the military. Although ultimately five women came forward, coercion, intimidation and provision of incentives by the military has resulted in only one petitioner still attending court regularly. Further, the communitarian view adopted by the President, 'eradicates politics by rejecting the existence of political antagonisms; the only antagonism is located outside the community: terrorism'. [43] In addition to the military, a number of other entities, both state and non-state, supported the military's surveillance architecture, including hotels and government officials, such as the *Grama Sevaka*. In the north and east, a number of hotels are known to inform the military of events held by civil society organisations and provide them with details of guests who are thought to be staff of non-governmental organisations. Organisations narrated several incidents in Vavuniya and Trincomalee where meetings that were held were reported to the CID leading to their arrival at the venue to interrogate event organisers.

Despite these factors, civic activists have found ways to continue their work, albeit sometimes in a limited way given the numerous challenges and obstacles. Following the victory of Maithripala Sirisena at the presidential election of 8th January 2015, the fear

[42] Rojas (2009): p. 229.
[43] Rojas (2009): p. 232.

factor has somewhat lifted and activists stated they feel they are able to hold meetings and gatherings without fear and re-start their engagement and work with communities. Even if they encounter military interference they now feel able to challenge it because to some extent the rhetoric and promises of the new President and his government have given them the belief that there is space to counter and challenge attempts to stifle their activities. This paradoxically underscores the centrality of the presidential institution, in that a mere change in the occupant of the office can lead to such a noticeable change in perceptions about securitisation and militarisation. Yet, the highly problematic environment created during the Rajapaksa regime (ultimately traceable to the executive presidency), described above, brought into being a 'shadow state' in which unofficial structures and processes began to be adopted as official, and even supersede, official legal structures. The contours of the shadow state are set out in the remainder of the chapter by drawing upon elements of three concepts: the 'garrison state', the 'deep state' and the 'dual state'.

Sri Lanka: The Convergence of the Garrison State, Deep State[44] and Dual State[45]?

The Blurring of Boundaries: Civilian or Military?

[44] A deep state comes into being when the military enjoys high autonomy and/or is under undemocratic civilian control. The deep state is produced through the interaction between formal and informal institutions. Informal institutions are not set out in writing but obtain their authority from being publicly known and being accepted socially. Informal institutions create 'known and accepted behavioural structures which furthermore cannot be changed by any individual'. Individuals abide by them even if they do not so wish because 'in accordance with rational calculation; the costs involved in rejecting them can only be offset when real behavioural alternatives are available'.

[45] A dual state is one where two political systems operate in parallel- the system of open politics, 'with all of the relevant institutions described in the constitution and conducted with pedantic regulation in formal terms. At this level parties are formed, elections fought and parliamentary politics conducted. However, at another level a second para-political world exists based on informal groups, factions and operating within the framework of the inner court of the presidency'.

In Sri Lanka, while securitisation and militarisation took place due to a number of conditions that came into being as a result of executive action, this process also led to the 'specialists on violence' becoming 'the most powerful group in society' with primacy given to ensuring the state was in constant readiness for war/to face a threat.[46] Harold Lasswell's description of a garrison state as one where 'society's institutions and military, economic and political leaders are completely inter-dependent with complementary goals and interests',[47] describes the Sri Lankan context under the Rajapaksa regime well. In such a context there is excessive involvement of the military in civilian affairs, greater cooperation between civilians, business, politicians, and the military, resulting in the breakdown of the traditional boundary between civilian and military authority.[48]

During the Rajapaksa regime, the tentacles of the army extended to involvement in development and commercial activities[49] and philanthropic initiatives.[50] In July 2013, the Army Commander at the time, Jagath Jayasuriya, stated that the army was awaiting Cabinet approval to form an entity to undertake profit-making ventures, including bidding for government tenders. [51] The military also became engaged in activities that fall within the purview of civilian authorities. In March 2014, the Security Forces Headquarters in Kilinochchi invited non-governmental organisations to a meeting to discuss 'progression of development activities and to strengthen ties between this Headquarters and civil agencies'. In January 2013, a committee in the north that

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[46] H.D. Lasswell, '*The Garrison State'* (1941) ***American Journal of Sociology*** 46 (4): p.455.
[47] M.J. Morgan, '*The Garrison State Revisited: Civil-Military Implications of Terrorism and Security'* (2004) ***Contemporary Politics*** 10 (1): p. 7.
[48] Morgan (2004): p.7.
[49] '*Army's Most Modern Eco-Friendly 'Laya Safari' at Yala Joins Thriving Tourist Industry'*, ***Ministry of Defence Website,*** 12 October 2012, available at: http://www.defence.lk/new.asp?fname=Armys_Most_Modern_Eco_Friendly_Laya_Safari_at_20121210_03 (accessed on 2 January 2015).
[50] '*Army Distributes Hearing Aids for Jaffna Mass'*, ***Ministry of Defence Website,*** 16 June 2014, available at: http://www.defence.lk/new.asp?fname=Army_DistributesHearing_Aids_for_Jaffna_Mass_20140616_02 (accessed on 2 January 2015).
[51] Supun Dias, 'We are investigating into the summary executions of captured LTTE cadres as alleged by Channel 4 TV says outgoing army chief Gen. Jagath Jayasuriya,

came together to prepare development plans for 2013 was convened at the Headquarters of the 55th Division in Vettilaikerny, Jaffna, and was chaired by the commanding officer of the Division.[52] Instead of being viewed as interference, the militarisation of civil administration has been internalised by government officials, the public, the judiciary, and even Parliament. For instance, in May 2014, the District Judge of Mullaitivu in a letter of appreciation sent to the Secretary to the Ministry of Defence (with copy to the Security Forces Commander for Mullaitivu) commended the military for clearing land on which a new court complex was to be built. The Parliamentary Committee on Public Enterprises stated that Rakna Arakshana Lanka Ltd, a government-owned company established by Gotabhaya Rajapaksa, could invest funds without obtaining Treasury approval.[53] In November 2012, following the police and army breaking up a gathering of students who were protesting against the military entering the premises of Jaffna University and the men's and women's hostels and assaulting students – the Vice Chancellor of the University met with the Jaffna Army Commander to request the withdrawal of the army from the vicinity of the premises. Although it was claimed the army was called in to assist the police, it was the army commander who made the decision regarding withdrawal rather than the police.

In other parts of the country, in partnership with the business community the army has ventured into commercial activities, from arranging whale-watching tours, to opening a chain of hotels and hairdressing salons. The army also issued public statements on political, social and legal issues that are clearly not within its purview. Although Gotabhaya Rajapaksa held an administrative position within the public sector, he played a vocal and active role

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[52] *'Development committee convenes at Vettilaikerny',* ***Ministry of Defence Website,*** 29 January 2013, available at: http://www.defence.lk/new.asp?fname=Development_committee_convenes_at_Veththilaikerny_20130129_04 (accessed on 2 January 2015).

[53] '*Gota's Ex-Security Personnel's Company Can Invest Funds Without Treasury Approval-COPE',* ***Colombo Telegraph,*** 27 November 2013, available at: https://www.colombotelegraph.com/index.php/gotas-ex-security-personnels-company-can-invest-funds-without-treasury-approval-cope/ (accessed on 2 January 2015).

in political decision-making and even judicial decisions that far exceeded his official powers and mandate. He has made pronouncements on a range of issues, including calling for the repeal of the Thirteenth Amendment to the Constitution which devolved power to the provinces as part of the Indo-Lanka Accord signed in 1987,[54] informing a visiting delegation of Indian MPs that a separate system of governance for the Northern and Eastern Provinces would never be a reality,[55] dismissing the proposal to sing the national anthem in Tamil as a 'ridiculous idea',[56] publicly expressing his deep disappointment with India for voting for the resolution on Sri Lanka at the Human Rights Council in March 2013,[57] blaming India for Sri Lanka's internal armed conflict,[58] and publicly criticising an elected TNA MP for calling for the reduction of the presence of the military in the north.[59] Similarly, in August 2013, the Chief of Defence Staff, General Jagath Jayasuriya, made a public statement criticising a number of academics and TNA MPs who had attended a conference organised by the Transnational Government of Tamil Eelam (TGTE), following which the academics were harassed by the military.[60] In another instance, in an email sent to local journalists and international correspondents on 30th August 2013, the military spokesperson urged them to exercise their freedom of expression and attend the visiting High Commissioner for Human Rights' press conference and report the 'true facts' to the public.[61]

The army has interfered in election processes by campaigning on behalf of candidates of the then ruling party. They have also

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[54] S. Fernando, '*Defence Secretary repeats call for abolition of 13-A'*, ***The Island,*** 21 Oct 2012.
[55] S. Fernando, '*Separate system of governance for N&E won't be a reality'*, ***The Island,*** 13 April 2013.
[56] *'Singing national anthem in Tamil a ridiculous idea: Gotabaya'*, **Lankasri News,** 2 April 2012
[57] S. Fernando, '*Gotabhaya deeply disappointed with India's stand'*, ***The Island,*** 21 March 2013.
[58] M. Srinivasan, '*India response ble for 30-year war: Gotabaya Rajapaksa'*, ***The Hindu***, 22 May 2013.
[59] S. Fernando, '*GR lashes out at TNA'*, ***The Island,*** 12 Sept 2013.
[60] '*Academics Harassed: FUTA'*, ***Sunday Leader,*** 8 Sept 2013.
[61] '*Sri Lankan Military Does PR For Pillay'*, ***Colombo Telegraph***, 30 Aug 2013 available at: https://www.colombotelegraph.com/index.php/sri-lankan-military-does-pr-for-pillay/ (accessed on 30 Sept 2013).

engaged in acts that directly contravene government regulations. For instance, although the Land Circular on Regularising Land Management Activities in the Northern and Eastern Provinces issued in January 2013 prohibits the distribution of lands until existing land issues are resolved in the Northern Province, the website of the Ministry of Defence reported that on 30th August 2013, the army organised a land distribution programme and distributed land to 106 families.[62] It is not known under which legislation, circular or regulation the army derived power to engage in an activity not only beyond its purview, but also clearly encroached upon and usurped the authority of civilian officials.

A Personal Army or Autonomous Entity, or Both?

The centralisation of power meant that along with the President who was Minister of Defence, his brother Gotabhaya Rajapaksa's appointment as Secretary to the Ministry of Defence effectively created a political-military partnership: a partnership that remained firmly within the control of the Rajapaksa family away from parliamentary oversight. The description in Gotabhaya's authorised biography of the manner in which he was appointed reveals the importance not only of kinship/familial ties that bound the executive and the defence sector, but also the lack of oversight of and checks on the President's decisions.[63] Following his victory in the presidential election of 2005, according to this account, Mahinda Rajapaksa walked out of the operations room after hearing the news and 'saw Gota standing in the corridor…And the next thing he told Gota was, *You must take over as secretary defence*'.[64] Unlike in Turkey where the military enjoys a high level of autonomy and functions as a separate entity, in Sri Lanka, the executive and the military were not separate, which made the

[62] '*More lands for Tamils in the North'*, ***Ministry of Defence Website,*** 2 September 2013, available at: http://www.defence.lk/new.asp?fname=More_lands_for_Tamils_in_North_20130902_03 (accessed on 2 January 2015).

[63] Following the defeat of Mahindra Rajapaksa at the Presidential elections on 8 January 2015, a narrative is being constructed that Gotabaya Rajapaksa exerted too much influence and while Mahinda did not always agree with him acquiesced as he felt he could not displease him.

[64] C.A. Chandraprema (2012) ***Gota's War: The Crushing of Tamil Tiger Terrorism in Sri Lanka*** (Colombo: Ranjan Wijeratne Foundation): p.290.

combination a very potent and dangerous force. For instance, prior to the presidential elections of 8th January 2015, the opposition released a document in which President Rajapaksa requested Gotabhaya Rajapaksa to use trusted retired military officers to coordinate ground operations related to his election campaign.[65] To-date, details of what the coordination constituted remains unknown. The defence establishment hence came to be viewed, and used by the executive as an instrument of the Rajapaksa family, which was expected to be loyal and accountable only to them.

As David Pion-Berlin explains, the military's political autonomy is indicated through its aversion to 'or even defiance of civilian control', with the military functioning as though it is above the constitutional authority of the government.[66] The military becomes very protective of its gains as it accumulates powers and will more vigorously resist the shifting of control to democratic authority, when their interests are very valuable and entrenched.[67] As noted above, although Gotabhaya Rajapaksa had no formal power to issue instructions to other government institutions, his informal influence extended well beyond his officially mandated powers. In the north where the military exercised 'veto powers' it overrode decisions made by elected civilians. For instance, on 16th June 2011, a meeting of the TNA held in Jaffna was attacked by a group of army officers. In response to reports of the attack, Gotabhaya Rajapaksa stated that he had received a letter from the leader of the TNA seeking assistance for his party to engage in political activity in the Northern and Eastern Provinces. While he was in the process of making the necessary arrangements to meet the TNA's request, according to him, a group of TNA MPs who sought to undermine the TNA leader's agreement with the

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[65] *'Gota Picks Jayasuriya for Dirty Work at Election',* ***Colombo Telegraph,*** 8 January 2015, available at: https://www.colombotelegraph.com/index.php/exclusive-gota-picks-jagath-jayasuriya-for-dirty-work-at-election/ (accessed on 10 January 2015).

[66] D. Pion-Berlin, *'Military Autonomy and Emerging Democracies in South America'* (1992) ***Comparative Politics*** 25(1): p. 4

[67] Ibid.

government held an 'unauthorised' meeting in Jaffna with the aim of derailing the national reconciliation process.[68]

A politicised military is also characterised by a new professionalism, 'which gathers public approval for its unrestricted scope of professional action in its reserved domains…'.[69] Former Army Commander Jagath Jayasuriya while he was still in office declared that 'the Army has the resources available with technical expertise. We can perform on a competitive basis because we are effective and efficient, so we can provide a good service. The Army is involved in almost all the services and professions that one can offer'.[70] In Sri Lanka, following the end of the armed conflict the rhetoric of the regime, particularly of Gotabhaya Rajapaksa, has focused on the efficiency and ability of the armed forces to undertake and implement tasks. A number of members of the regime, such as the then Advisor to the President on Reconciliation, Rajiva Wijesinha,[71] the then Chief Justice Mohan Peiris,[72] and the then Senior Minister for International Monetary Cooperation and Deputy Minister of Finance and Planning, Minister Sarath Amunugama,[73] have praised the armed forces for their efficiency. For instance, it was reported that due to the failure of the Colombo Municipal Council to manage Viharamahadevi Park in the centre of the city, the Urban Development Authority, which was then within the purview of the Ministry of Defence, had placed the park under the supervision of

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[68] S. Ferdinando, '*GR alleges TNA split over Sampanthan's reconciliation move'*, ***The Island,*** 20 June 2011.
[69] M. Soyler, '*Informal Institutions, Forms of State and Democracy: The Turkish Deep State* (2013) ***Democratization*** 20 (2): p.313.
[70] S. Dias, '*Army to Start Profit Making Ventures: Outgoing Commander Tells How Wartime Force is Being Turned into a Peacetime Force,* ***Daily Mirror,*** 23 July 2013, available at: http://www.dailymirror.lk/32744/army-to-start-profit-making-ventures--outgoing-commander-tells-how-wartime-force-is-being-turned-into-a-peacetime-force- (accessed on 2 January 2015).
[71] R. Wijesinha, '*The Role of the Armed Forces in Reconciliation',* ***Rajiva Wijesinha,*** 29 February 2012, available at: https://rajivawijesinha.wordpress.com/2012/02/29/the-role-of-the-armed-forces-in-reconciliation/ (accessed on 2 January 2015).
[72] N. Wijedasa, '*Armed Forces must be thanked for doing civilian work for free: Mohan Peiris, outgoing AG*', **Lakbima News,** 3 Sept 2011.
[73] '*Govt's decision to deploy security forces in development commended'*, ***Sunday Observer,*** 10 Feb 2013.

the Navy.[74] Hence, instead of strengthening civil administration and dealing with allegations of corruption in the public service, the government uses allegations of corruption and a weak administrative service to justify the military's involvement.

Democratic civilian control and oversight of the military is therefore lacking and there exist networks of patronage 'steered by the executive branch…whose continuity depends on effective deterrence and compromise of the coercive state apparatus'.[75] The Sri Lankan defence budget for 2014 was US$ 1.94 billion, which is two per cent of the country's GDP. Despite the large budget and size of the military, there is little parliamentary oversight, public debate on national security policies, or transparency in procurement. A report by Transparency International found there is 'little or no transparency on purchases, pre-bid standards for companies to meet or on a strategy to guide procurement'.[76] Following Rajapaksa's defeat on 8th January 2015, it has emerged that the security company Rakna Arakshana, which was founded by Gotabaya Rajapaksa, had imported weapons that were stored at several armouries, including an unauthorised one, and transferred them to third parties without proper end-user certificates.[77] With regard to the defence budget, the Transparency International report states that the breakdown of the defence budget was made available mainly through the President's speech in Parliament, where it was presented as a line item in the overall budget, with the breakdown of procurement expenditure between the three forces also unclear.[78] According to the report, although the Auditor-General is independent and tasked with auditing the accounts of all government departments, certain parts of the defence budget are

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[74] J. de Silva, *'Now Navy moves to supervise Viharamahadevi Park'*, ***The Island***,8 May 2011.
[75] Soyler (2013): p. 311.
[76] '*Sri Lanka'*, ***Government Defence Anti-Corruption Index***, Transparency International, July 2012, available at: http://government.defenceindex.org/results/countries/sri-lanka (accessed on 2 January 2015).
[77] *'Shocking Revelations of Deep Security State within the State'*, ***Sunday Times,*** 25 January 2015, available at: http://www.sundaytimes.lk/150125/columns/shocking-revelations-of-deep-security-state-within-the-state-131923.html (accessed on 26 January 2015).
[78] Transparency International (2012).

not audited and parliamentary oversight is not provided in this regard.[79]

In Sri Lanka the military was also used as a means of dispensing patronage, particularly in the conflict-affected areas, and bolstering the position of the ruling United People's Freedom Alliance (UPFA) in those areas. Institutions within the military complex, such as the CSD, which manages agricultural farms, have become, sometimes, the only form of steady employment for many persons in the conflict-affected areas. In early 2013 around 3000 persons were recruited to work in the CSD-run farms including former LTTE cadres, while Tamil women from the conflict-affected Vanni region who were recruited into the army were provided a permanent house, livestock, and means to begin home gardening.

The Outcome of Securitisation and Militarisation: The Rise of the Shadow State?

In a state where the military gains 'increased centrality in society'[80] the political elite of the state are said to make certain changes to the 'fundamental practices of the state', which turn out to be 'dictatorial than democratic, and institutional practices long connected with modern democracy…disappear'. [81] In Sri Lanka there existed autocratic cliques/client groups, which gathered political support, exerted direct political influence through hierarchical ties,[82] and were loyal to a person not an institution, resulting in the erosion of trust in institutions and the subordination of formal procedures to a clientelist logic.[83] Mehtap Söyler describes these groups as constituting of leaders of the security community and organised crime, but in the case of Sri Lanka these groups also consisted of friends, relatives, state officials and even elected representatives. The administrative

[79] Ibid.
[80] J. Stanley, '*Harold Lasswell and the Idea of the Garrison State'* (1996) ***Society*** 33 (6): p. 48.
[81] Lasswell (1941): p. 461.
[82] Soyler (2009): p. 312.
[83] H-J. Lauth, '*Informal Institutions and Democracy'* (2000) ***Democratization*** 7(4): p.14.

structure was centralised and at every level authority was integrated in a few hands,[84] which in the Rajapaksa regime consisted of client groups of a range of persons, such as astrologer and member of the Board of the National Savings Bank, Sumanadasa Abeygunawardena, Lakshman Hulugalle, the Director of the Media Centre for National Security and the Head of the NGO Secretariat who was convicted for his role in a timber scam, Dhammika Perera, owner of casinos and Secretary to the Ministry of Transport, Nishantha Wickremasinghe, former planter, brother in-law of the President and Chairperson of Sri Lankan Airlines, and Mervyn Silva, reported drug dealer, local Mafioso and Minister of Public Relations. These groups exerted political influence, were loyal only to the Rajapaksa family, and functioned as gatekeepers not only to access to services and entitlements, but also redress for grievances that should be legally/technically provided by state institutions.

These factors point to Sri Lanka being a state that is 'inadequately constrained by the constitutional state from above and lacks effective accountability to the institutions of mass representation from below (parliament, political parties, and civil society generally)'.[85] In such a context there emerges a condition where two systems come into existence – the normative state which is 'endowed with elaborate powers for safeguarding the legal order as expressed in statutes' and the prerogative or administrative state which 'exercises unlimited arbitrariness and violence unchecked by any legal guarantees'. [86] There is therefore the danger that 'despite the normative value and safeguards of certain legal mechanisms in terms of checks and balances, the entire legal system can become or de facto function as an instrument at the disposal of the political authorities', in this case the executive. [87]

The penetration by the military of the judicial system also takes place by influencing the judiciary or through military courts. For instance, Gotabhaya Rajapaksa's biography says that following the decision of the Supreme Court in 2007 that required the

[84] Lasswell (1941): p. 463
[85] Sakwa (2010): p. 186.
[86] Sakwa (2010): p. 187.
[87] Koops and Amsterdam in Sakwa (2010): p.190.

dismantling of all permanent road blocks and checkpoints as they were found to violate the freedom of movement enshrined in the fundamental rights chapter of the constitution, Gotabhaya explained to the Secretary to the Ministry of Justice the necessity of the checkpoints. The Secretary to the Ministry of Justice then arranged a meeting between the Chief Justice and Gotabhaya in the former's chambers. At the meeting 'Gota explained matters to him and certain compromises were worked out, such as shifting of some road blocks, and not having permanent barriers and so on'.[88] Following the end of the war, instead of trying to influence the judiciary, the military began disregarding decisions of civilian authorities and judicial decisions, even those of the Supreme Court. In a fundamental rights petition challenging the registration of civilians by the military, although the Attorney-General gave an undertaking to the Supreme Court on 3rd March 2011 that the military registration of persons in Jaffna and Kilinochchi districts would be stopped forthwith, people in the north continue to be registered by the military even in 2014. A report published by UNHCR in June 2013 states that 100% of respondents in Mannar, 99% in Kilinochchi, 95% in Mullaitivu 90% in Vavuniya said that the military (army, navy, air force) had registered their families.[89]

As has been pointed out several times in this chapter, in such a context political and military actors create new rules 'bypassing the formal constitutional order'.[90] For instance, during the period when the A9 highway from the south to the north of the country was closed, the local population in the government-controlled Jaffna peninsula was subjected to a number of militarised unofficial processes. They had to register their motorbikes and even mobile phones with the military as part of the military's surveillance of the population. Another example of a process that has been used since the late 1990s well into the post-war period is the process of 'signing-in'. In the late 1990s and from 2006-2009, the military would confiscate the National Identity Card (NIC) of individuals and then order them to report to the military camp to

[88] Chandraprema (2012): p.377.
[89] ***A Protection Assessment of Sri Lankan Internally Displaced Persons who have Returned, Relocated or are Locally Integrating*** (2013) (Colombo: UNHCR).
[90] Sakwa (2010): p. 192.

sign-in, weekly, fortnightly, or monthly as determined by the local commanding officer. As a population that could not easily leave the peninsula and was subject to the *diktats* of a military that consisted mainly of members of another community that did not speak a language they understood and viewed them as potential LTTE suspects, civilians had no option but to abide by the unwritten rules put in place by the military, as there were no viable alternatives.

Like in the deep state, in Sri Lanka a symbiotic relationship existed between organised crime and politicians and even Ministers who were known to be engaged in organised crime, or whose staff were known to be engaged in organised crime with some having prior convictions for such offences.[91] The blurring of the official/personal boundary fostered impunity as politicians were able to deny any responsibility or knowledge of crimes committed by these persons on their instructions by claiming they are not staff members. Minister Mervyn Silva was accused by members of his own party of being involved in prostitution, drug peddling, and even the murder of another member of his party who was a local councillor, while in 2011, one of his co-ordinating secretaries was arrested for his alleged involvement in extortion activities. Former Deputy Inspector General of Police Vass Gunawardena is being prosecuted for his involvement in several cases involving extortion and murders. Since the defeat of Mahinda Rajapaksa in January 2015, evidence of the involvement in the drug trade of parliamentarian, Duminda Silva, has begun emerging, including reportedly receiving Rs. 2.5 million per month from drug lord 'Wele Sudha' in return for providing protection to his drug business. Duminda Silva was the Monitoring MP for the Ministry of Defence and was known to be close to Gotabhaya Rajapaksa. This state of affairs is echoed by the 2012 Transparency International report which states that 'the police-military-politicians-drug dealers, is a nexus that is difficult to separate. There have been cases where the Defence Ministry has protected and defended his [Silva's] identity although several

[91] The boundaries are blurred as there are no formal or transparent methods of appointment and state funds are commonly used to financially compensate even unofficial staff members.

reports have alleged his involvement with drug dealers, and organised crime groups'.[92]

One of the most important and illuminating examples of the informal structure taking precedence over the formal, and functioning in an open and brazen manner, is the Presidential Task Force (PTF). The PTF a 19-member Presidential Task Force for Resettlement, Development and Security in the Northern Province was appointed by the President in May 2009. The PTF has no Tamil member, but it includes the Secretary to the Ministry of Defence, the Chief of Defence Staff, Commanders of the Army, Navy and Air Force, and the Inspector General of Police. The press release marking the occasion states the PTF was appointed by the President according to Article 33 (f) of the Constitution, which is a catch-all provision that contains the residual powers of the President. Along with specific tasks such as presiding at ceremonial sittings of Parliament, declaring war and peace, and receiving and appointing ambassadors and high commissioners, the provision gives the President the power 'to do all such acts and things, that are not inconsistent with the Constitution or written law'. Hence, the extent of the powers of the PTF and their legal basis were unknown. The PTF was mandated to prepare strategic plans, programmes and projects to resettle internally displaced persons, rehabilitate and develop economic and social infrastructure of the Northern Province. Although the PTF was supposed to report back in one year, giving an indication it was a temporary institution, the PTF evolved into a seemingly permanent structure that controlled and monitored the work of the non-governmental sector in the Northern Province until May 2014. Its working methods and regulations were not public and non-governmental organisations that had to submit their work-plans and projects to the PTF for approval had to often do so blindly, without any knowledge whether they were submitting the required documents. Organisations were often denied approval or given approval for very short periods, i.e., approval is given for a period less than the lifetime of the project forcing them to approach the PTF for renewal of the approval.

[92] Transparency International (2012).

The PTF functioned like the civilian vetting organisation of the Ministry of Defence and projects submitted to the PTF were approved only subject to approval by the Ministry. There have also been recorded instances in which the Ministry of Defence has requested local organisations that sought PTF approval to re-submit applications without the inclusion of the names of certain individuals within the organisation since those persons were noted by the Ministry to have engaged in activities adverse to national security.

Conclusion

Following the end of the armed conflict in May 2009, the securitisation of the certain communities and identities took place, with militarisation being depicted as the only means of staving off the threat posed by these groups. However, while militarisation was portrayed as the best strategy to deal with securitised communities, in reality securitisation was used to justify and legitimise militarisation. The executive presidency, with few fetters and restrictions on its authority, played a key role in these processes which led to the creation of unofficial structures and processes, which while existing alongside official and legal institutions, laws and processes, usurped their authority. The executive created an environment conducive for securitisation and militarisation, mainly through the use of emergency powers, which enabled the emergence of unofficial rules and processes that remained even following the lapse of the state of emergency. The dual processes of securitisation and militarisation had an adverse impact on particularly the conflict-affected communities, as they deliberately undermined and controlled political activism and activity in these areas. In this context, a shadow state, that functioned in parallel to the official, normative state came into being, thereby further eroding democratic principles and practices, and centralising power within the executive.

9

The Devolution of Power and the Executive Presidency

Luwie Ganeshathasan

The system for the devolution of power, as provided for in the Thirteenth Amendment to the Constitution (1987), is a curious constitutional accessory retrofitted on the unitary structure of the Sri Lankan state, at the heart of which is the powerful executive president. Despite its close textual similarities to the framework of devolution in India, operationally, Sri Lanka is still significantly different. The primary reason for this difference is the strong centripetal pull exerted by the executive president on the political and legal dynamics of Sri Lanka's power-sharing framework. The President's power over the Provincial Councils can be analysed in terms of, firstly, the powers exercised by the President through the office of the Governor and, secondly, in terms of the powers directly exercised by the President. This chapter examines the scope and impact of presidential powers in both those aspects.

Provincial Executive Power

Executive power within the Provincial Council is exercised by the Governor (who is appointed by the President) and the Board of Ministers, which comprises of representatives, including the Chief Minister, directly elected by the people of the given province. The Thirteenth Amendment is not clear in its single reference to provincial executive power in Article 154C,[1] although the latter purports to define the parameters of the power as "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes." However, as Asanga Welikala argues, "This seems like a clear-cut devolution of executive powers in relation to the subjects over which legislative power has been devolved. However, it is in the manner prescribed

[1] Which reads as "Executive power extending to the matters with respect to which a Provincial Council has power to make statutes shall be exercised by the Governor of the Province of which that Provincial Council is established, either directly or through Ministers of the Board of Ministers, or through officers subordinate to him, in accordance with Article 154F."

for its exercise, and in the institutions empowered to exercise it, that it becomes clear that the devolution of executive power does not exactly match the extent of legislative devolution, and indeed is materially a lesser extent of devolution." [2]

The relationship between the Governor and the Board of Ministers is both complex and confusing. The Governor is to exercise executive power as defined in Article 154C either directly, through the officers subordinate to him, or through the Board of Ministers. The structure of Article 154C, thus, establishes the pre-eminence of the Governor in the exercise of provincial executive power. However, Article 154F(1)[3] provides that, unless the constitution requires the Governor to exercise his functions in his own discretion, the Governor should exercise his functions on the advice of the Board of Ministers. The result is that the Board of Ministers, which is sometimes a tool through which the Governor channels executive power, also acts, in certain instances, as the determinant of the Governor's exercise of provincial executive powers.

The Governor as the agent of the President

In order to understand the President's power within Provincial Councils, it is necessary to understand the relationship between the President and the Governor, and the extent of the latter's dependence on the former. Article 154B(2) of the constitution provides that the Governor is to be appointed by the President, and is to

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[2] A. Welikala (2011) ***Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010***, (Colombo: The Centre for Policy Alternatives) at p. 45.

[3] Which reads as, "There shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advise the Governor of a Province in the exercise of his functions. The Governor shall, in the exercise of his functions, act in accordance with such advice except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion."

hold office during the pleasure of the President. Article 154B(2) further provides that the Governor shall hold office in accordance with Article 4(b)[4] which provides for the way in which the executive power of the people is to be exercised. This provision must be understood in light of the fact that the Article 4 is an enumeration for the manner in which the sovereignty of the people of Sri Lanka is to be exercised and enjoyed.

Accordingly, reference to Article 4(b) in relation to the Governor is significant, since Article 4(b) provides that the President is the sole repository of the executive power of the state. In the context of a unitary state, this authorisation to the Governor to wield executive power in terms of Article 4(b) – to the extent of the powers the Provincial Council has jurisdiction to legislate upon – implies that the office and powers of the Governor are an extension of those of the President.[5] The Governor is merely an appointee/delegate of the President. Because the President retains the power to give directions to the Governor and to oversee the manner in which the Governor exercises his executive powers, the President retains pre-eminence in the exercise of provincial executive power.[6]

Furthermore, the construction of Articles 154B(2) and 154C, as explained above, has lent itself to the proposition that there is no 'provincial executive power' *per se*.[7] It is the executive power reposed in the President that manifests itself at the level of Provincial Councils. Moreover, since it is impossible to infer a link between the President and the Board of Ministers, similar to that between the President and the Governor, particularly since the Board of Ministers comprises of representatives

[4] Article 4(b) provides that "the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People."
[5] Welikala (2011): p. 45.
[6] See Article 154F(2) "….The exercise of the Governor's discretion shall be on the President's directions"; See also, *infra*, fn.9.
[7] See Welikala (2011): p. 45.

directly elected by the province, the Board of Ministers merely has a role in the manner the President's executive power is exercised, and such role is defined in Article 154F.

This position is consistent with the determination of the Supreme Court in *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987).

> "The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. *Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of exercise of Executive powers no exclusive or independent power is vested in the Provincial Councils. The Parliament and President have ultimate control over them and remain supreme.*"[8]

In the same case, a plurality of the judges of the Supreme Court said of the relationship between the Governor and the President that,

> "The Governor is appointed by the President and holds office in accordance with Article 4(b) which provides that the executive power of the People shall be exercised by the President of the Republic, during the pleasure of the President (Article 154B(2)). *The Governor derived his authority from the President and exercises the executive power vested in him as a delegate of the President.* It is open to the President therefore by virtue of Article 4(b) of the Constitution to give directions and monitor the Governor's exercise of this executive power vested in him."[9]

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[8] *Per* Sharvananda, C.J., *In Re the 13th Amendment to the Constitution* (1987) 2 SLR 312 at p.320. Emphasis added. Hereinafter, '*Thirteenth Amendment Case*.'

[9] Ibid: p.323. Emphasis added.

The fact that the Governor remains under the control of the President and is completely subject to his power is further made clear when analysing the provisions regarding the removal of the Governor: the Governor holds office during the pleasure of the President. The concept of holding office at pleasure suggests, *prima facie*, that dismissal may be for a reason good, bad, or indifferent, or without any reason.[10] Therefore, the President can remove the Governor at any time, without the obligation to provide any reason. Moreover, such a removal would not be subject to judicial review due to Article 35(1) of the constitution.[11] The person holding the office of Governor is therefore placed in a precarious position. The Supreme Court has opined, therefore, that as a matter of self-interest, it is desirable for a Governor to consult the President in matters of importance pertaining to the Provincial Council.[12]

The constitution also provides that a Provincial Council may by a resolution *advise* the President to remove the Governor on the ground that the Governor has either intentionally violated the provisions of the constitution, or is guilty of misconduct or corruption involving the abuse of the powers of his office, or is guilty of bribery, or an offence involving moral turpitude. Such a resolution can only be passed by a vote of not less than two-thirds of the whole number of members of the Council (including those not present).[13] It remains to be seen whether the President is mandatorily required to remove the Governor upon receipt of such an address from the Council. Considering the relationship between the President and the Governor, and the overall nature of the

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[10] See *Bandara v. Premachandra* (1994) 1 SLR 301 at p.312.
[11] Which reads as, "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."
[12] See *Maithripala Senanayake v. Mahindasoma and Others* (1998) 2 SLR 333 at p.369. Hereinafter, the '*Mahindasoma* case.'
[13] Article 154B(4a).

relationship between the President and the Provincial Council, it is unlikely that the decision of a Provincial Council would be considered as binding on the President.

In any case, speculating on the legal validity of the argument that such resolutions bind the President is a fruitless exercise because, as mentioned above, the President's decision on the issue will be immune from judicial review under Article 35.[14] Furthermore, unlike Parliament, Provincial Councils do not possess alternative avenues of checking the President, or influencing his decisions, for its lack of any powers similar to Parliament's ability to impeach the President. As such the Governor is completely dependent on the President to ensure the security of his office.

The Powers of the Governor in relation to the Provincial Council

As seen above, the linking of the Governor's power to Article 4(b) and the complete control the President exercises over the appointment and removal of the Governor, is indicative of the fact that the Governor is merely an agent who animates, within the province, the executive power that vests solely in the President. However, in an attempt to give some meaning to the power devolved, the Thirteenth Amendment provides that the Governor exercises executive power either directly in his discretion where he is required to do so 'by or under'[15] the constitution, or in the absence of such a

[14] It is submitted that the exception to Article 35, carved out in *Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others* (2003) 1 SLR 157 at p.177, would not apply in this situation as in order to remove the Governor, the President would have to be compelled to do a positive act (i.e. issue a warrant under his hand), which it is respectfully submitted is not within the limits of the said exception.

[15] Welikala argues that "the phrase 'by or under the Constitution' in Article 154F(1) is important. In addition to the powers conferred by the Constitution itself, those that are conferred by central legislation are under the Constitution. This refers to, inter alia, Article 154Q." See

requirement, on the advice of the Board of Ministers.[16] The provisions of law are not always clear-cut and, as has been pointed out by the Supreme Court, "It is not inconceivable that a genuine doubt or difficulty may arise, in regard to a particular function, whether the Governor must act on advice, or in his discretion. *Normally any such question of interpretation would have to be judicially determined.*"[17]

Be that as it may, having an understanding of the circumstances in which the Governor has to exercise his power on the advice of the Board of Ministers, and the circumstances in which he is required by the constitution to act in his own discretion, is essential to understanding the role of the President with regard to Provincial Councils. This is because where the Governor is required to act in his own discretion he is essentially acting on the President's directions.

The key term in Article 154F, 'discretion', is often used in law, but rarely is its meaning defined with any degree of specificity. The following definition is particularly useful in understanding the meaning of the word as it has been used in the context of Article 154F(1):

> "The term 'discretion' must be understood in its legal sense. It may denote an action which is taken by the Governor upon exercising a choice from a range of options available to him within the powers conferred on him by law. It may also relate to the existence of a particular factual situation in which the law stipulates how the Governor should act. An illustration of both types of situation is the provision concerning the

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also the Supreme Court determination in the Provincial Councils (Consequential Provisions) Bill (1989), SCSD No. 11 of 1989, reported in L. Marasinghe & J. Wickramaratne (2010) Judicial Pronouncements on the 13th Amendment (Colombo: Stamford Lake): pp.138, 140-141.

[16] Article 154F(1) of the constitution.

[17] *Premachandra v. Montague Jayawickrema* (1994) 2 SLR 90 at p.114.

> Governor's function in the appointment of the Chief Minister. Article 154F(4) gives him a discretion to appoint as Chief Minister the member of the Provincial Council who, in his opinion, is best able to command the support of a majority of members of that Council. In a situation where no single party or group enjoys an absolute majority, the Governor is given a legal discretion to make a reasonable choice in the appointment of the Chief Minister. By contrast, where more that one-half of the members elected to the Provincial Council are from one political party, the proviso to Article 154F (4) expressly requires him to appoint the leader of that group as Chief Minister. Here he has no choice in the exercise of his discretion."[18]

The Governor's Role in the Legislative Procedure and the Administration of the Provincial Council

Whilst the President has a limited role to play in terms of the legislative procedure in Parliament, his agent in the province is more involved in both the legislative procedure of the Provincial Council as well as in controlling its legislative agenda. One of the most important roles of the Governor is in respect of the discretion on whether to grant assent to provincial statutes. A statute made by a Provincial Council will only come into force after it receives the assent of the Governor.[19] However, if he does not assent, he must return the statute to be reconsidered by the Provincial Council with or without recommendations for amendment.[20] In such a situation, the Provincial Council will reconsider the statute, having regard to the Governor's message. The Provincial Council may pass the statute with or without amendment and re-present it

[18] See Welikala (2011): p.49.
[19] Article 154H(1).
[20] Article 154H(2).

to the Governor for his assent.[21] After the statute is presented for the second time, the Governor may either assent to it, or reserve it for reference by the President to the Supreme Court, for a determination on whether it is consistent with the provisions of the constitution. The Governor can assent to such a statute only if the Supreme Court determines that the statute is consistent with the provisions of the Constitution.[22] Ostensibly the Governor is expected to act as a check on the way a provincial council exercises its legislative power. Therefore the Governor exercises his own discretion in deciding whether to assent or to refuse to assent to a statute. To assume otherwise would render the relevant provision superfluous and meaningless.

However, it must be noted that the level of scrutiny imposed on a statute is exceptionally high in comparison to legislation passed by Parliament, especially because the scrutiny takes place after the statute's affirmation by the majority of a democratically elected Provincial Council. Furthermore, the Governor's right to return the statute to the Provincial Council without his assent, at least in the first instance of refusal, is not circumscribed (by, for example, questions of constitutionality). The Governor can simply return the statute for the Provincial Council 'to reconsider the statute or any specified provision thereof and in particular, requesting it to consider the desirability of introducing such amendments as may be recommended in the message.' It is only after the Provincial Council passes the statute for a second time does the question regarding constitutionality become relevant.

In any event, statutes of Provincial Councils are not exempted from judicial review and, as such, can be struck down by courts at any time.[23] Therefore the utility of the

[21] Article 154H(3).
[22] Article 154H(4)
[23] Article 80(3) states that no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of a law (i.e. after the bill has been certified by the President or the Speaker, as

above provision in ensuring the constitutionality of statutes is questionable.

However, through this procedure, the Governor is able to create considerable delays in the legislative process of a Provincial Council. It is theoretically possible for the Governor, together with the President, to obstruct the passage of a statute and stall its progress. This is so because nothing suggests a legal/constitutional compulsion upon the President to refer to the Supreme Court a statute that was reserved for him by the Governor. Assuming such a compulsion existed, Article 35 still shields the President from any action brought against him to compel referral of the statute to the Supreme Court. It is not unlikely that a Governor would resort to these provisions to delay the passage of statutes in a Provincial Council. Moreover in the absence of redress for abuse, by the mere threat of refusing to grant his assent a Governor can have a significant impact on the Provincial Councils legislative agenda. In this context the refusal of assent (or the threat thereof) is not merely a checking mechanism, but is also a source of political for the Governor.

Furthermore, the Governor acts in his own discretion to summon, prorogue and dissolve the Provincial Council when the Chief Minister does not command the support of a majority of the Provincial Council.[24] The Supreme Court has clearly held that this power is only available to the Governor when the Chief Minister cannot command a majority; he cannot exercise this powers against the wishes of a Chief Minister who commands the support of a majority in the Provincial Council. In the *Mahindasoma Case*, Amerasinghe, J., held that;

> "I find no reason adduced in the matters before us to give Article 154B(8)(c) read with Article

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the case may be). Statutes passed by Provincial Councils enjoy no such immunity from judicial review.

[24] Article 154 B(8).

> 154B(8)(d) any meaning other than that the Governor will have to or must, if the Board of Ministers commands, in the opinion of the Governor, the support of the majority of the Provincial Council, exercise his powers of dissolution in accordance with the advice of the Chief Minister. Wade and Forsyth, op. cit., p. 245 observe that: Powers confer duties whether to act or not to act, and also in many cases, what action to take, whereas duties are obligatory and allow no option. De Smith, Woolf and Jowell, op. cit., p. 296, observe that: if only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. Since the Board of Ministers in the opinion of the Governor commanded the support of the majority of the Provincial Council, there was only one, uniquely right course of action prescribed – to follow the advice of the Chief Minister in deciding whether to exercise his power of dissolution. There was no discretion. By his failure to act in accordance with the duty imposed on him by law, the Governor acted illegally."[25]

The Chief Minister is also required to communicate to the Governor all decisions of the Board of Ministers relating to the administration of the affairs of the Province and any proposals for legislation. Furthermore, the Chief Minister is required to furnish such information relating to the administration of the affairs of the Province and proposals for legislation as the Governor may call for.[26] Thus, even though the Governor is physically removed from the chamber of the Provincial Council, he is still required to be kept appraised of its administration.

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[25] See the *Mahindasoma* case, *supra*, fn.12, at pp.365-366.
[26] Article 154 B(11).

The Governor's Role During Exceptional Situations

Over and above the previously examined powers are the constitutional functions dealing with exceptional situations in which the Governor acts in his own discretion. Article 154J concerns situations where a state of emergency has been declared in terms of the Public Security Ordinance. This empowers the President to give directions to the Governor as to the manner in which his executive power is to be exercised in such circumstances.

Article 154L pertains to the powers of the President in the context of a failure of administrative machinery within a Province. One of the ways in which the provisions of Article 154L are triggered is when a Governor transmits a report to the President that a situation has arisen in which the administrative of the Province cannot be carried on in accordance with the Constitution. It would be incongruous if the Governor were expected to follow the advice of the Board of Ministers in such a situation. As such it goes without saying that the Governor arrives at such a conclusion through the exercise of his own discretion. In terms of Article 154N, when the President has issued a Proclamation regarding a situation of financial instability in the country or in any part thereof, he may give directions to the Governor of a Province to observe such canons of financial propriety as may be specified. In such a situation, the Governor must exercise his powers in compliance with the directions of the President.[27]

In addition to the provisions of the constitution, the Provincial Councils Act in Section 5A makes provision for the Governor to deal with an exceptional situation. This

[27] Article 154 N(3) provides that "During the period any such Proclamation as is mentioned in paragraph (1) is in operation, the President may give directions to any Governor of a Province to observe such canons of financial propriety as may be specified in the directions, and to give such other directions as the President may deem necessary and adequate for the purpose."

provision authorises the Governor to dissolve a Provincial Council where the Provincial Council has for all intents and purposes ceased to function, or a situation in which more than one half of its membership has expressly repudiated or manifestly disavowed obedience to the constitution or otherwise acted in contravention of their oath of office. The Provincial Council stands dissolved upon the transmission of the Governor's communication to the President. In such a situation, whether factual circumstances necessitating a communication under Section 5A actually exists is a matter for the Governor's exclusive discretion.

The Governor and Provincial Finance

The Governor enjoys extensive powers as regards the procedure for financial statutes in the Provincial Councils. The source of this power is not the Thirteenth Amendment but the provisions of the Provincial Councils Act. The Governor makes the rules governing all aspects of provincial finance, including the Provincial Fund[28] and the Emergency Fund[29] of the Province. No provincial statute involving revenue[30] or expenditure[31] may be introduced, moved, or passed by the Provincial Council except on the recommendation of the Governor.[32]

The statutory provision regarding the 'annual financial statement' is somewhat confusing. Section 25(1) of the Provincial Councils Act provides,

> "The Governor of a Province shall in respect of *every financial year*, at least three months before the expiration *of such financial year*, cause to be laid before the Provincial Council of that Province, a statement of the estimated receipts and

[28] Provincial Councils Act: Section 19.
[29] Ibid: Section 20.
[30] Section 24(1) (a) and (e).
[31] Section 24 (1) (b), (c) and (d).
[32] Provincial Councils Act: Section 24.

> expenditure of the Province *for that year*, in this Part referred to as, the 'annual financial statement'." (emphasis added)

A plain reading of the Act suggests that what the Governor is having placed before the Provincial Council is the estimated receipts and expenditure of *that same financial year.* This is contrary to the general principle that an appropriation bill/ budget will be submitted for the following financial year.[33] Be that as it may, Provincial Councils seem to be adhering to the general principle and submitting appropriation statutes for the following year, in spite of how the statutory language is worded.[34]

The Governor must recommend all demands for grants made to the Provincial Council.[35] While the Provincial Council has the authority to approve the annual budget, the consequent Appropriations Statute is subject to the assent of the Governor.[36] Practically, though, the 'annual financial statement'/budget is prepared by the officers of the Chief Secretary's Secretariat, specifically through the Deputy Chief Secretary of Finance.[37] The Chief Secretary is appointed by, and serves at the pleasure of, the

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[33] In comparison, Pradeshiya Sabhas Act, No.15 of 1987, in Section 168(1) states that, "The Chairman of every Pradeshiya Sabha shall each year on or before such date … prepare and submit to the Pradeshiya Sabha, a budget *for the next succeeding year*, and containing an estimate of the available income and details of the proposed expenditure for the ensuing year." Emphasis added.

[34] See Southern Province Provincial Council, Appropriation Statute No.03 of 1999, (attestation noted on the 30th day of November 1999), which provides estimates for beginning 1st January 2000 and ending on 31st December 2000; Available at http://www.lawnet.lk/docs/statutes/prov_stats/htm/Appropriation%20statute%20No_%2003%20of%201999.html

[35] Provincial Councils Act: Section 26(3).

[36] Article 154H.

[37] The role of the Chief Secretary and Deputy Chief Secretaries are not defined by statute. It is regulated by a plethora of circulars and administrative guidelines. See 'Key Functions, Deputy Chief Secretary of Finance', available at http://www.np.gov.lk/index.php?option=com_content&view=article&id=190&Itemid=151

President. As such, there is a possibility of a Governor and the Chief Secretary taking control of the finances of the Provincial Council and creating an environment in which it becomes impossible for the Provincial Council to function.[38]

Any demands for supplementary grants or votes on account during a financial year may only be initiated by the Governor.[39] The Governor submits audited accounts of the provincial administration to the Provincial Council.[40] The cumulative effect of these provisions, in short, is that the Governor is essentially the 'finance minister' of the Province.[41]

The Governor and the Provincial Public Service

Similar to the framework regarding provincial finance, the arrangements for the direction and control of the provincial public service also provides the Governor with ultimate control over its workings. The appointment, transfer, dismissal and disciplinary control of officers of the provincial public service are vested in Governor.[42] The Governor has the power to make rules in relation to all aspects of the public service.[43] The Governor may delegate these powers to a Provincial Public Service Commission[44], the members and chairman of which are appointed and are removable by him.[45] The Governor has the power to alter, vary or rescind any appointment or order of the Provincial Public Service Commission.[46] In the light of these provisions, the legal framework for

[38] See Appropriation Statutes of the Northern Provincial Council for the years 2013 and 2014, where provision was made to allocate to the Governor a sum of money from the Criteria Based Grants (CBGs).
[39] Provincial Councils Act: Sections 28 and 29.
[40] Ibid: Section 23.
[41] See Welikala (2011): p.52.
[42] Provincial Councils Act: Section 32 (1).
[43] Ibid: Section 32 (3).
[44] Ibid: Section 32 (2).
[45] Ibid: Section 33 (3).
[46] Ibid: Section 33 (8).

the independence of the Provincial Public Service Commission, and thereby the provincial public service, cannot be regarded as effective.

This is particularly problematic as the Board of Ministers is ultimately responsible to their electors (i.e. the people of the Province). However, they have no authority regarding disciplinary control over the Provincial Public Service. Therefore, in a situation where a provincial public servant refuses to carry out lawful orders of a minister, the Board of Ministers is not empowered to take any disciplinary action. The Provincial Public service is ultimately responsible to the unelected Governor, who, although in an abstract sense is responsible to 'people of Sri Lanka,' is not responsible to the people of the Province. This dichotomisation of accountability and control has the potential in the some circumstances to render the Provincial Council useless in terms of the delivery of service to the people in the province.

Furthermore, the Chief Secretary, the most senior public officer of the Province is appointed directly by the President with the concurrence of the Chief Minister.[47] While the Chief Secretary's his role lacks statutory definition, it includes varied tasks from providing guidance for the formulation, implementation, and monitoring of annual development programmes, to ensuring the smooth functioning of the provincial public service. This control enables the Governor, if he is so inclined, and if the presidentially-appointed Chief Secretary is supportive, to indirectly control the functioning of provincial ministries notwithstanding the wishes of provincial ministers elected by and accountable to the people in the province.

As noted above, whether by design or otherwise the relationship between the President and the Governor and the Board of Ministers is complex and confusing. On the one hand in terms of Article 154B(2), read together with

Article 4(b), the Governor becomes the animator of President's executive power in the Province. On the other hand, Article 154F(1) subjects the Governor to the advice of the Board of Ministers, except in situations where the constitution requires him to act in his own discretion. However, an examination of the nature and extent of the powers exercised by the Governor in his own discretion – and by extension the directions of the President – unveils the broad and overwhelming role envisaged for the Governor. It has to be noted that the role envisaged for the Governor is by no means a titular one. To the contrary, with the powers provided to the Governor in terms of the Thirteenth Amendment and the Provincial Councils Act, he has the potential to run a parallel administration within a Provincial Council. Therefore to a large extent the success or failure of Sri Lanka's scheme of devolution is dependant upon the how much of his potential power, a Governor is interested in/ requested to exercise.

Having analysed the central role of the Governor within the provincial administration, let us now move onto the role directly exercised by the executive President in relation to Provincial Councils.

Executive Power Directly Exercised by the President

As explained above, the President exercises substantial power within the provincial sphere through his agent, the Governor. However, the Thirteenth Amendment framework also provides for several situations in which the President is directly involved in the affairs of the Province.

Article 154J is an extension of the President's powers in relation to the declaration of a state of emergency and the exercise of emergency powers thereunder, which empowers the President to give directions to the Governor as to the manner in which the latter's executive

power should be exercised during the state of emergency. More directly, the President's power to make emergency regulations extends to any matter in the Ninth Schedule to the Constitution (i.e., including the Provincial Council and Concurrent Lists),[48] and such emergency regulations may override, amend or suspend provincial statutes.[49]

Article 154K, Article 154L, and Article 154M relate to the failure of administrative machinery within the Province, and in effect provide for the complete suspension of devolution within a Province. This imposing power of the President is fettered only by Parliament, which must approve any presidential proclamation under Article 154L. [50] There is no constitutional procedure to safeguard the interests of the elected institutions at the provincial level to ensure that this unilateral power is not exercised arbitrarily, capriciously, or in haste.

The President may hold that there is a failure of the administrative machinery if any Governor or Provincial Council fails to implement a lawful direction given to him.[51] On receipt of a report from a Governor, or on any other grounds, if the President is satisfied that the administration of a Province cannot be carried on in accordance with the constitution, he may by Proclamation assume all or any of the provincial executive functions.[52] However, he has no power to directly assume the legislative functions of the Provincial Council himself; he may declare that the powers of the Provincial Council are exercisable by Parliament. In this situation Parliament may either exercise the statute-making power in respect of the Province, or it may confer that power on the President, who may in turn, delegate that power on any other authority. In addition, the President is given a residuary power to take all necessary

[48] See Welikala (2011): p.57
[49] Article 155 3A.
[50] Article 154L (3) and (4).
[51] Article 154 K.
[52] Article 154 L(1a).

measures to give effect to the objects of his Proclamation,[53] and he is only prohibited from assuming any judicial power.

If the President is satisfied that a situation has arisen whereby the financial stability or credit of Sri Lanka (or any part its territory) is threatened, he may make a Proclamation to that effect. The continuing validity of such a proclamation is subject to parliamentary approval, but during its operation, the President may give directions to the Governor to observe specified canons of financial propriety or to take any other measure required.

The President also exercises powers regarding the alienation of State Land. In terms of the Ninth Schedule to the Constitution, alienation or disposition of state land within a Province to any citizen or to any organisation is to be done by the President, on the advice of the relevant Provincial Council.[54] Several previous judgements of the Supreme Court stated that the Thirteenth Amendment has created an 'interactive' regime with regard to state land alienation and that state land can only be disposed with the advice of the Provincial Council.[55]

However, in the case of *Solaimuthu Rasu Vs. Superintendent, Stafford Estate*, [56] Mohan Pieris, stated that the view previously held that a precondition laid down in paragraph 1:3 that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council, is not supportable. This was because the word 'only' was absent in Item 1.3 in the Appendix on Land in the Ninth Schedule, which referred to the need to consult the Provincial Council. The legal basis for this judgement

[53] Article 154L(1c).
[54] See Item 1.3 of Appendix II (Land and Land Settlement) in the Ninth Schedule to the Constitution.
[55] See *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134; *In re the Bill titled 'Land Ownership'*, SC SD. No. 26/2003 - 36/2003.
[56] SC Appeal 37/2001.

is questionable.[57] However, at least for the present moment the President retains complete control over alienation of state land.

The Provincial Councils Act also makes reference to the President, the most important of which is that he appoints the Chief Secretary of the Province with the concurrence of the Chief Minister.[58] Rules may be made by the Provincial Council regulating its procedure generally, but such rules concerning the conduct of its business on financial statutes and the prohibition on the discussion of the conduct of the Governor require the approval of the President.[59] All executive actions of the Governor, whether taken on the advice of the Ministers or in his own discretion, are expressed to be taken in the name of the President. Furthermore any discussion on the conduct of the President is prohibited in the Provincial Council.

The Judiciary: A Limitation on the President and his Agent?

As was seen in several instances in the preceding discussion, the judiciary proved to be an inconsistent check on the exercise of powers by the President either directly or through the Governor. The main problem in relation to the judicial control of the President's functions was the immunity of the President enshrined in Article 35 of the constitution.

Presidential immunity, however, does not apply where the President has a direct role in the legislative process *before* a bill is placed on the order paper of Parliament. In terms of Article 154 G (3), no bill in respect of any matter set out in the Provincial Council List shall become law unless such bill has been referred by the President to

[57] See S.N. Silva, '*Ramifications Of 13A Governing State Land*', *Colombo Telegraph*, 9th October 2013.
[58] Provincial Councils Act: Section 31.
[59] Ibid: Proviso to Section 11.

every Provincial Council for the expression of its views before it is placed in the rrder paper of Parliament. The question arose during the determination of the constitutionality of the Divineguma Bill as to whether, due to Article 35, the Court was precluded from examining if the President had failed to refer the bill to all Provincial Councils prior to it being placed on the order paper of Parliament.[60] The Supreme Court stated that,

> "It has to be born in mind that the matter that has to be determined arises out of legislative process based on the constitutional jurisdiction and not out of an executive act... The Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon the Constitutionality of a bill and its procedural compliance before it's placed on the order paper of Parliament."

The determination of the Supreme Court provided a purposive interpretation to the provisions of the Constitution, specifically to those provisions introduced by the Thirteenth Amendment. However, in the subsequent determination of the Supreme Court,[61] the Court for the first time opined that it did not have jurisdiction to examine what the Court in the Divineguma determination described as "procedural compliance before it's (a bill is) placed on the order paper of Parliament".[62] In light of these conflicting opinions of

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[60] *Chamara Madduma Kaluge and others v. The Attorney General* SC. SD. 4 – 14/ 2012

[61] *The Centre for Policy Alternatives v. The Attorney General* SC. SD. 17/2013

[62] In this determination the Supreme Court opined that in terms of Section 3 of Parliament (Powers and Privileges) Act which is incorporated into Article 67 of the constitution, the placement of the bill on the Order Paper was part of parliamentary proceedings and that the Supreme Court is denuded of jurisdiction to impeach proceedings in Parliament. The court further stated that the petition is misconceived in law and was in contravention of the jurisdiction conferred on the Supreme Court by proviso (a) to Article 120 read with Article 124 of the constitution.

the Supreme Court, it is unclear whether the President's obligations in terms of Article 154 G (3) are enforceable by the Court.

In terms of the Governor, Article 154 F (2) operates as an ouster clause which provides that any question on whether the Governor is by or under the constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any court. Furthermore it stated that the exercise of the Governor's discretion shall be on the President's directions. On the face of it this provision seems ridiculous as it supposes 'unlimited discretion' vests with the Governor.

Welikala responds to the ouster in terms of Article 154 F (2) as follows;

> "An important issue here is whether, unlike in the 'extraordinary situations' contemplated by Articles 154J, 154L, 154N and Section 5A in which it is reasonable to presume that the Governor exercises his functions at his own discretion, the more general functions set out in the Act are also of that nature (i.e., that he is not legally required to seek or follow the advice of the Board of Ministers). A literal interpretation of the statutory provisions would seem to indicate that the Governor is not required to act in accordance with the advice of the Board of Ministers. On the other hand, a purposive interpretation of the statutory provisions, within the meaning of Article 154F (1), and consistent with democracy and devolution, suggests that the Governor should in practice act on the advice of the elected Board of Ministers."[63]

[63] See Welikala (2011): p.53.

This is descriptive of the approach adopted by several judgments of the Supreme Court and Court of Appeal. On several occasions where the tension between the Governor and the Board of has led to litigation the court has taken great pains to give a purposive approach the constitution, which promotes the provisions of devolution and interprets narrowly the provisions of Article 154 F (2).[64]

The broader point to note in relation to this statutory framework, however, is that the cumulative results of the provisions of the Thirteenth Amendment and the Provincial Councils Act are framed in such a way that it opens the space for the Governor, if he so desires or upon the instructions of the President, to assert his will against the wishes of the elected representatives in the form of the Board of Ministers even in matters of day-to-day administration.

Whilst creative judicial interpretation has attempted to promote the purpose of the Thirteenth Amendment (i.e. devolution of power), as has been seen, there has not been a coherent development of this jurisprudence. Even when there has been a line of 'devolution friendly' determinations, the flaws in the statutory structure lends itself to a judge, who so desires, to turn back decades of jurisprudence.

Conclusion

As has been reiterated several times, the President both directly and through his agent the Governor wields extensive power over the Provincial Council system. The

[64] *Bandara v. Premachandra* (1994) 1 SLR 301; *Maithripala Senanayake v. Mahindasoma and Others* (1998) 2 SLR 333; *Premachandra v. Major Montague Jayawickrema and another* (1994) 2 SLR 90; *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134; *In re the Bill titled 'Land Ownership'* SC SD. No. 26/2003 - 36/2003; *Chamara Madduma Kaluge and others v. The Attorney General* SC. SD. 4 – 14/ 2012.

nature and extent of power so exercised by the executive president undermines the limited devolution of power afforded by the Thirteenth Amendment.

The main problem in this regard is the provisions of the Provincial Councils Act, which allow the Governor to infiltrate and control the day-to-day operation of the Provincial Council. However, it should be noted that peculiar characteristics – both legal and political – of the executive presidency as it exists, also contribute to the undermining of the Thirteenth Amendment. Foremost among these is the legal immunity conferred upon the President in terms of Article 35 of the constitution. Whilst there is nothing to suggest that there is widespread political support for the Thirteenth Amendment, the immunity so conferred on the President has facilitated successive Presidents since 1987-88 to not wilfully implement parts of the Thirteenth Amendment. The absurdity of the proposition that a creature of the constitution, could effectively suspend parts of the very same constitution that gives it legitimacy, is captured by the following statement:

> "How on earth could parts of the 13th Amendment to the Constitution, part of the Supreme Law of the country, NOT be implemented for over 20 years? What does this say about the Supremacy of the constitution and the Rule of Law in Sri Lanka? *Indeed the fact that there was no legal remedy available to the ordinary citizen or a person committed to devolution of power to demand such implementation makes the situation even more reprehensible.* Constitutions that permit non-implementation of its provisions and do not provide for an appropriate legal remedy in such situations, are flawed constitutions. *Constitutions cannot rely on political will or the goodwill of the people in power for success.* Indeed the basis of Constitutionalism is suspicion and scepticism

about those who wield power." [65] (emphasis added)

The executive presidential system that exists in Sri Lanka promotes the notion of unfettered power and actively undermines the notion of constitutional governance. Moreover, the executive presidency promotes the centralisation of power which is contrary to the very purpose of the Thirteenth Amendment which is devolution of power.[66] In such a constitutional order, which is overwhelmingly stacked in favour of the executive president, it is no surprise that the Thirteenth Amendment will continue to be undermined.

[65] R Edrisinha, '*The APRC Process: From Hope to Despair*', *Groundviews*, available at http://groundviews.org/2008/02/03/the-aprc-process-from-hope-to-despair/

[66] See *Madduma bandara v. Assistant Commissioner Agrarian Services* (2003) 2 SLR 80. At p.83 the Court states that "The 13th Amendment to the Constitution, which came into effect in November 1987, was chiefly introduced for the purpose of devolving power from the Central Government to the Provincial Councils." See also *Town and Country Planning (Amendment)* SC. SD. No.03/2011.

10

Flawed Expectations: The Executive Presidency, Resolving the National Question and Tamils

Kumaravadivel Guruparan

Introduction

Constitutional design for deeply divided societies is an old problem but as of recent times has become a distinct sub-area of study in comparative constitutional law.[1] The interest arguably stems from the belief that multi ethnic/multi-national/plurinational democracies can be designed through constitutional engineering. Samuel Isacharoff characterises this designing as something that tries to seek a balance between democratic self-governance and majoritarian oppression. [2] However, an obvious point that nevertheless needs emphasis is that there are other variables that determine the manner in which political dynamics interact in deeply divided societies, and it needs to be acknowledged that institutional design alone does not and cannot solve problems. We have to be careful with constitutional lawyers dominating the discourse on finding solutions to political problems. This is not to underestimate the point that the kind of institutions that are designed and put in place do have a great impact on the way the politics play out in deeply divided societies. This is a useful, but it has to be acknowledged, an exercise that has limitations.

Ulrike Theuerkauf speaks of three types of formal political institution that are of particular relevance when seeking to achieve sustainable peace in ethnically diverse societies.[3] In their order of importance, these institutions according to Theuerkauf, are: 1) electoral systems for the legislature; 2) state structures (by which she means debates over power-sharing and federalism); and 30 forms of government (by which she means the choice of presidential, semi-presidential, parliamentary forms of government). According to Thuerkauf, the choice of form of government has got the least attention from scholars. The executive presidential system as a form of government was introduced in Sri Lanka, *inter alia*, with the stated intention of creating an institution that could provide a solution to the (Tamil)

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[1] S. Choudry (Ed.) (2008) ***Constitutional Design for Divided Societies: Integration or Accommodation*** (Oxford University Press): Ch.1.
[2] S. Isacharoff, '*Constitutionalising democracy in fractured societies*' (2004) ***Texas Law Review 1861-1891***, 82
[3] U.G. Theuerkauf, '*Presidentialism and the Risk of Ethnic Violence*' (2013) ***Ethnopolitics*** 12(1): pp.72-81.

National Question.[4] The institution was expected to stand above the politics of 'ethnic outbidding' hitherto practiced by the two major parties in Sri Lanka. This chapter will seek to argue that this objective both conceptually, but also with hindsight empirically, is misplaced. It further put forwards a broader argument that in the case of Sri Lanka, the form of government does not have an impact on resolving the Tamil National Question.

The chapter is organised as follows. I begin with a brief comment on the literature on forms of government that best suits deeply divided societies. I then trace the history of constitution-making in relation to the National Question with particular reference to whether and how the choice of form of government has figured in this debate. I then consider in detail the motives that drove the drafters of the 1978 Second Republican Constitution to introduce the executive presidential system, and critique these assumptions and motives, and test their relevance to contemporary Sri Lanka.

Is the presidential form of government better than the parliamentary form of government for deeply divided societies?

The literature on the subject is vast and it will not be presumptuous to conclude that the conclusions are themselves deeply divided. The Linz-Horowitz debate is the most well known scholarly exchange on this subject. There is reference to Sri Lanka in this exchange between Linz and Horowitz and I treat this elsewhere in detail.

Alfred Stepan and Cindy Skach argue that parliamentary forms of

[4] I define the National Question in Sri Lanka as the problem relating to the hierarchical nature of the Sri Lankan state at the helm of which is the Sinhala Buddhist nation. In this hierarchical state structure the other constituent nations and peoples of Sri Lanka are regarded as subservient peoples and nations to the dominant nation. The dominant nation (the Sinhala Nation) has used the state, its constitutional and legal apparatus to preserve its dominant status. This I contend is the best explanation of the post-colonial constitution making efforts in the country and of constitutional praxis in post-colonial Ceylon/Sri Lanka.

government provide more of a 'supportive evolutionary constitutional framework for consolidating democracies' and provide a number of reasons in support of their argument.[5] They argue that a parliamentary system's a) greater propensity for governments to be in possession of majorities to implement their programmes, b) greater ability to rule in a multiparty setting, c) lower propensity for executives to rule at the edge of the constitution and its greater facility at removing a chief executive who does so, d) its lower susceptibility to military coups, and e) its greater tendency to provide long party-government careers are attractive for multi-national states. However, other scholars have argued the complete opposite and have pointed to the usefulness of presidential systems in emerging democracies. For example, in a recent study on the working of presidential democracies in Latin America Carlos Pereira and Marcus André Melo argue the contrary. [6] They argue that presidentialism combined with multipartism is attractive for a region marked by extreme inequality and social heterogeneity. Drawing from the Latin American experience they argue that multiparty presidentialism has boosted political stability. The problem with these generalist arguments in favour or against presidential system is that these general observations tend to break down depending on context, particularly in deeply divided societies.

Arend Lijhpart, well known for his work on constitutional designs for plural democracies, makes clear prescription of a parliamentary form of government for deeply divided societies. He argues that in countries with deep ethnic cleavages, the choice should be based on 'the different systems' relative potential for power sharing in the executive'.[7] The cabinet or the government in a parliamentary system, he argues, is a 'collegial decision-making body – as opposed to the presidential one-person executive with a purely advisory cabinet'. Hence he concludes that the parliamentary form of government offers 'the optimal

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[5] A. Stepan & C. Skach, '*Constitutional Frameworks and Democratic Consolidation; ParliamentarismVersusPresidentialism*' (1993) ***World Politics*** 46:1, 1-22.
[6] C. Pereira & M.A. Melo, '*The Surprising Success of Multiparty Presidentialism*' ***Journal of Democracy*** 23(3): pp.156-170.
[7] A. Lijhpart, '*Constitutional Design for Divided Societies*' (2004) ***Journal of Democracy*** 15(2): pp.96 –109, 101.

setting for forming a broad power- sharing executive'. An additional advantage of parliamentary systems, he argues is that there is no need for presidential elections, which are necessarily majoritarian in nature.

Lijhpart's first assertion that the parliamentary system has provided for a broad power-sharing executive depends on whether there is the need and the will to accommodate parties belonging to the numerically smaller nations in a multinational state in the executive. More difficult is the question of how to ensure that this is not merely symbolic. It also depends on whether the numerically smaller nations in a multinational state consider that there is adequate political space (as distinct from legal/constitutional space) in national politics, which they can seek to influence by sharing power in the executive. As to Lijhpart's second assertion that presidential elections are more majoritarian in nature, it is not clear as to how parliamentary elections are less majoritarian in nature, particularly in deeply divided societies. Where parties are primarily divided on ethnic lines and where ethnic lines produce a clear majority and a minority, parliamentary elections also tend to more often than not, reflect the deeply divided nature of the state and tend to reproduce majoritarian politics. There are not enough reasons to support the argument in deeply divided societies that parliamentary elections are less majoritarian.

The 'parliamentary v. presidential' debate constructs a neat dichotomy between parliamentary and presidential forms of government, which however does not necessarily exist in practice. Recent scholarly work on the 'Presidentialisation of Politics', particularly that of Thomas Poguntke and Paul Webb questions this dichotomy and adds more complexity to our understanding of the contemporary praxis and functioning of governments.[8] Poguntke and Webb suggest that irrespective of the form of government, that there has been a shift from collective or organisational power to individual power and accountability in the way all types of governments function. This change they argue has happened at three levels: within the executive, within political

[8] T. Poguntke & P. Webb (Eds.) (2005) ***The Presidentialisation of Politics: A Comparative Study of Modern Democracies*** (New York: OUP).

parties, and in electoral processes. At all three levels of inquiry, a personalisation of politics has driven the focus of politics on to the individual. This has equally affected, they stress, all forms of government be, they presidential, semi-presidential or parliamentary. In this analysis, Prime Ministers in even typical Westminster-style governments are 'Presidential' and sometimes more 'Presidential' than in classical presidential systems. Political parties and collective responsibility of governments have become less important than the individuals. Modern media democracy, Poguntke and Webb demonstrate, has become a driving force behind this transformation that focuses on individual personalities. Elections have largely become referenda about a particular individual's performance in public office rather than that of a party's or a government's performance. This argument is important, and has the potential to make the debate about the choice of forms of government appear irrelevant. It is important that Poguntke and Webb's work be reflected upon in the constitutional discourse in Sri Lanka relating to the choice of form of government. As a general proposition however, given the particular features, powers and privileges that a separate institution of an executive president tends to be adorned with, and which a Prime Minister as *primus inter pares* among ministerial colleagues would not enjoy in a typical Westminster-style system, it would be wrong to suggest that the debate on the choice of government is entirely meaningless.

This chapter, however, is more interested the argument that in deeply divided societies, where there is an *a priori* question of the character and legitimacy of the state itself, the form of government with which the state is managed does not necessarily correlate with the question of how to resolve this *a priori* question. The rest of this chapter will attempt to establish that this conclusion is true for Sri Lanka.

From the Donoughmore constitution to the first republican constitution: choice of forms of government and the Tamils

Ceylon and later Sri Lanka's constitution-making processes have from colonial times failed to grapple adequately with the question of the kind of political institutions that would best suit the multi-ethnic character of the state. The colonial constitution-making attempts were the result of an inadequate understanding of designing institutions for a plural state, and the post-colonial constitution-making processes have been explicitly about consolidating Sinhala-Buddhist hegemony over the state through constitutional design.

The colonial 1931 Constitution (popularly known as the Donoughmore Constitution) [9] and the colonial given 'independence' constitution of 1947 (the 'Soulbury Constitution') approached the idea of constitutional design from a point of view that placed very little importance to Ceylon as a multi-ethnic society.[10] The Donoughmore Commission introduced universal franchise, an executive committee system of government, and a shift away from 'communal' representation to territorial representation. The Donoughmore Commissioners felt that the communal representation scheme that existed hitherto had 'accentuated rather than diminished racial differences'.[11] The leadership of the Tamils and other smaller communities felt the opposite. The establishment of an executive committee system, as a consociational measure, it was hoped would give representatives from the numerically smaller communities an opportunity to participate in the executive branch of government. The first election under the Donoughmore scheme was boycotted by Jaffna

[9] Colonial Office (1928) ***Ceylon: Report of the Special Commission on the Constitution***, Cmd.3131 (London: HMSO).

[10] As the Kandyan National Assembly put it, "The fundamental error of British statesmanship has been to treat the subject of political advancement of Ceylon as one of a homogenous Ceylonese race" Kandyan National Assembly (n.d., probably 1927) ***The Rights and Claims of the Kandyan People*** (Kandy) as quoted by A.J. Wilson (1988) ***The Break up of Sri Lanka*** (London: Hurst Publishers): p.98.

[11] C. Collins, '*The Significance of the Donoughmore Constitution in the political development of Ceylon*' ***Parliamentary Affairs*** 4(1): pp.101-110 at 109.

owing to a call for boycott by the Jaffna Youth Congress that stood for *Poorana Swaraj* (complete independence) from the British colonial power and a rejection of colonial piece meal reforms. The second elections (in which Jaffna participated) produced a board of ministers that was pan-Sinhalese. The pan-Sinhala board confirmed the apprehension of the Tamils that the introduction of universal franchise within a unitary form of Government would lead to the unleashing of populist, ethnically driven mass politics,[12] which in turn would lead to a majoritarian democracy. In this scheme of politics then Donoughmore was an early reminder that the choice of form of government would have very little impact in the manner in which the country's politics was going to take shape.

Tamils and other non-Sinhalese communities were more focused on fighting for more balanced representation, but in the face of Sinhalese agitating for constitutional reform (beyond the Donoughmore Constitution), K.M. de Silva notes that the Tamils, Muslims, Up Country Tamils, Burghers and Europeans came to view the executive committee system (despite the bad experience with the pan-Sinhala Board) as an instrument that will help in buttressing their weakening political position in the constitutional reform process and hence demanded for its retention.[13] The Tamils were alarmed by the permanent majority status afforded to the Sinhalese and the concomitant permanent minority status that they were relegated to through the universal franchise. As Stanley Tambiah noted, the Donoughmore epoch established forcefully the reality of Sinhalese majoritarian rule and monopoly over governance.[14] The Tamil position at that time hence feared that an ever-increasing transfer of powers from the British to Ceylonese would be no different to a transfer of power exclusively to the Sinhalese (and to the exclusion of the Tamils). Hence their demands were anti-self-rule; for example, Tamil leaders demanded that the powers of the colonial Governor be retained.

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[12] Cf. N. Wickramasinghe (1995) ***Ethnic Politics in Colonial Sri Lanka (1927-1947)*** (New Delhi: Vikas): p.114.
[13] K.M. de Silva (2005) ***History of Sri Lanka*** (New Delhi: Penguin India): p.433.
[14] S.J. Tambiah (1992) ***Buddhism Betrayed*** (Chicago: Chicago University Press): p.10

The Upcountry Tamils and Muslims largely supported this position.

The next stage of the constitutional reform process that led to Ceylon becoming a Dominion produced the Soulbury Constitution, which tried to tackle the 'apprehensions of the minority'[15] primarily by including a minority rights protection clause which the drafters hoped would prevent the passing of discriminatory legislation.[16] This proved ineffective in preventing legislation against minority interests from being passed by the independent Ceylonese Parliament. It also tried to allay concerns of the Tamils and Muslims by creating some multiple-member constituencies. The Soulbury Commissioners expressed confidence in their report that the proposed Provincial Council system would come into operation.[17] Later Lord Soulbury in a letter to C. Suntharalingam in 1964 would regret not having drawn up a more comprehensive Bill of Rights like in India, which he thought would have better protected minority interests.[18] Soulbury's afterthought only serves to further confirm the limitations of the liberal orthodox approach to constitution designing, which assumed that an individual rights approach – having a bill of rights – was adequate to respond to the concerns of Sri Lanka's numerically smaller nations and peoples.

It must be noted the Tamil leaders at this point did not imagine a constitutional design that was anything more than an adjustment within the unitary state, with the exception of the Kandyan National Assembly which pressed for a federal arrangement for Ceylon. [19] G.G. Ponnambalam Q.C., who was the most

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[15] Colonial Office (1945) ***Ceylon: Report of the Commission on Constitutional Reform***, Cmd.6677 (London: HMSO): para.120 [*The Soulbury Commission Report*]: para.177.
[16] The Soulbury Constitution: Section 29 (2).
[17] The Soulbury Commission Report: para.84.
[18] C Suntharalingam (1965) ***Eylom: Beginning of the Freedom Struggle; Dozens Documents*** (Arasan Printers): p.74.
[19] Bryan Praffenberger asserts that a unitary state was convenient even for the Ceylon Tamils because their middle class greatly benefited from their economic and public service roles in the Sinhalese south and hence were reluctant to devolve power to the provinces. B. Praffenberger, '*Book Review; The Break-up of Sri Lanka: The Sinhalese-Tamil Conflict*' (1991) ***Journal of Asian Studies*** 50(1): pp.196-197 at p.197.

prominent Tamil leader of that time, in fact pushed for only a balanced representation for minorities in the legislature or what is famously known as the '50-50' demand. The '50-50' demand was couched in language of constitutional equality but there was no specific demand about state structures or for that matter about the form of government. Ponnambalam and other Ceylonese Tamil politicians at that time believed in what Michael Roberts calls 'Ceylon Tamil Sectional Patriotism'.[20] They were apprehensive about Sinhala majoritarianism but their politics did not seek to fundamentally question the political foundations of the Ceylonese state.

Tamil politics underwent radical change in 1949 – in Robert's terms a shift from Ponnambalam's sectional patriotism to 'Sectional Nationalism' – when the *Ilankai Tamil Arasu Katchi* was formed (ITAK or 'Federal Party'). The ITAK put forward the federal demand – the first time that the Tamil leadership put forward the demand for a constitutional design for Ceylon, which went beyond the confines of a unitary state. But this was not merely a shift in the attitude to constitutional design; it was a shift in ideology. A separate national imagination started taking root among the Tamils that fundamentally started questioning the legitimacy of the Ceylonese/Sri Lankan state. The ITAK proposals of 1949 for a federal Ceylon did not favour a change in the form of government and sought to retain a parliamentary form of government.

To summarise, prior to 1949 the Tamils position relating to constitutional reform largely was confined to demands for equality of representation (the push for more 'communal' representation and the 50-50 demand) and by attempts at slowing down the progress towards self-rule (in their view Sinhala-rule). Post-1949 and more definitely after the Sinhala Only Act of 1956, this shifted fundamentally. The focus now was on challenging the political ideology and legitimacy of the Ceylonese/ Sri Lankan state. From 1949-1977 this was couched in the demand for a federal Sri Lanka and after 1977 on independent statehood. The

[20] M. Roberts, '*Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: barriers to Accommodation*' (1978) ***Modern Asian Studies*** 12(3): p,353 at p.370.

form of government (choice of parliamentary form versus others) did not figure in this discourse. It just was not important.

Post-colonial constitution-making, the form of government, and the Tamils: From a supreme parliament to an executive presidency

The first attempt at post-colonial 'republican' constitution-making, the Constitution of 1972, despite calling itself an autochthonous constitution, reaffirmed a Westminster-style legislature and executive in its worst possible form by, *inter alia*, making legislative supremacy the cornerstone principle of the constitution, by constitutionalising the unitary state, constitutionalising the status of Buddhism, by truncating the mechanism and idea of judicial review, and scrapping the minority protection clause in the Soulbury Constitution. The constitution, and the exclusively majoritarian process through which it was made, pushed the Tamil leadership to abandon the vision of a federal Sri Lanka and to further a campaign for independent statehood.

The Second Republican Constitution enacted six years after the First Republican Constitution made a radical departure in the form of government by introducing an executive presidential system. The reasons and motives for the introduction of the executive presidential system are diverse. Normative political ideology (by which I mean a particular political vision for the state) and instrumentalism (by which I mean furthering a particular political party's interests) have both impacted constitution-making in Sri Lanka. Both the republican constitutions were about ideology and instrumentalism.[21] In both the constitutions the desire to consolidate the Sinhala-Buddhist character of the state was a clear normative ideological position that both the UNP and SLFP shared and agreed. There was, for example, no contestation from the UNP in the Constituent Assembly of 1970-1972 that drew up the 1972 Constitution, of the SLFP's endeavour to constitutionalise the unitary state, the

[21] C.f. R. Coomaraswamy (1997) ***Ideology and the Constitution*** (Colombo: ICES).

official language, and in granting Buddhism a constitutional status. In fact the UNP did the same when it was their time to enact a constitution in 1978. The commitment to a unitary state and to Buddhism is an ideological commitment that was and continues to be important for both the mainstream Sinhala nationalist parties – the UNP and the SLFP.[22] For these mainstream parties there was absolutely no question of considering alternative state structures in the process of constitutional designing for a multinational state. Despite agreement over the normative political ideology underpinning the constitution, the two parties had different economic interest based preferences, at least in appearance. Socialist grandstanding partly drove the constitutional philosophy of the 1972 Constitution. The 1978 Constitution, and particularly the creation of an executive presidential system, was conceived as being important to push forward a neo-liberal economic agenda for Sri Lanka. In addition to these ideological motives, the motives were also instrumentalist in that the SLFP and the UNP in 1972 and 1978 respectively used their extraordinary majorities in Parliament to further their party's interests through constitutional reform. For example, J.R. Jayewardene introduced the proportional representation system in the 1978 Constitution to make sure that the UNP would never be reduced to the state it found itself in the 1970 elections. Another common theme that underlies both the republican constitutions was, as Rohan Edrisinha and N. Selvakkumaran have shown, the desire for executive convenience.[23] Taking note of these instrumentalist narratives is important while examining the 1978 Constitution and the executive presidency in a holistic manner. This chapter, given its focus, is not interested in the instrumental narratives but rather with the normative reasons advanced for the

[22] Between 1995 and 1997 and in 2002 the SLFP (under Chandrika Bandaranaike Kumaratunge) and the UNP (Ranil Wickremesinghe) respectively, wavered from this position momentarily but returned to their original positions soon after. Even these momentary swings were instrumentalist in nature, largely pursued to convince the International Community of their commitment to liberal peace and to delegitimize the LTTE's agenda of creating a separate state.

[23] R. Edrisinha & N.Selvakkumaran, '*The Constitutional Evolution of Ceylon/Sri Lanka 1948-98*'in W.D. Lakshaman & C. Tisdell (2000) ***Sri Lanka's Development since Independence: Socio Economic Perspectives and Analyses*** (New York: Nova Science Publishers): p.96.

introduction of the executive presidency, particularly those in relation to the resolution of the National Question.

Alfred Jeyaratnam Wilson, who was a key advisor to J.R Jayewardene in the drafting of the 1978 Constitution, asserted in his seminal book on that constitution, *The Gaullist System in Asia*[24] that the prime purpose of introducing an executive presidential system was to 'promote economic growth and national unity'.[25] He believed that a presidential form of government would increase the possibility of finding a political solution to the national question. He guarded this optimism by acknowledging that the whole framework of the constitution 'hangs on the skill and ability of one person – the elected Executive President'[26] and that the potential cost of the project was that the President could in practice become a 'constitutional dictator'.[27] This excessive focus on one person led to a very peculiar executive presidency being enshrined through the Second Republican Constitution, wherein executive powers, in Urmila Phadnis' terms, were 'uni-personalised'.[28] Wilson seemed to believe that only President J.R. Jayewardene was fit for the job and anyone else would convert the system into a '*fidelismo*'.[29] The drafters' intention behind the constitution, as discerned from A.J. Wilson's account, was animated by the possibility of having a popularly elected leader who would be able to push through a solution irrespective of opposition [30] and the related hypothesis that a presidential candidate will have to appeal to minorities.[31] The rest of this chapter will critically examine these assumptions.

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[24] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka (1978)*** (Macmillan).
[25] ibid.: p. xiii.
[26] ibid.: p. xiv.
[27] ibid.: p. 61.
[28] U. Phandis, '*The Political Order in Sri Lanka under the UNP Regime: Emerging Trends in the 1980s*' (1984) ***Asian Survey*** 24(3): pp.279-295.
[29] Wilson (1980): p.154.
[30] A.J. Wilson notes that in 1978 "sections of the Tamil elites hoped that as an executive President he could now resist the pressures of chauvinistic Sinhalese groups". Wilson (1988): p.136.
[31] "The system of electing a President, as constitutionally provided, ensured that support from minority ethnic groups, particularly the Tamils, was necessary". Wilson (1988): p.136.

Deconstructing Assumption 1: ***A strong leader who is not subject to the whims and fancies of parliamentary opposition might be able to sail through a solution to the national question***

The assumption is historically grounded in the fact that whenever a party in government has tried to accommodate the Tamil aspirations, that the parliamentary opposition had blocked such efforts. An early example of this phenomenon is the fate that befell the pact signed between Prime Minister S.W.R.D. Bandaranaike of the SLFP and S.J.V. Chelvanayakam, leader of the Federal Party in 1957, which sought to provide for 'reasonable use' of the Tamil language in Tamil-speaking areas and for the setting up of Regional Councils. Dudley Senanayake, the leader of the UNP labelled the pact an 'act of treachery', which would result in the 'partition of Ceylon'. Senanayake had declared that he was prepared to even sacrifice his life to stop it.[32] J.R. Jayewardene, then second-in-command of the UNP, organised a march from Colombo to Kandy against the pact. The monks who were a key part of Bandaranaike's ascendance to power also joined the protests. Bandaranaike later tore up the pact unilaterally. James Manor in his biography of Bandaranaike, in the context of writing about the incidents relating to the pact, noted that 'J.R. Jayewardene, like Bandaranaike and many other prominent Ceylonese leaders (including some Tamils), was not a communalist bigot. But in what has been a central facet of the island's tragedy, he found the temptation to use communalism to mobilise popular support too tempting to resist.'[33]

A similar fate befell the pact signed between Prime Minister Dudley Senanayake and S.J.V. Chelvanayakam which provided for a further watered down proposal from that envisaged in the Bandaranaike-Chelvanayakam Pact. The pact provided for the establishment of District Councils. This time around the Leftist parties joined hands with the SLFP in accusing the government for selling out to the Tamils.

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[32] As quoted by J. Manor (1989) ***The Expedient Utopian: Bandaranaike and Ceylon*** (Cambridge University Press): p.269.
[33] Manor (1989): p.271.

A.J. Wilson thought that a strong institution such as the executive presidency would be able to withstand these pressures. The point was repeatedly made even in the post-war context that suggests that President Rajapaksa is the only person, given the support he has from the Sinhala community, as the person who successfully led the war against the LTTE, who be able to sail through a solution to the conflict. I have elsewhere argued that the end of the war provided for 'a constitutional moment' that has redefined, and reversed significantly, the mainstream discourse on the abolition of the executive presidential system and on restructuring the state through devolution of power.[34] President Rajapaksa utilised the politics of triumphalism built on the constitutional moment of 18th May 2009 to amass the second largest victory in the history of presidential elections in 2010. The only part of the constitution that significantly challenged the executive presidency, the Seventeenth Amendment, has been repealed through the enactment of the Eighteenth Amendment. In that piece I argued that the enactment of the Eighteenth Amendment was an act of reverting to the original constitution of 1978 and given the abolition of the term limits, the Eighteenth Amendment strengthened the presidency beyond the limits envisaged even by the drafters of the constitution. All of this has been possible owing to the defeat of the LTTE by the government led by President Rajapaksa.

However, the myth of the executive presidency being the best institution suited to deal with the national question and for the revival of the economy continues to be restated. Rauf Hakeem, leader of the Sri Lanka Muslim Congress speaking in Parliament on the eve of the passage of the Eighteenth Amendment noted:

> "The Hon. Basil Rajapaksa this morning very graciously admitted that this amendment is not simply to get a third term or go beyond that but more than that, to have a second term without unnecessary convulsions and a very stable government during the second term"

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[34] K. Guruparan, '*18 May 2009 as a Constitutional Moment: Development and Devolution in the Post War Constitutional Discourse in Sri Lanka*' (2010) ***Junior Bar Law Review***: pp.41-51.

> "[We vote for this amendment] with the sincere belief that the passage of this bill will enable His Excellency the President to have a trouble-free second term and if possible with a large mandate, get another term to bring an end to the polarisation in this country, bring an end to the protracted political struggles which had destroyed the economy in this country and put the country in the path of prosperity."[35]

This assumption that has been long held however is deeply flawed at many levels. Normatively from a constitutional democratic point of view, it is close to a naive belief in a benevolent dictatorship, in which the decision-making process does not care about means but only in ends, leave alone the question of what is the right (benevolent) or wrong decision. The assumption is anti-democratic and stems from the belief that democratic processes, debate, and deliberation do not deliver solutions. The normative concern is also a practical concern because unless there is an inclusive process of participation and deliberation whatever the result that is achieved is unlikely to be sustainable. The National Question is far deeper than a democratic problem *simpliciter* – it is a pre-democratic problem and by extension a pre-constitutional question.[36] The question relates to the political composition and character of the state. It is about the place of the different constituent nations and peoples in the island of Sri Lanka in relation to the state. An answer to the question cannot be found by an expedient, adventurist individual actor, in whom unbridled powers are vested, without support from the social and political forces that produced the question in the first place.

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[35] Speech by the Hon. Rauf Hakeem, Parliament of the Democratic Socialist Republic of Sri Lanka- Debate during the Second reading of the Eighteenth Amendment to the Constitution Bill, *Hansard* (8th August 2010):Col. 278-179.

[36] I have elsewhere characterised this as a 'pre-constitutional question', a question that has to be answered before embarking on negotiations for institutional/ constitutional arrangements:
Tamil Civil Society Written Submission made at the '*Exploring Peaceful Options in Sri Lanka: Part II*' conference organised by Berghof Foundation, Berlin, 26th- 27th January 2013
<http://www.tamilnet.com/img/publish/2013/02/Civil_Society_Submission_Berlin.pdf> accessed 01st August 2014.

The assumption is also flawed because it does not show an adequate appreciation of the complex social and political factors that inhibit the resolution of the national question. More particularly, the assumption displays a lacks of adequate understanding of the politics of the Sinhala polity – an understanding that will help understand the impossibility of any Sinhala leader pushing through a solution that even seeks to meet the minimum political demands of the Tamil political leadership. I will now address this problem in more detail.

Tamil politics since 1949 has steadfastly refused to accept a solution within the confines of a unitary state. The unitary character of the state is deeply embedded in the Sinhala-Buddhist nationalist consciousness. The narrative is that without a unitary state the existence of the Sinhala nation would be fundamentally threatened. As Asanga Welikala explains,

> "Sinhala Buddhist nationalism employ[s] a powerful idiom of centralisation of state power. That is to say, it interpolated the glorious historical paradigm of the ancient Sinhalese monarchy, patron of the people and protector of the faith, onto the new institutions of political independence. The greatest characteristic of a truly heroic occupier of the Sinhala monarchical paradigm was the overthrow of foreign domination (usually Dravidian invasions but subsequently Western powers as well) and subsequent 'unification of the country' under a single, central authority. This is the imperative pre-condition of the good life: peace, stability, economic progress and cultural renaissance, and is the subject matter of popular historical myth. On the other hand, dilution of central authority, often derisively attributed to vapid leadership in Sinhala historiography, was seen to produce anarchy, pestilence, moral decadence and cultural degradation. Therefore centralised unity related to territorial integrity is axiomatic in the traditional Sinhala ontology of the state and exercise of sovereignty, and explains its resonance in the modern nationalist hostility to any sort of political decentralisation. Decentralisation, devolution, federalism, power sharing and autonomy, in the Sinhala

> nationalist view, are mere precursors of an unthinkable certainty: the territorial division of the island." [37]

David Rampton stresses the point that Sinhala Buddhist nationalism is not merely an elitist project.[38] Far from being an elitist project, according to Rampton it is a manifestation of a 'deep hegemony'. Sinhala nationalism has in Rampton's terms, 'a gradual discursive and ideological diffusion into wider social strata' which has cemented the idea of Sri Lanka as a Sinhala Buddhist state. He emphasises that Sinhala Buddhist nationalism must be understood as 'a socio-political representation of Sri Lanka, in which the territory, state and nation of the island compose a bounded unity revolving around a majoritarian axis of Sinhala Buddhist religion, language, culture and people'. This social representation, Rampton argues reproduces a hierarchy placing the Sinhala nation at the apex with Sri Lanka's minority communities in a position of subordination.

Liberal constitution-building efforts in the past have assumed that Sinhala Buddhist politics is an elitist project that gets reproduced through competitive party politics. This liberal peace approach has assumed that if the 'ethnic outbidding' problem is resolved and an agreement between both major Sinhala parties (the UNP and SLFP) is produced, that a resolution to the National Question could be found. If Sinhala Buddhist nationalism is not just elite politics, as I have argued relying on Rampton, then ethnic outbidding is not the reason why a political solution to the National Question has been impossible. The hegemonic force of Sinhala Buddhist nationalism has a direct influence on the praxis of legal norms, and acts as a constraint on the usefulness of liberal constitution building efforts.[39]

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[37] A. Welikala, '*Theorising the Unitary State: Why the United Kingdom is Not a Model for Sri Lanka*', paper presented at the 60th Anniversary Academic Sessions of the Faculty of Law, University of Colombo, Sri Lanka, 25th October 2008 (paper in file with author).

[38] D. Rampton, '*'Deeper hegemony': the politics of Sinhala nationalist authenticity and the failures of power-sharing in Sri Lanka*' (2011) ***Commonwealth & Comparative Politics*** 49(2): pp.245-273 at pp.255-256.

[39] Also see D. Rampton, '*A Game of Mirrors: Constitutionalism and Exceptionalism in a Context of Nationalist Hegomony*' in A. Welikala (Ed) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): Ch.9.

From the preceding the following conclusions emerge: a) Sinhala Buddhist Nationalism is incapable of conceiving of a solution that goes beyond the contours of the unitary state; (b) the reason for a political solution not materialising is not the lack of a 'Southern Consensus', understood as an agreement between the two important political parties amongst the Sinhalese;[40] and (c) the reason for a political solution not materialising is, because the 'Southern Consensus' is in fact ideologically wedded to Sinhala Buddhist unitary nationalism.

A.J. Wilson and those who subscribe to his view that the executive presidency will help resolve the ethnic outbidding problem fail to appreciate the deep hegemonistic character of Sinhala Buddhist nationalism as the underlying problem in resolving the national question. The reason why experiments at a political solution failed is not as Wilson identifies the problem of 'ethnic out bidding' – which can then be fixed by designing an institution (like the Executive Presidency) – but the democratic assertiveness of the political manifestation of Sinhala Buddhist nationalism which clings on to the unitary state. There is abundance of evidence of the working of the Executive Presidency which suggests that the institution itself promoted the ethnic outbidding that it was supposed to eliminate. Two instances are provided by way of illustration.

The first case study involves President J.R. Jayewardene himself on whom Wilson personally pinned this hopeful assumption. Soon after the July 1983 pogrom, Prime Minister Indira Gandhi sent a special envoy to discuss a possible political solution to the conflict. Negotiations were held for four months at the conclusion of which Prime Minister Gandhi invited the parties to New Delhi. President Jayewardene in his separate meeting with Mrs Gandhi on 30th November 1983 is reported to have promised her that he was prepared to put forward the solution agreed to between him and the TULF leadership to the All Party Conference (APC) that

[40] See further A. Welikala & D. Rampton, '*Politics of the South*' (2005) ***Segment of the Sri Lanka Strategic Conflict Assessment 2000 – 2005*** 3 <http://asiafoundation.org/resources/pdfs/SLPoliticsoftheSouth.pdf> accessed 1st November 2013.

had set been up for the purpose, except for the TULF demand seeking a merged North and East. He however suggested to Mrs Gandhi that the TULF put forward their proposals including for a united Tamil province at APC and that he would ensure that the proposals are accepted by the APC. Mrs Gandhi conveyed this guarantee to the TULF leadership in her meeting with them on 1st December 1983,[41] who promptly joined the APC wherein they made the case for a united Tamil province. President Jayewardene went back on his word. His party, the UNP, objected to the merger. Subsequently President Jayewardene packed the APC with non-parties including organisations represented by Buddhist monks who opposed the TULF proposals. The TULF walked out soon after and the APC was called off in a year's time.

The second case study is that of President Mahinda Rajapaksa's All Party Representatives Conference (APRC) constituted in 2006. The principal Tamil party, the Tamil National Alliance (TNA) was not invited to this conference. The president appointed an expert committee to advice the APRC which split into two and produced separate reports. The majority report recommended a weak federal model whereas the minority report recommended a solution that would have further weakened the already weak provincial council system, preferring the district as the unit of decentralisation or a solution based on a local government system based on the Panchayat Raj system found in India. In an act comparable to President Jayewardene's handling of the APC, President Rajapaksa's SLFP put forward proposals that sought to abolish the provincial council system and replace it with the district as the unit of devolution thereby undermining the APRC Expert Committee majority report. The final APRC report was never officially released but two members of the committee launched it unofficially in 2010.[42] At the launch of the report it was revealed that President Rajapaksa had himself

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[41] Tamil United Liberation Front (1988) ***Towards Devolution of Power in Sri Lanka: Main Documents: August 1983 to October 1987*** (Chennai: Jeevan Press): pp.iv-v.

[42] R. Yogarajan, MP & N. Kariapper (Eds.) '*Proposals made by the APRC to form the basis for a new Constitution*' <http://www.satp.org/satporgtp/countries/shrilanka/document/papers/images/APRC%20Report.pdf> accessed 1st August 2014.

insisted to the APRC membership, that the proposals had to explicitly retain a reference to a 'unitary state'.[43]

A possible exception to the Executive Presidency stepping out of the unitary state conundrum was President Chandrika Bandaranaike Kumaratunga's efforts in the mid-1990s to put forward proposals based on the federal idea. The proposals met with stiff resistance from the Sinhala Buddhist civil society who organised themselves into a 'National Joint Committee' chaired by a retired Supreme Court judge, who then set up a 'Sinhala Commission'. The commission found that the President Kumaratunga's constitutional package 'will not only destroy the unitary character of Sri Lanka, which has been preserved for over 2500 years, but will also spell disaster for the country as a whole'.[44] The commission further asserted that the proposals 'will further impoverish the Sri Lankan people, in particular the Sinhala people, who are already a disadvantaged section of the population despite their comprising three fourths of it'. This groundswell of Sinhala Buddhist nationalism that started directing itself against President Kumaratunga gave opportunities for parties like the Janatha Vimukthi Peramuna (JVP) and the Jathika Hela Urumaya (JHU) which openly espoused Sinhala Buddhist nationalist politics to became popular. President Kumaratunga had to later align herself with the JVP with to keep herself in power. But it is not clear as to whether President Kumaratunga herself genuinely was committed to a federal project. D. Sivaram's writings point to the instrumentalist and strategic purpose of President Kumaratunga's federalist project which he asserts were solely aimed at discrediting the separatist project of the LTTE.[45] President Kumaratunga's alliance with the JVP in 2001 and 2004, the manner in which she disrupted the 2001-2004 Norwegian-facilitated peace process initiated by the Ranil Wickremesinghe government, and her silence with regard to a political solution after the military defeat of the LTTE in 2009, provide credence to

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[43] Personal notes of the author present at the launch of the report, July 2010.
[44] Sinhala Commission, '*Interim report of the Sinhala Commission dated 17.09.1997*' <http://www.satp.org/satporgtp/countries/shrilanka/document/papers/sinhala_commission.htm> accessed 1st November 2013.
[45] M. Whitaker (2007) ***Learning Politics from Sivaram: The Life and Death of a Tamil Revolutionary Journalist*** (New York: Pluto Press): p.126.

Sivaram's scepticism. Prime Minister Wickremesinghe's peace initiative and particularly the Oslo Communiqué of December 2002 (which proposed that a solution be explored along federal lines) were no doubt bold initiatives. But this track record on the National Question also has not been consistent. Prime Minister Wickremesinghe when he was the Leader of the Opposition in 2000 watched silently as his fellow parliamentarians burnt President Kumaratunga's (by-now watered down) proposals for constitutional reform in Parliament. The UNP under the same leadership, post-war has reiterated its commitment to not only a unitary state but also to retaining the Executive Presidency, although it is as yet unclear what form of executive power will emerge with the proposed constitutional changes of the Sirisena-Wickremesinghe administration elected in January 2015.[46]

In summary, the two important conclusions that may be drawn from the above discussion are as follows: Firstly, the Executive Presidency did not help deal with the 'ethnic outbidding problem', even if the problem were assumed to be one of ethnic outbidding. In fact the Executive Presidency also successfully used 'ethnic outbidding' as a tool to block the emergence of a solution. Secondly, the Executive Presidency even if the individual holder of the office wished to, could not transcend the processes of 'deep hegemony' of Sinhala Buddhist nationalism. The latter point will be further substantiated in the section that follows.

Deconstructing Assumption 2: *Presidential candidates have to appeal to a cross-community vote to be able to win*

In 1990, political scientists Juan Linz and Donald Horowitz debated the merits and demerits of the presidential system in the *Journal of Democracy*, wherein Juan Linz[47] took the position that a parliamentary system will benefit deeply divided societies,

[46] Full text available here: UNP, '*Principles for a New Constitution*' <https://www.colombotelegraph.com/index.php/full-text-of-the-principles-unps-new-draft-constitution-to-submit-people-within-6-months-after-the-formation-of-a-government/> accessed 1st November 2013.
[47] J.J. Linz, '*The Perils of Presidentialism*' (1990) ***Journal of Democracy***: pp.51 -59.

particularly in view of the 'winner takes all' nature of presidential elections. Horowitz[48] having – rightly in my opinion – pointed out that parliamentary elections are susceptible to the same by contrast, referred to the Sri Lankan example of presidential elections as a presidential system which did not provide for a 'winner takes all' situation. His argument is worthy of a lengthy quote:

> "In 1978, Sri Lanka also moved to a presidential system. Its principal purpose was to create a political executive with a fixed term that would permit the incumbent to make unpopular decisions, particularly those concerning the reduction of ethnic conflict. A majority requirement was instituted. Since most candidates were unlikely to gain a majority in Sri Lanka's multiparty system, a method of alternative voting was adopted. Each voter could vote for several candidates, ranking them in order of preference. If no candidate attained a majority of first preferences, the top two candidates would be put into what amounted to an instant runoff. The second preferences of voters for all other candidates would then be counted (and likewise for third preferences) until one of the top two gained a majority. It was expected that presidential candidates would build their majority on the second and third choices of voters whose preferred candidate was not among the top two. This would put ethnic minorities (especially the Sri Lankan Tamils) in a position to require compromise as the price for their second preferences. So, again, the presidential system would rule out extremists, provide incentives to moderation, and encourage compromise in a fragmented society".

Having made the above claim, Horowitz then extends its reach further by arguing that, had the Sri Lankans adopted their presidential electoral system earlier, their conflict would have

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[48] D. Horowitz, '*Comparing Democratic Systems*' (1990) ***Journal of Democracy*** 1(4): pp.73 -79. Linz response to Horowitz can be found here: J.J. Linz, '*The Virtues of Parliamentarism*' (1990) ***Journal of Democracy*** 1(4): pp.84 -91.

been moderated by that system. He argued that the conflict in Sri Lanka worsened because of the winner-take-all rules that governed its parliamentary systems that excluded minorities from power. Horowitz's claim, though made in 1990, even for that time, constituted a very broad sweep that was not corroborated by experience. With hindsight, more than three decades after the introduction of the executive presidency, one can definitely say that Horowitz was anything but wrong in making that claim: The presidential elections experience suggests a negative relationship between the presidential electoral system and the Tamils.

Horowitz's assumption that the Tamils would play a significant role in electing a President is based on two assumptions. Firstly, that the need for counting the second preferences would arise, i.e., that there would be a need for a runoff, and secondly, that the Tamils would not have cast their vote for one of the two candidates as first preference. There is also the further assumption (not mentioned by Horowitz) that generally both the main political parties in the south (the SLFP and the UNP) have a vote share of 38% and hence that for them to pass the 50% plus mark that they need to earn the votes of the parties that represent the other communities. A detailed psephological study would be necessary to ascertain the validity of these assumptions.[49] However the following general observations may be made.

In the six presidential elections that the country has voted for between 1982 and 2010 none have required the need for an 'instant runoff', i.e., the counting of second preferential votes contrary to Horowitz's expectations for the minorities through the instant runoff. Barring Kumar Ponnambalam's candidature in 1982, and M.K. Shivajilingam's candidature in 2010, no other Tamil candidates have contested Sri Lanka's presidential elections. Hence whenever Tamils have voted, they have cast their first preference for a Sinhala candidate. In the elections that were held in 1982, 1994, 2000 and 2010, the Tamil vote did not make a significant difference to the outcome of the election. The

[49] This is an area that is very much understudied in Sri Lankan politics. The only one that I was able to find was: Y. Warnapala & Z. Yehiya, (2008) ***Polarization of the Sri Lankan Polity: An Analysis of Presidential Elections (1982 – 2005)*** (Feinstein College of Arts & Sciences Faculty Papers-Paper 8) <http://docs.rwu.edu/fcas_fp/8/> accessed 1st August 2014.

Muslim and Upcountry Tamil vote did make a difference in these elections, but unlike the Tamils, the Muslims and Up Country Tamils for a variety of reasons do not pose a fundamental challenge to Sinhala Buddhist nationalist politics. The choice was particularly clear in 1994 and 2010 (President Kumaratunga's first term and President Rajapaksa's second term) in which the Tamil vote made no real difference to the outcome. In 1994 in response to the anti-incumbency mood sweeping the country against a 17-year-UNP rule and owing to Chandrika Bandaranaike Kumaratunga's liberal peace credentials, Kumaratunga received cross-community support. The main Tamil political party the TULF called for a vote in favour of Kumaratunga (noteworthy that the LTTE did not call for a boycott of this elections). However, Jaffna and Vanni registered less than 4% voter turn out at these elections.[50] The Tamil vote did not count at these elections because Kumaratunga enjoyed strong support from the majority. The Tamil community's – or even other numerically smaller communities' vote – does not have an impact in a presidential election if a candidate has clear support (more than two-thirds of the vote) from the majority community. In 1982, J.R. Jayewardene won the Eastern Province Tamil vote but lost in Jaffna and received overwhelming support from the Muslims and the Up Country Tamils. In 1999 President Kumaratunga won with overwhelming support from the Sinhala community and Ranil Wickremesinghe lost, despite winning handsomely in the North and East provinces with less than 4% vote being registered in the Vanni. In the election campaign, both President Kumaratunga and Mr Wickremesinghe accused each other of trying to hold secretive talks with the LTTE.[51] Mr Wickremesinghe's suggestion of a two-year interim council for the North and East with LTTE participation is said to have resulted in his losing the election.[52] The LTTE supremo in a speech

[50] All election related statistical reference is from the 'Official Website of the Elections Commission of Sri Lanka' <www.slelections.gov.lk> accessed 1st November 2013.
[51] '*Opposition seeks letters to LTTE*', ***Tamilnet***, (2009) <http://tamilnet.com/art.html?catid=13&artid=4266>; Also see 'World Socialist World Web Site' <https://www.wsws.org/en/articles/1999/12/sri-d09.html> accessed 1st November 2013.
[52] P. Saravanamuttu, '*Sri Lanka in 1999: The Challenge of Peace, Governance, and Development*' (Jan. - Feb., 2000) ***Asian Survey*** 40(1): pp.219-225 at p.221.

delivered just before the election had noted that 'Tamil people know what to do at the elections' which was read as a suggestion that he was indicating that the Tamils should vote for Mr Wickremesinghe.[53]

In the 2005 elections the strategy of earning the Sinhala Buddhist vote by 'othering' the opponent as a 'Tamil sell out' was taken to a new height. In 2005 presidential candidate Rajapaksa signed agreements with the JVP and the JHU which, *inter alia*, called for a complete renegotiation of the cease-fire agreement (CFA), a re-examination of the role of the Norwegian facilitators, insisted on retaining a unitary state, and trashed the Post-Tsunami Operational Management Structure (P-TOMS). Ranil Wickremesinghe lost the elections by a margin of 180,786. The boycott of the polls called for by the LTTE is widely considered to have resulted in Mr Wickremesinghe's defeat. But this contradicts the explanation of the outcome in the 1999 presidential elections that Wickremesinghe lost because of the implicit support from the LTTE. Indeed if the LTTE had implicitly supported Ranil Wickremesinghe, it is a plausible theory that he would have lost more votes in the Sinhala heartland making it very difficult for him to have won the election even if the Tamils had voted for him.[54] The presidential elections of 2010 provides further evidence as to the negative correlation between Tamil support for a presidential candidate and his or her ability to win an election. The TNA at the 2010 elections openly supported the opposition's common candidate, Sarath Fonseka. General Sarath Fonseka was the army commander who led the Sri Lankan army against the final war against the LTTE. The support given by the TNA to Sarath Fonseka provided the opportunity for Rajapaksa to portray Fonseka as a 'traitor' to the Sinhala nation, which arguably contributed to the weakening of Fonseka's chances of winning the presidency. That the army commander who led the armed forces of the Sri Lankan state to defeating the LTTE could be branded as a 'traitor' of the Sinhala nation, and later stripped

[53] Ibid: p.223.

[54]Ranil Wickremesinghe performed badly in Sinhala strongholds in the 2005 elections. For example he received only 35% of the vote in Hambantota and 36% of the vote in Matara. I am grateful to Mr Gajendrakumar Ponnambalam, Member of Parliament for Jaffna (2001-2010) and President, Tamil National People's Front, for drawing my attention to this point.

off his title and sent to prison is evidence of the exuberant power of Sinhala Buddhist nationalism's 'othering' capability. In the 2015 presidential elections the two main candidates (Maithripala Sirisena and Mahinda Rajapaksa) split the Sinhala vote base equally amongst themselves (with Rajapaksa getting a slight edge over Sirisena) and this created the space for the Tamil and Muslim vote to play a significant role in the election. Maithripala Sirisena seemed to have learnt from the experience of 2005, and beyond general promises of restoring the rule of law and good governance, did not promise anything substantive to the Tamils during the election campaign.[55] The support of the Tamil National Alliance was deliberately kept secret until the last few days of the campaign so as to not give Rajapaksa the opportunity to use it against Sirisena. To summarise, all four presidential elections after 1994 show that an appeal for cross community votes (more particularly an attempt to woo the votes of the Tamil community) worked or was understood to be a disadvantage to a presidential candidate's chance of winning elections. The evidence from elections before do not contradict this conclusion.

One final point needs to be made with regard to the general nature of the political understanding of the Tamils *vis-a-vis* their engagement with presidential elections. Over the years particularly under the influence of the LTTE, Tamil political leaders started interpreting presidential elections as merely providing for an election of the leader for the Sinhala nation. But there is evidence that this position was taken even before the LTTE came to dominate Tamil politics in its entirety. Kumar Ponnambalam justified contesting the 1982 presidential elections on the basis that it would perform the function of a referendum through which Tamils could democratically express their rejection of the 1978 Constitution.[56] The TULF in 1999 refused to support a presidential candidate arguing that both the majority Sinhala

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[55] For my detailed analysis of this, see: K. Guruparan, '*Why Sirisena's victory is not a victory for Sri Lanka's Tamils*', ***The Caravan***, 13th January 2015: <http://www.caravanmagazine.in/vantage/why-sirisena's-victory-not-victory-sri-lanka's-tamils>

[56] See S.S. Kantha, (2008) ***The 1982 Presidential Candidacy of G.G. (Kumar) Ponnambalam, Jr. Revisited*** <http://www.sangam.org/2008/08/Ponnambalam_Candidacy.php> accessed 1st November 2013.

parties were not be trusted.[57] The 2005 decision was also justified in similar lines by the TNA.[58] Mr Gajendrakumar Ponnambalam and three other Members of Parliament justified their decision to boycott the 2005 elections on the same basis that the Tamils have no real choice between the two parties and that they should not take part in the Sinhala nation's choice of its leader. Mr Shivajilingam who contested separately took a similar position to justify his participation.[59]

The preceding analysis makes clear that the *modus operandi* of the presidential elections did not contribute much to drawing Tamils into a national constituency. In fact since the mid-1990s it appears that any presidential candidate seeking to attract votes from the Tamil constituency can only do so at a very serious risk of alienating the Sinhala Buddhist voting block. It needs mentioning that the electoral strategy of portraying the other candidate as a 'sell out' to the Tamils was not an electoral strategy exclusive to presidential elections. It was also used when the country had a parliamentary form of government. Michael Roberts writing in 1978, before the introduction of the Second Republican Constitution identified the bi-polar demographic structure of Sri Lanka and 'an electoral framework which accentuates the majoritarian status of the Sinhalese and places any political party which co-operates with the Tamil sectionalist associations in a vulnerable position'[60] as one of the factors that perpetuates the non-resolution of the ethnic conflict. (Interestingly Roberts relies on Wilson's study of elections in making this observation[61]). The above leads to the conclusion that the form of government and the mode of elections to it ostensibly had no or very little impact on resolving the National Question.

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[57] '*TULF urges Tamils to shun UNP, PA*', ***Tamilnet***, (1999), <http://www.tamilnet.com/art.html?catid=13&artid=4293>.
[58] '*LTTE-TNA conference concludes: "Tamil people have no interest in SL Presidential elections"*' <http://www.tamilnet.com/art.html?catid=13&artid=16298>.
[59] Author's personal communication with Mr Gajendrakumar Ponnambalam and Mr Shivajilingam, April 2013.
[60] Roberts (1978): p.376.
[61] Ibid: at fn.72 citing A.J. Wilson (1975) ***Electoral Politics in an Emergent state: The Ceylon General Election of May 1970*** (Cambridge: Cambridge University Press).

One final question remains as to the relationship between the choice of form of government question and the National Question. The question is as follows: in the event that there is a settlement of the National Question within the current parameters of the state, would not such a settlement, influenced presumably by the federal idea, be better served by a parliamentary form of government at the centre? It will be extremely hypothetical without knowing the detailed workings of such a solution to attempt to answer this question. A general comment would suffice. Given the experience with the existing Provincial Council system under the Thirteenth Amendment to the Constitution,[62] it might be desirable to have the same form of government both at the centre and periphery. To have an elected executive president at the centre and a parliamentary form of government at the periphery would likely lead to competitive politics between the executive at the centre, his representative in the periphery and the elected executive at the periphery. Even such a system may be theoretically workable if there is a clear division of powers and an honest arbitrator of the constitutionally designed solution in the form of an independent judiciary.

Conclusion

I have in this chapter sought to demystify certain myths that have been constructed about the relationship between the executive presidency, the resolution of the national question and Tamils. I have tried to demonstrate that the notion that the Executive Presidency would be able to resolve the 'ethnic out bidding' problem has turned out to be false in practice. I have gone further and argued that in fact ethnic out bidding is the wrong diagnosis of the problem and pointed to the deep hegemonic nature of Sinhala Buddhist nationalism as the reason for a non-resolution of the National Question, which cannot be resolved by experimenting with different forms of government. I have also tried to demonstrate that presidential elections do not necessarily

[62] Cf. K. Guruparan, '*The Irrelevancy of the 13th Amendment in finding a political solution to the National Question: A Critical note on the Post-War Constitutional Discourse in Sri Lanka*' (2013) ***Junior Bar Law Review*** 3: pp.30-42.

require a candidate to appeal to votes cutting across ethnic communities and that the 1999, 2005, 2010 and 2015 presidential elections in particular show an emerging practice of such a cross-community appeal operating against the prospects of a candidate winning the elections. This I have tired to show is a result of the same deeply divided nature of the Sri Lankan polity along ethnic nationalist lines. Anything that I have argued in this piece however does not lead necessarily to the conclusion that abolishing the Executive Presidency benefits the prospects of resolving the National Question.[63] I have in fact argued in this chapter that the choice of form of government has no direct relevance to solving the National Question. The conclusions of this chapter put forward a broader, even more troubling question: as to whether the national question in Sri Lanka in fact can be resolved through a constitutional reform process within the current framework of the state. Goodin makes the important point that there is no constitutional solution to be found to the case of radical social diversity.[64] This might be just true for Sri Lanka.

[63] For a more detailed exposition on this see: K. Guruparan, '*Understanding the National Question as a Pre-Democratic Problem: A Skeptical Note on the Southern Reform Agenda*', ***Groundviews*** <http://groundviews.org/2014/05/24/understanding-the-national-question-as-a-pre-democratic-problem-a-skeptical-note-on-the-southern-reform-agenda/> accessed on 1st August 2014.

[64] R.E. Goodin, '*Designing Constitutions: The Political Constitution of a Mixed Commonwealth*' ***Political Studies*** 44(3): pp.635-636 at p.643. Kauffman makes the point direct when he says that for groups that are not territorially inter-mixed secession should be looked upon with much favour than it has habitually received. C. Kauffman, '*Possible and Impossible Solutions to Ethnic Wars*' (1996) ***International Security*** 20: pp.136-175.

11

Presidentialism, the 1978 Constitution and the Muslims

Ameer M. Faaiz

Presidentialism and the Muslims: Early Views

The nature of the 1978 Constitution was a foregone conclusion when the United National Party (UNP) won a 5/6th majority in the parliamentary election of 1977. The UNP's election manifesto proposed constitutional reforms including the promise to create an executive presidency. [1] Therefore the J.R. Jayewardene government elected in 1977 had a clear mandate to establish an executive presidency in Sri Lanka. Whether this mandate extended to the ultimate nature and form of the current constitution is an entirely different matter. [2] Even though a distinctive Muslim position on the institutional form of the executive is difficult to discern in the drafting process of the 1978 Constitution – whether for or against an executive presidency – it would hardly have mattered given the scale of the UNP mandate.[3]

A more prominent Muslim voice is present in the proceedings of the Constituent Assembly that drafted

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[1] See quotation from the UNP manifesto in the letter by President J.R. Jayewardene to Sirimavo R.D. Bandaranaike MP of 23rd May 1978, reproduced as Annexure IV in the Report from the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution, Parliamentary Series No.14 of the Second National State Assembly, 22nd June 1978: p.170. [Hereinafter PSC Report (1978)]

[2] See e.g., Statement in the National State Assembly by Sirimavo R.D. Bandaranaike MP in the debate on the Second Amendment to the [1972] Constitution Bill, 4th October 1977: Official Report of the National State Assembly Debates, Vol.23, No.1: Cols.1293-1314; the Memorandum of the Sri Lanka Freedom Party to the Select Committee on the Revision of the Constitution, reproduced as Annexure II in the PSC Report (1978): pp.165-8. For other contemporaneous criticisms of the 1978 Constitution from the Left, see the chapter by Jayampathy Wickramaratne in this book and A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka* (1978) (London: Macmillan): pp.38-40.

[3] There were some Muslim representations to the Select Committee on the Revision of the Constitution, but these entirely concerned minute aspects of the electoral system. See evidence of the All Ceylon Muslim League in PSC Report (1978): pp.257-62.

and enacted the previous 1972 Constitution. It is well known that J.R. Jayewardene was allowed by the UNP to propose an amendment in the Constituent Assembly in support of a presidential executive, a motion that was seconded by R. Premadasa, but crucially, without the support of the then UNP leader, Dudley Senanayake, who was trenchantly opposed to presidentialism.[4] What is less well known, is that the senior Muslim UNP politician A.C.S. Hameed, who went on to become Jayewardene's long-standing Minister of Foreign Affairs after 1977, also opposed presidentialism when it was proposed in the Constituent Assembly by Jayewardene.

In the Constituent Assembly debates, Hameed cited three main reasons for his rejection of the executive presidential system. First, he argued that it placed too much power in the chief executive, for example, by enabling the president to dismiss members of the Cabinet at will. His second reason, connected to the first, was that a fixed-term presidency would be less accountable to the people than a parliamentary system where the Prime Minister must command the confidence of the House continuously. Thirdly, Hameed argued that there would be a hostile relationship and even competition between the President and Parliament, as they would both enjoy sovereign power emanating from their respective direct elections, with the President the stronger player in this relationship.[5]

M.M. Mustafa, a UNP MP from the east (Nintavur), was more ambivalent, but he too was not unequivocally in support of an executive presidency.[6] Although one cannot claim that Hameed's and Mustafa's positions and perceptions reflected a

[4] See the chapter by Rohan Edrisinha in this book for a discussion of this issue.
[5] A.C.S. Hameed, Official Report of the Constituent Assembly Debates (1970-2): pp. 2650-2723.
[6] M.M. Mustapha, ibid: pp. 2696-2701.

'Muslim perspective' as such, one can yet infer that they had the numerically smaller communities' interests at heart. So one of the first insights we can gather from constitutional debates in recent history is that Muslim politicians were not exactly keen on executive presidentialism, and in some cases, were even stoutly opposed to it on broader grounds of constitutional principle that went beyond the Muslim community's own interests. In other words, in the Constituent Assembly, Muslim representatives' concerns were more about the effects of presidentialism on democratic government than about how it would or would not affect Muslims. Hameed's central argument in the Constituent Assembly was very clear: that it is not proper for a system of governance to be entrusted to a person or an individual institution. In hindsight, this was prophetic.

But as noted earlier, when the executive presidency became a *fait accompli* after the 1977 elections, with the general conformist tendency displayed by Muslims, they started looking into the advantages of the system, as did the other numerically smaller communities like the Tamils of recent Indian origin. These communities including the Muslims looked at ways and means of collectively contributing and ensuring the winner at presidential elections. This was possible in an environment of evenly challenged two-party contests. It enabled the Muslims to enjoy certain leverage in matters relating to their own communities or even in relation to national issues, in return for their electoral support.

The broad approach of the Muslim community towards constitutional reform can be characterised as preferring to arrive at reasonable accommodations with the majority Sinhalese, and to distance itself from the confrontational character to which the political relations between the Sinhalese and the

Tamils were deteriorating in the 1970s.[7] It is relevant to recall here that the leaders who articulated the Muslim community's political opinion at the time were all from the western, southern or central regions of the island; in other words, the voice of the Muslims of the north and east was unrepresented in political and constitutional discourse before the 1980s.

Some have seen the Muslims' opposition to the Tamil demand for federalism, and the Muslims' emphasis on the intimacy of their relations with the Sinhalese, and their reliance on the latter's goodwill, as a form of appeasement. But it is important to recall that as a numerically smaller, territorially dispersed community, with a different history of social and cultural evolution from that of the Tamils and a different historical relationship with the Sinhalese, the Muslim leaders saw the community's political interests in different terms to that of the Tamil nationalists in particular.[8] Consequently, they broadly supported centripetal policies and constitutional structures while attempting to emphasise the country's plural nature and the distinctiveness of Muslim identity.[9]

Therefore in 1977-8 when the current constitution was drafted and enacted, there was no discernible Muslim position as such, and if at all, it would have been the principled opposition to presidentialism A.C.S. Hammed had articulated in the Constituent Assembly a few years before. But by the time 1977

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[7] See F. Haniffa, '*Conflicted Solidarities? Muslims and the Constitution-making Process of 1970-72*' in A. Welikala (ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: CPA): Ch.5.

[8] See esp. D.B. McGilvray (2011) ***Crucible of Conflict: Tamil and Muslim Society on the East Coast of Sri Lanka*** (Colombo: SSA): Ch.10.

[9] See speech by M.H.M. Ashraff in the debate on the Constitution of the Republic of Sri Lanka Bill (2000), 3rd, 7th and 8th August 2000 reproduced in M. Somasundram (Ed.) (2000) ***Constitution 2000: Parliamentary Debates*** (Colombo: Ministry of Justice): pp.204-48 at pp.229-48.

election campaign got underway, the numerically smaller communities had been persuaded by the argument that the presidential system was beneficial for them. They would presumably have a more direct say in the election of the President than they would have in the election of the chief executive in a parliamentary executive system. In a predominantly two-party system where the Sinhala vote was quite evenly divided, the perception was that the winning candidate at a presidential election would have to rely on the minorities. In this context, the argument was that the numerically smaller communities would be able to maximise their bargaining power in obtaining concessions in exchange for vote blocks to presidential candidates. So therefore when the executive presidency came to stay, as it were, the Muslims tried to capitalise on the advantages it offered, and attempted to reposition themselves politically in the new institutional framework of electoral politics.

However, throughout the 1980s, there were to be dramatic developments that would alter the Muslims' relations with the two major communities, and heightened their need to articulate an independent political position to ensure their own interests and security. While the 1978 Constitution had introduced proportional representation, which benefited the Muslims as a numeric minority, no parliamentary elections were held under proportional representation until 1989. The UNP had controversially extended the life of the Parliament elected in 1977 under the first-past-the-post system, in which as noted above it had obtained an overwhelming 5/6th majority, by recourse to the referendum of 1982.

In the meantime, with the conflict between the government and Tamil militants reaching crisis proportions, the Indo-Lanka Accord was signed in

July 1987.[10] Under the terms of this agreement between the governments of India and Sri Lanka, a system of devolution to newly established Provincial Councils was promulgated by the Thirteenth Amendment to the Constitution and other associated legislation.[11] It was also one of the terms of the Accord that the Northern and Eastern Provinces would be merged for the purpose of establishing a single Tamil-majority Province, the whole of which was claimed by Tamil nationalists as their traditional homeland. The merger of the two Provinces within which there were numerous Tamil-speaking Muslims contributed to the marginalisation of the Muslims in these areas. The Tamil militants did not like the Muslims asserting a distinctive identity notwithstanding the fact that they were Tamil-speakers, and hence treated Muslims with suspicion as not being wholly committed to the Tamil nationalist cause.[12] The provincial bureaucracy under the control of the Tamil nationalist administration of the North-Eastern Provincial Council also engaged in discriminatory practices against the Muslims.

This led to the emergence of the Sri Lanka Muslim Congress (SLMC) as a political party devoted principally to the espousal of the Muslim cause. Its rapid ascendancy amongst the Muslims evinced the Muslim polity's desire to assert its political independence from other communities. An important factor in the events leading to the Indo-Lanka Accord

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[10] K. Loganathan (1996) ***Sri Lanka: Lost Opportunities*** (Colombo: CEPRA): Ch.5.

[11] R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) ***Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008*** (Colombo: CPA): Ch.17.

[12] This tension has a long history. See D. McGilvray & M. Raheem, '*Origins of the Sri Lankan Muslims and Varieties of the Muslim Identity*' in J.C. Holt (Ed.) (2011) ***The Sri Lanka Reader: History, Culture, Politics*** (Durham, NC: Duke UP): pp.410-9. See also M.I.M. Mohideen, '*Sri Lanka Peace Process and the Muslim Question*' in K. Rupesinghe (Ed.) (2006) ***Negotiating Peace in Sri Lanka: Efforts, Failures and Lessons***, Vol.2 (Colombo: FCE): Ch.12.

was the disregard displayed by President Jayewardene for the sentiments and concerns of the Muslim MPs within his own ruling UNP as to the adverse effects of the proposed settlement on the Muslims in the north and east. Even though the Muslims had supported Jayewardene and the UNP, and had contributed in large measure to his victory in the presidential election of 1982, he felt able to ignore their concerns at this critical juncture. This was the first of many subsequent manifestations of the negative side of the executive presidency from the perspective of Muslim interests.

The merger of the Northern and Eastern Provinces reduced the Muslims' proportion of votes from a substantial near-33% within the Eastern Province, to a mere 17% once the two provinces were merged, without any mitigatory safeguards being provided to protect Muslim interests after the merger. This was a clear case of a government sacrificing an unassertive Muslim community at the altar of expediency. This suppression of Muslim interests lent credence to the long-felt need of an independent Muslim political voice, as opposed to their voices being either subsumed within national parties like the UNP or the Sri Lankan Freedom Party (SLFP). Thus the ground was fertile for the SLMC to garner increasing support.

The SLMC was initially conceived in 1984 as a social movement. However, building on the tradition of Muslim representation developed by the Council of Muslims, (a group which represented Muslims at the All-Party Conferences of the 1980s), it transformed itself into a political movement after the Indo-Lanka Accord. [13] Proportional representation gave an opportunity and impetus for smaller parties like the SLMC (and later, the Janatha Vimukthi Peramuna (JVP)) to gain ground.

[13] Ashraff (2000): pp.228-9.

The interests of Tamil nationalists in parliamentary parties like the Tamil United Liberation Front (TULF) were different from that of the Muslims due to the fact that they had a Tamil constituency territorially concentrated in the north and most of the east; they were not especially interested in seeking election outside the north and east; and they were not seriously interested in any power at the centre. The SLMC, by contrast, was 'national' in conception and outlook and it had to represent a community that was territorially dispersed across the island, even though it did have a territorially concentrated constituency in the southern parts of the Eastern Province. The SLMC also had to contend with the violence and intolerance of the Liberation Tigers of Tamil Eelam (LTTE).

In fact the SLMC's electoral appeal was initially tested outside the north and east. It contested elections for the first time in the inaugural Western Provincial Council elections and returned with success. From then on the SLMC evolved in strength to the point where it could make or unmake a President. In at least two presidential elections – that of 1988 and 1994 – the SLMC played a decisive role in ensuring the victor. Thus the belief grew among the smaller parties that they could influence or wield leverage, not only at the presidential election, but also to ensure a clear majority in Parliament for the President through coalition politics. This explains their early support for the executive presidency. However, this should not be read as an endorsement of the view that smaller parties, particularly the SLMC, have been entirely successful in promoting the good of either their communities or the common weal through their leverage in electing and providing parliamentary support to the executive president.

Turning Against Presidentialism

The Muslim position on presidentialism has become more sceptical over the years, albeit incrementally. As time passed the existing democratic structures and governance systems began to feel the brunt of the impact of an 'over-mighty' executive president.[14] This is the primary cause for the SLMC shifting its position, and it is important to stress the deeper concerns with the undermining of democratic principles in addition to the community's interests. These deeper concerns related to the concentration and abuse of power by the presidency, and in particular, they centred on presidential immunity from suit, the absence of independent checks on presidential power, and the lack of presidential accountability to Parliament. Together they make the office of the President virtually unaccountable. Not only the SLMC; many other political parties and civil society organisations have articulated these problems at various points in time.

Under the current constitution, the absolute nature of the President's legal immunity is such that he or she is always above the law, rendering the office totally unaccountable. With the passage of the Eighteenth Amendment in 2010, and the impeachment of the Chief Justice in 2013, the limited judicial and bureaucratic independence Sri Lanka enjoyed was significantly weakened. Thus a powerful and important check on presidential power was dismantled.

The President has arbitrary powers to dissolve Parliament and to appoint and dismiss Cabinet Ministers. Such an overly powerful office was also debilitating for independent bodies: bureaucrats and other independent organs were losing their independence, interested only in placating the

[14] See the chapter by Chandra R. de Silva in this book.

President. These developments led to significant discontent, which was not necessarily felt by the SLMC or smaller parties alone. Major opposition parties began to express their dissatisfaction. Public opinion too started to build against the executive presidency, and the most virulent exponent of presidentialism in the history of the 1978 Constitution was eventually defeated in the presidential election of January 2015 by the candidate promising the abolition, or at least the substantial reduction of the powers of the presidency.

Previously too, promises had been made to abolish the executive presidency. The SLMC played a role in the formulation of the 2000 Constitution Bill and the debate on it in Parliament. In this debate Muslim interests were represented by the SLMC. The late M.H.M. Ashraff, the founder leader of the SLMC, continuously participated in these deliberations. In relation to the debate on the abolition of the executive presidency, Ashraff, on behalf of the SLMC, stated that, "as a party we feel that the executive presidency must remain." But he stressed that "there are some bad features in the system." Nonetheless, the SLMC's commitment to the executive presidency was not fundamental: they were willing to support its abolition as "a commitment has been given to the People [*sic*] by Her Excellency [President Kumaratunga] and the PA [People's Alliance]."[15]

After the 2000 Constitution Bill failed, the SLMC played a critical role in the enactment of the Seventeenth Amendment to the Constitution in 2001. Even though the SLMC had participated in the All Party Representative Committee (APRC), and advocated the abolition of the executive presidency prior to 2009, paradoxically and regrettably, the SLMC played an equal or even more critical role in the Seventeenth Amendment being rolled back

[15] Ashraff (2000).

completely by supporting the enactment of the Eighteenth Amendment in 2010. This was a critical blow to the little democracy that was left by then, and the grave experience of the Muslims subsequently under the Rajapaksa regime diminished support within the community for presidentialism.

Thus smaller parties like the SLMC have made a paradigm shift in their position *vis-à-vis* the Executive Presidency. They all have virtually come full circle. From a firm rejection of the executive presidency in the Constituent Assembly in 1970-72, to a *fait accompli* situation in 1977-78, to whole-hearted support in the early 1980s, to supporting a reformed presidency in the years thereafter, and post-2010 to a complete abolition of it.

The Critique of the 1978 Constitution

According to many constitutional analysts, the 1978 Constitution established the most powerful executive presidency on earth. Every incumbent, except perhaps one who became President by default, has attempted to increase the institution's power. In doing so, the executive presidency has ensured that the legislature has gradually lost its lustre and its salience within the constitutional and political system. For all intents and purposes, the legislature does not legislate, but laws are made by the executive only to be rubberstamped by the legislature.

The separation of powers and the system of checks and balances is totally undermined. Hence the supremacy of Parliament, which the legislature likes to think exists, is a misnomer, although it is conveniently used by the executive for different motives. Three recent cases in particular come to mind. First, the infamous impeachment of the Chief

Justice in early 2013.[16] Second, the parliamentary resolution condemning the resolution adopted by United Nations Human Rights Council against Sri Lanka's human rights abuses. Whereas the executive's decision on the matter had already been officially declared, to hoodwink the public, the legislature was used to rubberstamp the decision. Third, the Rajapaksa regime's insistence that 'an overall solution to the ethnic issues and constitutional changes have ultimately to be decided upon by the Parliament Select Committee', tried to posit that it was Parliament that had the authority to evolve a political solution to the ethnic conflict. The truth was very far from that in reality.

Not only the survival of government parliamentarians but Parliament's life itself depends on the executive President. He or she can dissolve Parliament at will with very little limitations to this enormous power. Further there is no check on ministerial appointments: under the Rajapaksa regime, 109 of Parliament's 225 members were ministers. That is, the executive controls 48% of the legislature as ministers serve at the President's pleasure and are bound by collective responsibility. Furthermore, effective governance becomes difficult during times of cohabitation. There is little clarity of responsibilities, and thus accountability is thwarted, as was seen in 2001-4 when the people's mandate was split between the UNP, which controlled the legislature, and the President, who was from the PA.

Moreover, the executive presidency was not introduced as a stand-alone reform; it was introduced together with an electoral system that replaced the hitherto practiced first-past-the-post-system with district level proportional representation. Proportional representation was to ensure a fair representation of

[16] N. Anketell & A. Welikala (2013) ***A Systemic Crisis in Context: The Impeachment of the Chief Justice, the Independence of the Judiciary and the Rule of Law in Sri Lanka*** (Colombo: CPA).

Members of Parliament from all parties proportionate to the overall votes polled, and also to facilitate coalition politics. In other words, the aim was to increase the representation of smaller parties while enabling stable government.

With the introduction of proportional representation, the size of Sri Lanka's electorates increased significantly. Candidates seeking parliamentary office now have to seek their mandate across an entire district, rather than focus on their own electorate. Although proportional representation is in principle better than the first-past-the-post system in a pluralistic society, there are several shortcomings in both the system and the practice of proportional representation system in Sri Lanka.[17]

One of the criticisms against proportional representation is that it undermines the individuality and the freedom of conscience of a Member of Parliament. But even there we have seen the converse in practice in Sri Lanka, courtesy of the executive presidency. Political parties have not been able to take disciplinary action against their members who crossover to the President's party in Parliament due to the protection afforded by the executive presidency. This means that Sri Lanka has the worst of both worlds: it lacks the benefits of constituency representation and it does not genuinely provide the benefits of proportional representation. Parties – and thus the collective interests that proportional representation is meant to protect – are undermined by individual MPs crossing over at will.[18] And it makes a mockery of the principle of the freedom of conscience of MPs when crossovers are often if not

[17] See R. Edrisinha & A. Welikala (Eds.) (2008) ***The Electoral Reform Debate in Sri Lanka*** (Colombo: CPA).
[18] See S. Rajakaruna (2010) ***Changing Party Allegiance and Termination of Parliamentary Mandate: Analysis of Checks and Balances in Expulsion of MPs in Sri Lanka*** (Colombo: Stamford Lake).

always facilitated by corrupt motives and inducements.

Proportional representation is said to promote coalition politics. But what we have found is that parties are breaking up and coalitions are being built around the executive president by individual Members of Parliament, often against the collective wish of parties. Thus, and this applies to the smaller parties in particular, we have seen a trend where parties are poached upon or split due to the overbearing interference of the executive presidency. Executive presidents have been able to draw or poach members from other parties at will to boost up numbers in Parliament. This is a travesty, as it defies the democratic mandate, where parties are selected first in elections, and only then candidates. In practice, the composition of Parliament does not reflect the democratic will – it is beholden to elite bargaining.

As noted before, undermining the separation of powers and in particular the subjugation of the independence of the judiciary has eroded public confidence in institutions to its nadir and sent governance down a precipice. Not a single expulsion of a Member of Parliament by the party from which such member was voted into Parliament has been upheld by the Supreme Court.[19]

Is there a unique Muslim perspective on the Executive Presidency?

A few years ago, there would have been no difficulty to talk about a 'Muslim perspective' on the executive presidency. But now it is debatable as to whether a single perspective could be advanced as *the* Muslim perspective. There are or can be more than one perspective amongst the island's Muslims and that any perspective ought to be considered in that backdrop.

[19] See the discussion of the case law in ibid.

Broadly, there are two main approaches to governance within the Muslim community. The differing responses to the 'Grease Yakas', and then the 'Bodu Bala Sena' (BBS) illustrate the difference between them. There is a significant segment which would like to safeguard their material interests and physical wellbeing, thus adapting a more flexible or appeasing approach. This leads to them seeking or giving into patronage. This approach is antithetical to the other approach. Those who espouse the second approach want to deal with issues that confront them through a more institutional or rights-based approach. They seek the establishment of sound and robust structures and systems that would fairly and impartially implement the laws of the land, thus offering long-term systemic protection.

As for the SLMC, as said earlier, after careful review and the benefit of experience, it has developed its assessment of the executive presidency further. Its submission to the APRC during 2006 to 2009 was for the executive presidency's abolition. This remains the party's position today. The SLMC supports the return to a parliamentary form of government, where the Prime Minister and the executive (the Cabinet of Ministers) will be accountable to the representatives of the sovereign people through their Members of Parliament.

There are two options for constitutional reform: changing the entire system or reforming existing structures. As a comprehensive change is unlikely, the SLMC would also like to focus on two other major reforms. First, implementing existing power-sharing structures and developing news ones, especially those relating to the devolution of power. Second, reinforce systemic checks and balances. A vital component is of course establishing the independence of the judiciary and the civil service, but improving Parliament's ability to hold the executive accountable is important

too.

Another important aspect is what would be the electoral system in place if the executive presidency gets abolished. We have gone through, in the recent past, select committees looking at electoral reforms. There is some consensus on the need to move from the current system of proportional representation to a mixed system incorporating both first-past-the-post and proportional representation elements. How 'mixed' it should be needs to be agreed upon. The SLMC has indicated that it would support a 50-50 mix. Even in a mixed system it could be salutary to find a way to reduce the size of an electorate or constituency for otherwise the larger constituencies would inherently promote money-power and corruption.

Seen this way, the ideal form of executive power for the Muslim community is power that is checked and held accountable by strong and independent institutions, and by an effective and well-represented legislature. An independent judiciary can play an important role, as it should, in preventing the trampling of the liberties and rights of all citizens, while an effective and well-represented legislature will ensure that the interests and aspirations of all communities are included in decision-making.

Strengthening Constitutional Democracy and Protecting Pluralism

Underlying this approach are three key democratic principles: rights, representation, and participation. Democratic rights, especially those relating to equality, are critical for the preservation, health and sustainability of a democratic society. An independent and strong judiciary goes a long way in ensuring the preservation of these rights. Second, representation

and participation in decision-making, scrutiny and debate, especially legislative decision-making, is critical for the health of a democracy. A democracy that excludes or limits the voice and interests of a community violates the principles of autonomy and free agency that form critical constitutive elements of democracy.

The executive President is often able to infringe upon the rights of citizens, and there are limited legal checks on his or her ability to do so. An independent judiciary, modelled along the lines of India or the United States, could help ensure that the executive's power over citizens is limited. In the context of Sri Lanka's majoritarian ethno-politics, this is particularly relevant to numerically smaller communities.

Independent bureaucratic institutions are also critical. The rights of numerically smaller communities' have often been infringed due to the politicisation of the bureaucracy. The civil service, police, and elections commissioner all need to be free from political appointment or interference, and appointments and promotions must be meritocratic.

Parliamentary oversight of the executive is extremely important and can help ensure that the executive does not become over-mighty. Therefore, Parliament must be effective in its scrutiny of the executive and be effective in passing legislation to prevent too much power from being vested in the executive through secondary legislation. This requires a strengthening of the committee system, parliamentary conventions, and limitation of the number of MPs that can be part of the executive.

However, ensuring representation is also vital. Reform of the electoral system, for the reasons outlined above, is critical. In order to maintain the voice of the Muslim community, while ensuring the responsiveness of legislators to their constituencies, the SLMC would support the mixed member model.

However, even if there is a representative electoral system, the voice of smaller communities is often simply drowned by virtue of their lesser number. Therefore, in order to ensure effective representation in decision-making and debate, we feel that a second chamber based on the APRC proposals is necessary.

In summary, the SLMC advocates a return to a parliamentary form of government that is part of a governance system that includes independent judicial and bureaucratic institutions, a representative and effective legislature that is well equipped to check executive power and includes an upper house, a mixed electoral system and the maximum devolution of power consistent with the unity of Sri Lanka.

12

Economic Development and the Executive Presidency

Rajesh Venugopal

Introduction

This essay charts out the developmental causes and consequences of the executive presidency in Sri Lanka, examining its provenance, rationale, and its unfolding trajectory. It argues in brief that the executive presidency was born out of an elite impulse to create a more stable, centralised political structure to resist the welfarist electoral pressures that had taken hold in the Soulbury period, and to pursue a market-driven model of economic growth. This strategy succeeded in its early years, when Jayewardene and Premadasa retained legislative control and maintained a strong personal commitment to market reforms. It later struggled under Kumaratunga as resistance mounted from above and below. Under the Rajapaksa regime, the market reform project was suspended indefinitely, so much so that the power of the executive presidency acted as the obstacle to the very agenda it was created to facilitate.

Economic growth increased under the aegis of the executive presidency, although in unexpected ways. Most importantly, the rapid growth and structural transformations that was evident through market reform-led growth in the south occurred in parallel with the escalating civil war in the north-east, generating a schizophrenic mix of development amidst destruction. The market reform programme was itself no textbook shift from state to market: it was accompanied by a massive expansion of the state, first under rural development schemes such as the Mahaweli project, and later through the fiscal impact of the expanding defence budget, each of which created knock-on effects within and beyond the economic sphere.

The link between presidentialism and economic development is a subset of the larger field of study on the relationship of political institutional design to policy outcomes. At its core is the causality posited between institutional type and policy outcomes: institutions provide the over-arching framework, and the system of rules and incentives that sociological agents work within and respond to. Policy outcomes are a function of institutional structures that beget them, and desired policies can thus be obtained by engineering an optimal institutional regime of rules, with concomitant rewards and punishments.

This logic seems to apply very neatly in Sri Lanka, where the history of development policy regimes matches closely with the evolution of the political architecture. The period of the Westminster-style prime ministerial system (1948-77) gave rise to electoral populism that translated into economic populism with the steady expansion of a welfarist state and state regulation of private economic activity. In contrast, the switch to a more authoritarian Gaullist semi-presidential system in 1978 gave birth to a more authoritarian politics and an era of market reforms.

Appealing and intuitive as this taxonomy is, it is important to be cautious in taking the link between institutional design and policy outcomes too far. There was much about both welfarism and market reform that can be traced back to the respective constitutional structures that they flourished under, but this does not always amount to a causal link from the former to the latter. To some extent, they both had the same parentage, and were shared outcomes of similar causal factors and broader historical trends. In that sense, much of what is outlined in this essay refers to economic development that transpired *during* the period of presidentialism, without necessarily implying that these were *caused* by presidentialism.

The second relevant strand of the institutional literature is the relationship between democracy and development. In brief, the academic literature on this subject as well as the guiding wisdom during the colonial period was that development has to precede democracy; that stable democracies are only tenable at later stages of development with higher levels of income and education. Modernisation theorists such as Seymour Lipset argued that the poor are either not educated enough or lack the socio-cultural and economic wherewithal to participate effectively in democratic institutions[1]. Adam Przeworski on the other hand argues similarly that the democratic empowerment of an impoverished majority will be unsustainable, but does so from a different direction of causality. A democratically empowered majority of poor citizens will, he argues, vote to expropriate and redistribute the assets of the rich, ultimately derailing democracy because the rich will

[1] S. Lipset, '*Some Social Requisites of Democracy: Economic Development and Political Legitimacy*' (1959) ***American Political Science Review*** 53:1, 69-105.

revolt in favour of more authoritarian governance that protects their assets.[2]

As such, theory holds that premature democratisation in poor, under-developed countries, such as colonial Ceylon at the dawn of the Donoughmore era, would cause either democracy or development to suffer; such countries would either revert to non-democratic authoritarian regimes (in form if not in substance), or else suffer extended periods of retarded and distorted development. Or else, they could chaotically zigzag through a half-way system where weak democratic institutions and weak developmental outcomes reproduce one another. In contrast, the experience of rapid late-developing states in East Asia such as South Korea and Taiwan is illustrative: both remained authoritarian dictatorships during the period of their rapid development, and did not democratise until the 1980s, by which time they had already achieved a substantial measure of prosperity.

Tasting the Fruit before Planting the Tree: 1948-77

Democracy has for long been so well established as a moral norm in Sri Lankan public life that the trade-off between development versus democracy is rarely invoked explicitly. Nevertheless, many of its elements have strong resonance, both in terms of the occasional reversion to a more authoritarian style of rule, and also in terms of the populist legacy on economic development. The internal debate on this issue actually goes back to the founding moment of universal suffrage, in the hearings of the Donoughmore Commission in 1927. As is well known, the aspiring native elite of the time was almost unanimously opposed to the idea of universal franchise, and was appalled to find that that the Commission had over-ruled their objections and granted the vote to their social inferiors.[3]

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[2] A. Przeworski, '*The Poor and the Viability of Democracy*' in A. Krishna (Ed.) (2008) ***Poverty, Participation and Democracy: A Global Perspective*** (Cambridge: Cambridge University Press).

[3] J. Manor (1989) ***The Expedient Utopian: Bandaranaike and Ceylon*** (Cambridge University Press): p.78 lists the only three people who advocated

Under the Donoughmore constitution, the crown colony of Ceylon – not even a dominion yet –was the first country in Asia, and the first 'non-white' part of the empire to enjoy universal suffrage, and had the first such elections a full two decades before India. The political enfranchisement of the entire adult population led to radical changes in society in the coming decades. The initiation of a range of transformative social welfare schemes such as subsidised food, free education, and free public health, changed life for the better for millions of poor rural Sri Lankans within a relatively short space of time. By the early 1960s, Sri Lanka was being described as an unusual and precocious development miracle, as with nearby Kerala. Between 1946-63, the infant morality rate dropped from 141 to 56 per 1000 while life expectancy increased from 43 to 63 years. The adult literacy rate, which was already comparatively high in 1946 at 58 per cent rose quickly to 72 per cent by 1963. These improvements occurred in the absence of anything near a commensurate increase in economic growth, so that Sri Lanka was in terms of social welfare indicators, in the league of countries that were a factor of between five and ten times wealthier.[4]

These historic gains notwithstanding, it is also not possible to ignore the many negative features that were also intrinsic to this process, and which would vindicate the apprehensions, however condescending they seem in retrospect, of the pre-Donoughmore elites. Universal suffrage granted abruptly in this manner to an impoverished rural population that had never actually asked for it was quickly exploited and captured; first by dominant social groups and later by populist demagogues. In short order, the newly elected leaders of the 1940s and 1950s elevated and institutionalised ethnic prejudice into political competition and handed out generous, but excessive and unaffordable welfare subsidies. In practice, this meant heavily taxing the productive sectors of the economy such as the tea plantations to fund unproductive and untargeted consumption subsidies. It led Joan

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universal franchise in Ceylon as trade unionist A.E. Goonesinha and two British residents.

[4] P. Isenman, '*Basic needs: the case of Sri Lanka*' (1980) ***World Development*** 8:3, 237-258.

Robinson, the Cambridge economist, to famously remark that 'Ceylon has tasted the fruit before she has planted the tree'.[5]

Emblematic of the economic and political dysfunctionality of the time was the institution of the rice subsidy into a political 'holy cow'. Introduced initially as a war-time measure, it grew to occupy 20 per cent of all government expenditures and became impossible to withdraw, even when the government was in fiscal distress. The 'hartal' of 1953, the legislation of Sinhala-only in 1956, the assassination of the prime minister in 1959, the island-wide race riots of 1958, were all viewed as part of the Pandora's box of problems unleashed by (what Sir Ponnambalam Ramanathan had described in 1927 as) the democratic dystopia of 'mob rule'. Even though many members of the surviving Donoughmore political elite were themselves deeply complicit in presiding over and politically profiting from these events, they also viewed the unfolding political and economic chaos in their midst with evident concern and distaste.

The failed officers' conspiracy of 1962 was one manifestation of the depth of desperation that had set into the *ancien regime* about the need to correct course and redress the excesses of electoral populism. The main protagonists in the 'colonels' coup' were senior (but second echelon) military and police officers whose educational, social, and religious background (they were almost entirely Christian) and family connections linked them closely to the erstwhile colonial-era social and economic elite. David Horowitz's study into the coup, based on an extensive set of interviews, clustered the reasons that motivated the conspirators around a familiar set of complaints by the members of that social stratum. These include 'unrest, strikes, no discipline', 'danger from the left', and 'politicians pandering to the mob'.[6]

As has since emerged,[7] three of the senior-most members of that very elite: two former UNP prime ministers, Sir John Kotelawala

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[5] J. Robinson, '*Economic Possibilities of Ceylon*' (1959) (Papers by Visiting Economists: National Planning Council): p.41.
[6] D.L. Horowitz (1980) ***Coup Theories and Officers' Motives: Sri Lanka in Comparative Perspective*** (Princeton, NJ: Princeton University Press).
[7] K.M. de Silva & W.H. Wriggins (1988) ***J.R. Jayewardene of Sri Lanka: A Political Biography***, Vol.II (A. Blond/Quartet): pp.113-120.

and Dudley Senanayake, as well as the then current president, Sir Oliver Goonetilleke, were complicit in the plot, and were to have stepped forward to assume control and re-constitute a new executive after the putsch. Fatefully for the subsequent history of democracy in Sri Lanka, not only was the conspiracy uncovered and stopped at the eleventh hour, but the role that Dudley Senanayake played in it was never fully uncovered until after his death.

The other, far more successful plan emanating from largely the same impulse, and from a leading politician of the same party and vintage, was the executive presidency. Conceived, nurtured, and introduced almost single-handedly by the force of J.R. Jayewardene's own personal will, the broader, unspoken compulsion that guided the executive presidency was, as with the coup d'êtat, one of turning the clock back to the golden age of political, economic, and inter-ethnic stability under UNP rule from 1947-56. This is of course an opportunistic misreading of that period, and belies the fact that as the first finance minister of independent Ceylon from 1947-51, J.R. Jayewardene's budgets – viewed at the time as a bold Keynesian departure from the stifling liberal orthodoxy of the colonial-era – were a precursor of much of what was to come later. The taxation of the plantation sector to fund consumer subsidies, state welfare expansion, and even some measure of planning and import-substitution industrialisation were all projects advanced (albeit with greater hesitation) by the very person who would, three decades later, seek to dismantle them, and to force that genie back into its bottle.

The historical source material on the provenance of the Gaullist system in Sri Lanka is surprisingly sparse. There was by all accounts, no long-standing debate on the issue within the UNP, or even among the broader political, journalistic, or intellectual milieu on the matter. It appears instead that the idea belonged to Jayewardene himself, and was announced publicly for the first time in a speech that he made in 1966[8]. In its form, it was clearly inspired by the French fifth republic, and the way that it appeared to correct the deep imbalances wrought by the Westminster

[8] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka (1978)*** (Macmillan).

system. The separation of executive from the legislature ensured that the president would stand above the petty bickering and fickle alliances of parliament. The fixed time-line for a presidential term ensured that policies could be formulated with a longer, more dependable time-line for their implementation, and free of populist electoral compulsions. In addition, proportional representation would end the unfairness of the massive, undeserved parliamentary majorities that the plurality voting system had produced in 1956, 1960 (July) and 1970 to the detriment of the UNP.

In substance though, the idea of concentrating centralised powers in the person of the executive president responded directly to the quest to contain electoral populism. It also corresponded with Jayewardene's admiration of the developmental results achieved by his more authoritarian contemporaries elsewhere in Asia. That said, despite the measure of international inspiration involved, the simultaneous adoption of a radically different political system and a new economic development regime was an original experiment in its own right and not the prevailing international fashion. Market reforms were also not forced on Jayewardene by the IMF at the knife-edge of a balance of payments or debt crisis bailout. Indeed Sri Lanka was one of the first countries in the developing world to implement such a radical change of course, five years before the rest of Asia, Africa, or Latin America would do so far more grudgingly.

"Let the robber barons come": 1977-94

In the first two years of the reforms, the new UNP government deregulated with speed and gusto. It liberalised foreign trade, removing import controls, reducing export duties, and devaluing the exchange rate by 43 percent. It eliminated subsidies on food and petrol and liberalised internal agricultural markets. It encouraged foreign investment, established export processing zones (including Katunayake in 1978), modified labour legislation, and deregulated credit markets. Foreign investment, which was practically zero for most of the 1970s, picked up to the level of US$50 million a year in the early 1980s (UNCTAD). This was the period in which the century old reliance on agricultural

commodity exports as the bedrock of government finances and foreign exchange earnings was finally overcome, and was displaced by the new economy of tourism, garments, and financial services.

Between 1977-86, the share of exports from agricultural commodities (primarily tea and rubber) dropped from 70 per cent to 40 per cent, while industrial goods (primarily garments) went up from 8 per cent to 40 per cent. As new export-processing zones continued to emerge in places such as Biyagama (1985), and Koggala (1991), the garment industry continued to expand steadily, and had the mid-1990s, accounted for half of all exports, while tea was reduced one fifth.

As a result, Sri Lanka witnessed a surge in foreign trade and private-sector led growth after 1978 that fundamentally transformed the structure of the island economy and government finances. There was also a significant increase in economic inequality in this period that continued to grow well into the 1990s. Much has been said about the negative impact of the reforms, both in domestic political discourse, and in international economic debates. The Sri Lankan experience became the subject of a heated controversy with broader international implications for advocates and critics of market reform and its role in growth versus poverty and inequality[9].

A largely technocratic rendering of the record since then would suggest that the presidential system succeeded in pulling Sri Lanka back from the precipice of economic collapse; that a judicious recalibration towards a more authoritarian structure was needed to introduce a more rational economic regime, albeit at the transitional cost of higher inequality. In other words, 'command politics' was needed to bring the command economy

[9] Isenman (1980); S.S. Bhalla & P. Glewwe, '*Growth and equity in developing countries: A reinterpretation of the Sri Lankan experience.*' (1986) ***World Bank Economic Review*** 1:1, 35-63; S. Anand & R. Kanbur (1991) ***Public Policy and Basic Needs Provision: Intervention and Achievement in Sri Lanka*** in J. Dreze, A. Sen & A. Hussain (1995) ***The Political Economy of Hunger: Selected Essays*** (Oxford University Press); S.R. Osmani, '*Is there a Conflict between Growth and Welfarism? The Significance of the Sri Lanka Debate*' (1994) ***Development and Change*** 25(2): pp.387-421.

to an end. There is however, much that is missing from this story without which it lacks not just colour and texture but many of its essential facets. Although the UNP's intention may well have been to engineer a more authoritarian, electorally insulated policy-making structure in order to pursue a technocratic agenda of market deregulation, there were other aspects that came along with it that limited, moderated and even reversed the concentration of power at the apex.

The high tide of authoritarianism that Jayewardene personified in the 1980s came about not just because the executive presidency provided him with many powers, but because this was buttressed by overwhelming legislative support. Jayewardene's parliamentary super-majority (140 of 168 seats) was actually a relic elected and inherited under the previous first-past-the-post system in 1977, of the type that the new rules he introduced had just done away with. Nevertheless, by preserving the 1977 parliament, and by controversially extending its life through to a second, unelected term until 1989, Jayewardene afforded himself unprecedented powers over an exceptionally long period of time. In his ten years as president, Jayewardene had the luxury of passing fourteen constitutional amendments. Premadasa would also pass another two amendments in the dying days of that elongated parliament in December 1988.

Proportional representation would, once inaugurated in 1989, change the structure of legislative representation entirely, and produce deeply fragmented parliaments out of which fragile multi-party ruling coalitions would be pieced together. This not only improved the representative quality of parliament in several dimensions, but it also served to constrain the powers that subsequent presidents after Jayewardene wielded, requiring them to share power and make deep compromises with several smaller, and often petulant coalition partners. Unlike the presidency, the legislature itself remained vulnerable to sudden collapse and electoral recall, and was therefore far more responsive to the popular pulse and to its murmurings of discontent. In time, this element would lead to the deceleration of the pace of market reforms after Premadasa, and eventually, to its indefinite suspension under Rajapaksa. One simple indicator of the changing power of the presidency *vis-à-vis* the legislature is in the

rate of constitutional amendments that have been passed. Between 1978-88, constitutional amendments happened at the rate of about 1.5 per year. Since then has dropped to one every decade.

In order to understand the story of market reforms in Sri Lanka, it is necessary to understand the involvement of a much larger and more complex set of actors than is immediately apparent, as well as an extraordinary array of political and ideological mechanics and theatrics. Having traumatically lost power to a wave of economic and nationalist populism in 1956, the UNP had, since then, consciously sought to repair its inherited identity as an unelectable party of rich urban cosmopolitans. As Jayewardene himself put it, the task was to 'correct the image of the UNP which was considered a conservative, capitalist party',[10] and he largely succeeded in this historical mission, at least for a while.[11] In order to get the UNP re-elected and to implement a counter-populist economic agenda of market liberalisation and the de-welfarisation of the state, Jayewardene set about finding alternate sources of populist legitimacy and consent. This happened on the one hand through an exaggerated performance of Buddhist religiosity, and on the other, through a wave of expensive rural development schemes.

Once elected into power with an overwhelming legislative majority in 1977, and the powers of the executive presidency at hand, Jayewardene's development agenda was not restricted to the market reforms, foreign investment and export-processing zones that it is known for. Indeed these elements were often overshadowed by the massive expansion of the state under public sector investment projects that increased the state employment head-count by 20 per cent in his first five years in power.[12] Most vivid of the many rural development projects of the time was the revitalisation the Mahaweli Development project. Originally

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[10] J.R. Jayewardene (1992) ***Men and Memories*** (New Delhi: Vikas): ix.

[11] See de Silva & Wriggins (1988), particularly chapter 14- 16 for a fairly sympathetic account of Jayewardene's reforms within the UNP in the 1973-1977 period.

[12] R. Herring, '*Explaining Sri Lanka's Exceptionalism: Popular Responses to Welfarism and the Open Economy*' in J. Walton & D. Seddon (Eds.) (1994) ***Free Markets & Food Riots*** (New York: Blackwell).

conceived in the 1960s as a thirty-year project of electrification and irrigation-based rural development covering 39 per cent of the land-mass of Sri Lanka, the project was under Jayewardene compressed and accelerated to fit within six years.

The reform agenda continued to unfold under Premadasa through the UNP's adroit ability to camouflage its business-friendly reforms under the thunder and lightning of populist ethno-religious outreach and rural development programmes. A considerable part of Premadasa's personal attention was spent designing, implementing and communicating his massive public housing scheme, the *Janasaviya* poverty alleviation programme, the two hundred garment factory plan, and the *Gam Udawa* extravaganzas.[13] Unusually for a poor South Asian country where such spending is frequently associated with clientelist excess, public waste, and corrupt misgovernance, the brief Premadasa period is nevertheless viewed in retrospect as relatively more successful in its stated aims. Even though many of these negative elements were present, the programmes were nevertheless imaginative and innovative and reflected Premadasa's personal commitment and zeal towards their success.

Moreover, given the extent of its association with high profile religiosity and poverty alleviation, it is instructive to note that the Premadasa period remains in the memory of corporate leaders as a golden age of government responsiveness and business-friendly efficiency. This was the point at which Sri Lanka most closely resembled an authoritarian East Asian developmental state. It was corrupt, but efficient; intolerant and rough with critics, but business-minded and results-oriented; it suppressed unions, but was generous and innovative with welfare schemes. It featured the inscrutable and demanding personality of Premadasa at its apex, ably assisted by competent bureaucrats such as Bradman Weerakoon and R. Paskaralingam. The government managed to deliver, both in terms of attracting foreign investments, but also in getting garment factories located in the rural hinterland where

[13] K. Stokke, '*Poverty as Politics: the Janasaviya Poverty Alleviation Programme in Sri Lanka*' (1995) ***Norwegian Journal of Geography*** 49:3, 123-135; D. Dunham & S. Kelegam, '*Does Leadership Matter in the Economic Reform Process? Liberalization and Governance in Sri Lanka, 1989–1993*' (1997) ***World Development*** 25(2): pp.179-190.

they provided jobs and incomes for poor families. In this brief period of 1990-93, the UNP's vision of authoritarian market-driven globalised economic growth and poverty alleviation briefly reached its pinnacle. This was in essence, what the executive presidency aspired to do.

The other important feature that shaped, and left a deep imprint on the development agenda was the escalating civil war. By the second half of the 1980s, the war in the north and the brewing JVP rebellion in the south had claimed a growing share of the state's resources, and was imposing a heavy toll on the economy. A series of economic analyses in the 1990s began to attach a developmental cost to the war, estimating the direct costs such as the diversion of scarce resources to military purposes, the destruction of physical capital, and the interruption of production and trade, as well as indirect costs such as the flight of human capital and foregone foreign investment.[14] As a result, there was a growing consensus that the conflict had come to pose an unbearable burden on the economy, and that it needed to be resolved, even at heavy cost if need be, in order for the country to progress.

If war was seen on the one hand as an obstacle to development, then it was in effect the flip-side of a widely held view that development was the solution to the conflict. The association of the LTTE and JVP insurgencies with the frustrations of poorer, socially disadvantaged groups in the Tamil and Sinhala communities has led to the identification of economic development as an urgent need and a potential alternative route to conflict resolution. In consequence, development has since 1977 frequently taken on the implicit if not explicit rationale of addressing the root causes of unrest in youth unemployment and rural poverty.

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[14] N. Arunatilake, S.K. Jayasuriya & S. Kelegama, '*The Economic Cost of the War in Sri Lanka*' (2001) ***World Development*** 29: pp.1483-1500; Marga Institute, International Alert & National Peace Council (2001) ***Cost of the War: Economic, Socio-Political and Human Cost of the War in Sri Lanka***; L.M. Grobar & S. Gnanaselvam, '*The Economic Effects of the Sri Lankan Civil War*' (1993) ***Economic Development and Cultural Change*** 41: pp.395-405.

But in reality, the way that development and war interacted was far more complex than the relatively straight-forward task of tallying up the costs of war, or in the causal link between poverty and violence. Market reform and the ethnic conflict were the two leading policy items on the agenda of the UNP government for most of its 17 years in power, and these two items were deeply inter-connected at the political, socio-economic, and ideological level. At one level, the UNP's exaggerated display of Buddhist religiosity and Sinhala patriotism – which was at least partly in order to compensate for the evident unpopularity and illegitimacy of the market reforms – had the obvious knock-on effect of further alienating the Tamil minority.

The results of the 1982 presidential election shows that the UNP's support was weakening amongst rural Sinhala Buddhists[15], probably due to a conjoined cultural/economic rejection of the reforms. It created a situation by the early-1980s where the continuation of the market reform agenda required the government to demonstrate that it was defending the interests of the Sinhala Buddhists, even if it meant alienating the Tamils and painting itself into a corner on the ethnic issue. Through the early 1980s, Jayewardene was forced into an increasingly confrontational posture on the ethnic conflict and was unable, for fear of arousing Sinhalese opposition, to make the concessions that would pull it back from the brink. In effect, the stability of the government, and the pursuit of its market reform plan depended indirectly on its refusal to pursue an appropriate course of conflict resolution. [16]

Presidentialism under Challenge: 1994-2005

By the second decade of the war in the mid-1990s, the nature of presidentialism and its relationship to the development agenda had changed entirely. After 17 years in power, the UNP lost

[15] M. Moore, '*The Gaullist-Bonapartist State in Sri Lanka*' in J. Manor (Ed.) (1984) ***Sri Lanka in Change and Crisis*** (Croom Helm).
[16] R. Venugopal, '*The making of Sri Lanka's post-conflict economic package and the failure of the 2001-04 peace process*' in E. Newman, R. Paris & O. Richmond (Eds.) (2009) ***New Perspectives on Liberal Peacebuilding*** (United Nations University Press).

power in 1994, and with that came an end to their unambiguous commitment to market reform. The return of the People's Alliance (PA) coalition as effectively an enlarged version of the old United Front (UF) coalition of the 1970s, with its Sirimavo Bandaranaike and a number of leading Marxist leaders at the top naturally led to speculation about the fate of the market reforms.

Despite some indications and electoral rhetoric in 1994 to suggest that there would be a reversal, the reform agenda remained in place and continued to unfold. It did so however, largely because of the personal commitment that Chandrika Kumaratunga demonstrated to continue with the reforms in the face of increasing pressure and hostility from her own coalition. Kumaratunga worked around the competing pressures she faced by appointing competent technocrats to key economic decision-making posts, while retaining important cabinet posts for those within her party who connected better with voters and could help win elections - such as Mahinda Rajapaksa. Meanwhile, leading members of Kumaratunga's People's Alliance (PA) coalition were Marxist trade union leaders with an ideological predisposition and an institutional mandate to oppose the reforms.[17]

As a result, market reforms sputtered on between 1995-2001, but often at an uneven pace. Some important reforms, including large privatisations happened in this period. But they happened amidst prevarication, self-doubt, and internal tension at the top. In line with the greater scepticism towards market reforms that had taken hold internationally at the time, Kumaratunga had campaigned for a 'human face' to the reforms and demonstrated greater personal commitment and energy towards addressing their social impact. In substance, this took the form of scrapping Premadasa's flagship *Janasaviya* project and replacing it with a new poverty alleviation scheme, *Samurdhi*.

In the aftermath of the tumultuous decade of the 1980s that ended with the JVP insurgency, Sri Lanka was being transformed along a number of different axes at very different rates. On the one hand, there was a striking contrast between the 'normal'

[17] M. Moore, '*Leading the Left to the Right: Populist Coalitions and Economic Reform*' (1997) ***World Development*** 25(7): pp.1009-1028.

development processes in the south and the abnormal, crisis-ridden situation of humanitarian relief and persistent insecurity in the north. But even in the south, there was a growing rift between the prosperity of globally connected, urban sectors of the economy such as finance, tourism and garments, versus the persistent poverty of the small paddy farmer. Inequality grew steadily since the late 1970s, but at a particularly sharp increase in the 1990s-2002 period, as high rates of economic growth were matched by very low rates in poverty reduction.[18] Moreover this growth was overwhelmingly concentrated in urban districts such that the poverty headcount was either the same or had increased in 9 of 17 districts during the 1990s (excluding the north-east). There was also a significant sectoral imbalance in the growth, which came largely from the industrial and service sectors, whereas there was an unusually rapid decline in the agricultural economy.

In that context, the intersection of normal development and the war created a series of perverse and unusual outcomes. For example, during the 1990s, the army had become the biggest employer in the country, and the largest source of formal sector cash employment for young Sinhalese men from rural backgrounds, particularly those from the outer rural periphery (Venugopal 2011b). In parallel, there was a steady flow of rural women to the garment factories of Katunayake or Biyagama,[19] and also to the Middle East as domestic workers.[20] A historic de-agrarianisation of the workforce took place during the 1990s as the share of the working population in agriculture, which had remained largely unchanged since the 1950s, dropped from 47 percent down to 32 percent. During this period, when commodity prices for crops such as paddy were in steady decline,

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[18] R. Gunatilaka & D. Chotikapanich, '*Inequality Trends and Deterninants in Sri Lanka 1980- 2002: A Shapley Approach to Decomposition*', Monash Econometrics and Business Statistics Working papers 6/06 (2006) (Monarch University).; A. Narayan & N. Yoshida, '*Poverty in Sri Lanka: The Impact of Growth with Rising Inequality*' (2005) (Report No. SASPR-8: World Bank).

[19] J. Shaw, '*'There is No Work in My Village' The Employment Decisions of Female Garment Workers in Sri Lanka's Export Processing Zones*' (2007) ***Journal of Developing Societies*** 23(1-2): pp.37-58.

[20] M.R. Gamburd (2000) ***The Kitchen Spoon's Handle: Transnationalism and Sri Lanka's Migrant Housemaids*** (Cornell University Press).

and farming was often unremunerative, remittances from migrant workers and soldiers did much to support the welfare of rural households, and to prop up the village economy at large.

Meanwhile, in the war-torn north-east, the kinds of transformations underway were entirely different. A journey past the frontiers of 'normal' Sri Lanka, beyond Medawachchiya, Kantale, or Welikanda often gave one the impression of arriving at an entirely different land, where the developmental debates on market reform or labour legislation were entirely irrelevant. Large parts of the north-east had been under the intermittent control of the LTTE, and were mostly excluded from government economic statistics, although it was well known to relief agencies and public servants by the early 1990s that the people of the north-east were among the most deprived, vulnerable, and under-served in the country.

This also meant that basic public services such as electricity, telephones, roads, hospitals and schools, were either entirely lacking or in very poor repair, having suffered war-damage followed by extensive periods of stagnation and under-investment. This situation was exacerbated in the decade of the 1990s, when the conflict was transformed from a low-intensity guerrilla insurgency to an increasingly frontal conventional war fought with artillery and large troop movements. During this period, wide swathes of land, including heavily populated areas such as Jaffna city itself, changed hands displacing hundreds of thousands of people who remained transient in an out of relief camps and other such forms of temporary shelter until the end of the war.

Due to the heavy media restrictions in place, most people in the south were never exposed to this reality, and remained largely insulated from it, living their lives in an entirely different set of realities and challenges. Perhaps in recognition of this, the LTTE had during the 1996-2001 period, changed tactics to inflict a direct and vivid economic impact on the country's prosperous economic nerve-centre. The January 1996 bombing of the Central Bank, the October 1997 bombing at the Galadari Hotel, and the July 2001 attack on Katunayake airport all had a serious impact on the segments of the new, post-liberalisation economy that had thus far avoided getting directly entangled in the war.

One consequence of this was that corporate leaders, who had hitherto been quietly sympathetic of the Kumaratunga government, became hostile to her strategy of 'war for peace', and lobbied instead for a negotiated end to the war, even if that ultimately meant sharing power with the LTTE.

The period between 2000-2004 brought the executive presidency into an unprecedented crisis, with its powers significantly weakened. The overlapping political, military, and economic crisis that the Kumaratunga government found itself in during 2000-2001 led first to a difficult and short-lived coalition, and then to a complete loss of the legislature in December 2001. Following a rare election victory for Ranil Wickramasinghe, the UNP-dominated legislature was now in the unusual situation of being under the control of a rival, hostile party to the president. Under this 'co-habitation' period that ensued between December 2001-April 2004, the executive presidency was reduced to the position of a Westminster-style figurehead while the prime minister took firm control of the executive.

Aware of the ticking political clock against him, and of the vulnerability of the co-habitation arrangement, Wickramasinghe was eager to achieve quick successes that he could have available to present to the public in time for the presidential elections of 2005.As a result, the new government rushed through a series of far-reaching initiatives on the two most controversial and long-standing items of state reform, the ethnic conflict and market liberalisation - often in a brazen and demonstrative disregard for the president. The government and its agenda eventually failed, largely because he was forced to the polls much earlier than expected by Kumaratunga in April 2004, and because he suffered a huge backlash against the economic and ethnic elements of his agenda. Despite the massive international support and funding from the western donors for his government, and to some extent because of it, Wickramasinghe found himself wanting in domestic support, particularly from the core Sinhala-Buddhist demographic.

Some elements of the fiscal austerity programme were particularly unpopular, such as the withdrawal of the fertiliser subsidy, and the public sector hiring freeze. But perhaps more substantial than

these individual budgetary line items was the larger strategic failure of statecraft. Wickramasinghe, unlike Jayewardene or Premadasa, made the mistake of presenting his core agenda in its naked, technocratic, counter-populist core, without any alternative avenue of populist legitimacy or patronage that could be used to disguise it or buy-off opponents. In doing so, he rendered his agenda vulnerable to attack from a two-pronged charge that it was against the interests of the Sinhalese majority, and that it would damage the economic welfare of the poor and vulnerable at large.[21]

There are two key conclusions on presidentialism and market reform that emerge and are reinforced by the events of 2001-2004. Firstly, the executive power of the presidency depends heavily on control of the legislature, without which the president can be reduced to a largely ornamental role. Secondly, there are deep currents of opposition to the market reform process in the electorate, and this can under certain circumstances, as in April 2004, become a systemic factor that sways the outcome of parliamentary elections. Beyond the growing disenchantment with the peace process in the south, fuelled to no small degree by the LTTE's provocative ceasefire violations, the Ranil Wickramasinghe government's breakneck pace of market reform in 2002-2003 became a significant element in catalysing the opposition movement that ultimately unseated it. Moreover, it led the subsequent UPFA government, which was now heavily dependent on coalition support from the JVP, to halt the economic reforms entirely and to adopt a pronounced anti-reform posture.

The Populist Presidency: 2005-2014

To recapitulate the argument thus far: after reaching its high water mark under Premadasa in the early 1990s, the executive presidency and the market reform programme slipped slowly into crisis over the next decade. Kumaratunga's early promise to abolish the presidency, and to moderate the reforms with a human face had led to a period of flux and ambiguity, ending

[21] Venugopal (2009).

eventually in the disintegration of the reform agenda and the dramatic weakening of the presidency. As an institution that is electorally more connected to the popular pulse, parliament had in the Kumaratunga period, become the vehicle through which a populist impulse had come to challenge the largely elite-driven projects of state reform (on the economy and ethnic relations) that the executive presidency had been empowered to push through. The relationship between president and parliament had swung decisively in favour of parliament in this period, and the project of the executive presidency envisioned by Jayewardene lay in disarray.

Faced with this crisis, the Rajapaksa presidency's historic challenge and accomplishment was to reverse that equation, and to reassert the power of the presidency. In order to do so, he had on the one hand to play a complicated game of carrots and sticks, by enticing and rewarding parliamentarians to his side through an unprecedented expansion in ministerships. But on the other hand, he also wrought a more substantial ideo-political shift by wresting the mantle of populism away from parliament. In doing so, he turned what were the presidency's weaknesses into his strengths, and what were traditionally the means of achieving state reform, into the ends in itself.

That is, whereas the presidency was initially designed to shield the executive from the heat of day-to-day electoral vulnerability, and from the ethnic nationalist and populist economic pressures, Rajapaksa instead embraced and championed both of those tendencies. The three previous executive presidents: Jayewardene, Premadasa, and Kumaratunga had often been found guilty of *conceding* to populist pressures, and *pandering* to chauvinism, the implication being that these were necessary tactical evils of the political game that they were forced to endure and perform for reasons of expediency, and perhaps even against their own better judgment. Rajapaksa instead, championed populism in a far more transparent way without it being used in the pursuit of any hidden agenda. Sinhala nationalism was not a fig leaf to lend legitimacy to some unpopular counter-populist economic or ethnic agenda: it became, perhaps by default, the agenda in itself.

Rajapaksa's first term was dominated by the war, and by his quest for a stable legislative majority: and he was fortunate on both counts. The steady drum-beat of military victories in the north-east did much to buttress his personal popularity with the southern electorate, and this assisted in his campaign to divide and conquer parliament. In his first two years in power, Rajapaksa managed to end his parliamentary dependence on the mercurial JVP and its contingent of 37 coalition MPs by winning over a large section of the UNP, including several senior leaders. Then, in a political masterstroke, he managed to split the JVP itself in April 2008, winning away its leading demagogue Wimal Weerawansa. Despite a brewing economic crisis and high levels of inflation that increased trade union pressure, Rajapaksa's public image in the south continued to soar during the war, with the crushing military defeat of the LTTE in May 2009 translating into a mighty electoral victory at the presidential and parliamentary elections of 2010.

Having thus successfully reasserted the power of the presidency in his first term, Rajapaksa had in his second term turned its energies towards an economic revival under a nationalist oriented vision of developmentalism. The 2010 election manifesto, *Mahinda Chintana: Vision for the Future* made a specific commitment to doubling per capita income and an eight percent annual economic growth rate. In the meanwhile, Rajapaksa not only maintained a safe rhetorical distance from any market reforms, but *Mahinda Chintana* asserted that the market reform era, which held sway from 1977-2005 had ended, and that Rajapaksa represents a new post-market reform period. Indeed, most economic reforms remained suspended between 2005-14, there had been a minor re-nationalisation (Sri Lankan Airlines), and the launch of a new public sector airline (Mihin Lanka). Beyond that, it is also important to recognise the substantial continuities at play: the economic policy of the Rajapaksa period was been one of treading water rather than any sustained campaign of rolling back the post-1977 reforms.

In place of the market reforms, and its association with western-oriented comprador capitalism, the new post-war developmentalism under Rajapaksa took on a distinctly nationalist and non-western orientation with three key features.

Firstly it signified the reversion to 'hardware' over 'software'. That is, the government prioritised the construction of airports, ports, expressways, and other such monuments of economic infrastructure, with the clear aim of bringing the island's ageing hardware up to date, and catching up for the time lost during the war. It was in essence a reversion to an older, grander developmental vision that held sway internationally during the 1950s and 1960s, and that due to its scale and scope, necessarily places the state back in a more commanding position. In contrast, there was a conscious de-prioritisation, and even a hostility for 'software': the kind of smaller, village-level projects of poverty alleviation and empowerment frequently implemented by NGOs rather than states, that had largely replaced hardware since the end of the Mahaweli project in the 1990s.

Secondly, it signified a shift away from western aid donors to non-western donors, particularly China. Most of the western donor countries, who had been closely involved in the 2002-2005 peace process, became very critical of the Rajapaksa government. The government in turn viewed western-funded aid projects, particularly those in the north-east, with suspicion as nodes of subversion, and subjected them to an increasing burden of surveillance and control. In their place, China emerged as Rajapaksa's preferred development partner, financier and implementer, with Chinese public sector firms constructing some of the most important and high profile projects of this period, such as the Hambantota port and the Katunayake expressway.

Thirdly, it signified an approach to post-war transformation in which economic development was promoted in lieu of a political solution to the ethnic conflict. The Rajapaksa government had from the very beginning, been deeply sceptical of the very existence of an ethnic conflict, and has instead viewed it as a combination of terrorist violence fuelled by regional under-development. As a result, and also in order to preserve its populist credentials with the Sinhala electorate, Rajapaksa was deeply reluctant to recognise, engage with, or address Tamil grievances through state reforms and through any process of accountability. Instead, it sought to accelerate economic and infrastructure development in the north-east, and to use this, often closely under the direction of a militarised civilian administration,

as a political weapon to win the support of the Tamils, and to undermine the appeal of ethnic Tamil politics. Development under the Rajapaksa presidency was thus a combination of underlying continuities with the post-1977 period, a rhetorical rupture with that past, and entirely new trends and trajectories that have emerged in the new post-war circumstances.

Conclusions

Sri Lanka's executive presidency was brought into being under a distinctly economic rationale: to transform what its framers perceived to be the dysfunctional relationship between populist democracy and stunted economic development. As Jeyaratnam Wilson describes, the problem was that 'the major contenders were merely auctioning away the limited assets of a society which was traversing the road to economic ruin'.[22] By the 1960s, there were clear signs that the socio-political elites of the Donoughmore and early Soulbury periods were growing alarmed at its consequences and trajectory, and it is within this context that the executive presidency must be situated.

To what extent did the executive presidency succeed in its ambition? Overall, there has been a significant degree of market liberalisation since 1977, and an increase in economic growth rates. This happened together with a steep increase in inequality, both at the household and regional level. The impact of the reforms and the entire trajectory of development in Sri Lanka was also heavily affected by the civil war at a number of different levels. The war destroyed productive infrastructure and resources, depressed investment and output levels, and transferred valuable resources to the security sector. But the war also perversely played a role in mitigating poverty and the negative social consequences of the reforms by providing a copious source of well paid formal sector employment (in the army) for young men in the depressed rural parts of the southern periphery.

The quest to tame electoral populism and establish an elevated, empowered presidency in the service of a counter-populist

[22] Wilson (1980): p.1.

economic strategy was, unsurprisingly, intensely complicated and prone to failure on multiple grounds. It worked best in its early years when the agenda benefited from three overlapping factors. Firstly, it required the strong personal commitment of the president to market reforms. Secondly, the president had to command the support of a dependable, loyal legislature. Thirdly, the president had to deploy a sophisticated array of countervailing sources of populist legitimacy in order to avoid a backlash to the reforms.

As described above, the market reform process went into crisis during the Kumaratunga period as it endured an ambiguous commitment level at the top and steadily lost parliamentary support. A populist resurgence gathered storm through the Kumaratunga period, bringing the domestic legitimacy of the elite-driven projects of state reform – and with it the executive presidency itself - into deep crisis by 2004-05. This crisis was manifest primarily in terms of the power imbalance between parliament and president, but had an underlying basis in an enduring elite-mass divide.

This divide was eventually bridged and repaired by Mahinda Rajapaksa, who embraced populist politics wholeheartedly and demonstratively rejected market reforms and ethnic concessions. In doing so, he rescued and revitalised the executive presidency, but only at the cost of inverting the logic and abjuring the agenda that the presidency was created for. The populist impulse had in that sense, prevailed, and triumphed over Jayewardene's best attempts to restrain it.

13

Nation, State, Sovereignty, and Kingship: The Pre-Modern Antecedents of the Presidential State

Asanga Welikala

The Emic v. Etic Approach to Constitutionalism

The introduction of the executive presidency in 1977-8 brought about a fundamental constitutional shift by transforming the Sri Lankan republic from a parliamentary state into a presidential state. Drawing upon the unfamiliar and unusual French model, this shift was radical to the extent that for the entire duration of Sri Lanka's modern state tradition commencing as a British colony, and then as a post-colony, the parliamentary form of government was assumed to be its natural constitutional state. Beyond the familiarity of the British model and the path dependency of Sri Lanka's constitutional evolution since the Donoughmore reforms, scholarly constitutional discourse in the 1970s was also informed by a number of conceptual assumptions associated with modern, positive, social science.

These assumptions about broader and deeper concepts beyond the mere institutional form of executive power informed both the early critics – like N.M. Perera and Colvin R. de Silva – as well as the early exegetists – like A.J. Wilson and Chandra R. de Silva – of the 1978 Constitution.[1] These included shared assumptions about the nature of the state, the nation, sovereignty, constitutionalism, and democracy. Indeed if there was something even more striking than the constitutional change of 1977-8 itself, it was the broad modernist and positivist consensus underlying the framework for constitutional analysis, comparison, critique, and the articulation of alternatives. In understanding, explaining, comparing, and evaluating the constitution, they took modernist categories of social science like the nation-state for granted, as they did the positive, black-letter law of the text of the constitution as the primary basis of their work,

[1] See the chapter by Jayampathy Wickramaratne in this book; A.J. Wilson (1980) ***The Gaullist System in Asia**: **The Constitution of Sri Lanka (1978)*** (London: Macmillan); C.R. de Silva, '*The Constitution of the Second Republic of Sri Lanka (1978) and Its Significance*' (1979) ***Journal of Commonwealth and Comparative Politics*** 17(2): pp.192-209.

and indeed modern constitutional models like Westminster and Gaullism as their comparative referents.

The consequence of this analytical and normative consensus was that the debate on the 1978 Constitution, by focusing heavily on modern and positive legal and political categories, ignored the visible contemporaneous evidence of the ethno-cultural and ethno-historical conceptual resources through which the constitutional change and the new presidential institution were being legitimated within the polity at large, and in particular the Sinhala-Buddhist section of the polity. In other words, what was occurring was not so much the incursion of Gaullism or Caesarism as the reincarnation of the pre-colonial Sinhala-Buddhist monarch in the constitutional present. The scholarly commentators (even where some of them were politicians) were therefore engaging in a debate that was insulated from the constitutional conversation that was taking placing between the politicians and the voters by reference to intensely local, cultural myths, memories, and symbols. These were terms of a political discourse that were completely separate from the terms of modernism and positivism. In other words, two entirely different constitutional discussions were going on: the emic conversation within mass politics and the etic debate within high politics.

In some ways, this was to be expected given that those early commentators were lawyers, political scientists, and historians trained in the British tradition of modernist and positivist social science, almost all of them at the University of London. It took a while for the anthropologists to enter the debate on Sri Lankan presidentialism, and when they did so, their ethnographic techniques revealed the deeper cultural and historical dimensions of the nature and the sources of legitimacy of the institution, how the religious and the secular spheres interact in the practices of power that surrounds it, and of course the personal predilections of the occupants of the

office, in a way that the earlier modernist and positivist analyses had completely failed to address.[2]

Thus while positivist analyses of the legal provisions of the 1978 Constitution told us of the authoritarian potential inherent in them, that methodology could not tell us why authoritarian presidents would enjoy not merely electoral popularity but also a large measure of cultural legitimacy, and indeed what the limits of that tolerance might be, when viewed against the cultural benchmarks against which presidents and their behaviour were being judged by the electorate. In other words, the positive law and the normative values underpinning it have never been able to fully account for the way power and especially executive power is exercised in Sri Lanka. This often leads either to plain bafflement or to misleading conclusions about the political system, because positivism and modernism cannot explain the relationship between the 'legal' constitution and the 'political' constitution, what the content of the latter is, and even how it prevails over the former.

These observations are borne out by an examination of every presidency from the inception, but are illustrated most vividly in the Rajapaksa presidency. Deliberately drawing a historiographical parallel between the defeat of the Tamil Tigers with that of the Dutugemunu legend of the *Mahavamsa*, the Rajapaksa regime extracted the Sinhala-Buddhist monarchical potential of the executive presidency to the maximum possible extent. His frequent and flagrant violation of the legal constitution seemed to have no political effect, until he exceeded the amorphous limits set by the very cultural sources of power and

[2] See chapters by Ananda Abeysekera, Michael Roberts, and Roshan de Silva Wijeyeratne in this book; S. Kemper, '*J.R. Jayewardene: Righteousness and* Realpolitik' in J. Spencer (Ed.) (1990) ***Sri Lanka: History and Roots of Conflict*** (London: Routledge): Ch.9; S. Kemper (1991) ***The Presence of the Past: Chronicles, Politics and Culture in Sinhala Life*** (Ithaca, NY: Cornell UP); M. Roberts (1994) ***Exploring Confrontation: Sri Lanka: Politics, Culture and History*** (Chur: Harwood Academic Publishers).

legitimacy that permitted him initially to expand the scope of presidential power far beyond the legal constitution.

In understanding the nature of Sri Lankan presidentialism, therefore, constitutional lawyers and political scientists ignore the insights provided by historians and anthropologists about the critical connections between the modern presidency and the ancient monarchy. These connections concern not merely the nature and form of executive authority, but also those between an authoritarian head of state on the one hand, and on the other, conceptions of power and sovereignty, collective identity and nationhood, and the role of religious sanction for political authority. These insights also shed light on the relationship between presidentialism and other centralising features of the Sri Lankan state tradition, notably the principle of the unitary state, but also the orthodox monistic conceptions of sovereignty and nationhood.[3]

Without understanding the institution in this holistic and sociologically contextualised way, attempts to reform it could also be derailed by the same analytical and normative fallacies that misled the early exegetists of the presidential constitution. Put simply, the overarching point is that constitutional lawyers will not be able to understand Sri Lankan presidentialism unless they understand the Sinhala-Buddhist monarchy. The following discussion therefore is not so much an attempt to break new ground as an attempt to integrate existing insights of historical anthropology into the discourse of

[3] I explore these issues in greater detail in A. Welikala, '*The Sri Lankan Conception of the Unitary State: Theory, Practice and History*' in A. Amarasingham & D. Bass (Eds.) (forthcoming 2015) *Sri Lanka: The Struggle for Peace in the Aftermath of War* (London: Hurst & Co.) and A. Welikala, ''*Southphalia or Southfailure? The Anatomy of National Pluralism in South Asia*' in S. Tierney (Ed.) (forthcoming 2015) *Nationalism and Globalisation* (Oxford: Hart Publishing).

constitutional law and theory around the Sri Lankan executive presidency.

The Theoretical Concepts of the Pre-British State in Sri Lanka

The pre-modern state began with the establishment of the first Sinhala polity in the third century B.C. by Devanampiya Tissa (250-210 B.C.) at Anuradhapura, and ended in 1815 when the Kandyan Kingdom was ceded to the British Crown by treaty. With the cession of Kandy the entire island became a Crown Colony, marking also the territorial unification of the island in the modern period. The primary concern of this chapter is not the political history of the pre-British Sinhala state, but the "religio-politico-moral conceptions of kingship" based on Buddhist canonical principles, and the way in which these norms were given effect in the ancient to early modern period according to "certain cosmological cum topographical models of the polity that were employed as blueprints for political form."[4] As such I avoid involvement in disputes as to historical 'facts,' and instead concern myself with the theoretical explanations of questions such as state form and collective identity that historians and anthropologists have offered on the basis of differing interpretations of events and evidence. This account must begin then with the canonical sources from which Buddhist ideas of sovereignty and monarchical statehood are derived, and which are in the Theravada Buddhist historiographical traditions exemplified in the righteous kingship of the Emperor Asoka of Maurya (274-232 B.C.). Mahanama, the author of the *Mahavamsa* in sixth century Sri Lanka, expressly drew from the Asokan paradigm, and the vast historiography of Sinhala-Buddhist kingship both textual and oral is permeated with its motifs.

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[4] S.J. Tambiah (1976) ***World Conqueror and World Renouncer: A Study of Buddhism and Polity in Thailand against a Historical Background*** (Cambridge: CUP): p.102.

This discussion of Buddhist doctrine and the Asokan nonpareil serves as the theoretical prelude for the following section, in which I consider of how these norms and models were actualised in the pre-British state in Sri Lanka. This focuses on the last few decades of the Kandyan kingdom (i.e., the late eighteenth and early years of the nineteenth centuries), for it is in relation to this period that the evidence of state practice is most clear, and as a result, historians have been able to make the most confident assertions about the normative and structural aspects of that state.

The Paradigm of Righteous Buddhist Kingship: The Concepts of *Mahasammata*, *Dhammiko Dhammaraja* and the Asokan Persona

Several of the Buddha's canonical discourses provide us with insights into the Theravada Buddhist conceptions of worldly order and the principles of righteous kingship.[5] As Roshan de Silva Wijeyeratne reminds us, these texts "evoke the classic Buddhist doctrinal themes of suffering and impermanence at the root of all existence, and this should be borne in mind when considering [their] political or jurisprudential import."[6] The canonical adumbration of the ideal-type Buddhist kingship is

[5] Of the canonical sources, particularly relevant are the *Agganna Sutta* (The Discourse on What is Primary), the *Cakkavatti Sihanada Sutta* (The Lion's Roar on the Wheel-Turning King), the *Mahavadana Sutta* (The Great Discourse on the Lineage), and the *Anguttara Nikaya* (The Book of Gradual Sayings), and to a lesser extent, the *Mahaparinibbana Sutta* (The Great Discourse on the Total Unbinding).

[6] R. De S. Wijeyeratne, '*Buddhism, the Asokan Persona and the Galactic Polity: Re-Thinking Sri Lanka's Constitutional Present*' (2007) ***Social Analysis*** 51(1): pp.156-78 at p.160; see also S. Collins, '*The Lion's Roar on the Wheel-Turning King: A Response to Andrew Huxley's 'The Buddha and Social Contract"* (1996) ***Journal of Indian Philosophy*** 24(4): pp.421-46 at p.427; S. Collins & A. Huxley, '*The Post-Canonical Adventures of Mahasammata*' (1996) ***Journal of Indian Philosophy*** 24(6): pp.623-48.

inextricable from the broader context of Buddhist cosmology. This sets out an elaborate and expansive vision of time and space, (non-divine) creation, recreation and order. All forms of existence – "god, man, animal, asura demon, and wandering ghosts" – participate in this cosmos, which as Stanley Tambiah emphasises, is fundamentally stratified and hierarchical, "presenting a gradient from black torment suffered by those in hell to pure bliss and tranquillity enjoyed by the gods [that] is a continuous scheme of ascent from gross materiality to ethereal spirituality."[7]

The *Agganna Sutta* sets out the Buddhist vision of the origins of the world, society, and kingship, the relevance of which to the present discussion is that it articulates the Buddhist theory of the founding of society and polity in the concept of the *Mahasammata* (The Great Elect), and the soteriological role of the Buddhist monkhood within this worldly scheme. The creation myth in the *Agganna Sutta* begins with the original state of existence as 'ethereal mind'. The world forms according to mankind's increasing attachment to material well-being and private property, which then leads to a state of disorder due to avarice and greed, and dissociation between man and nature.[8] The *Mahasammata* arrives at this moment of disintegration of worldly society in order to give it an "embodied social life" [9] as well as normative and structural order. He is the "…manifestation of the collective consciousness of human being [*sic*] and of its active will for the constitution of society."[10] According to Tambiah, the *Mahasammata* myth embodies,

> "an elective and contractual theory of kingship, whereby a king is chosen by the people and he is remunerated by the payment of a rice tax. This elective and contractual theory is

[7] Tambiah (1976): p.9.
[8] Tambiah (1976): p.14-15.
[9] Collins (1996): p.430.
[10] B. Kapferer (1997) ***The Feast of the Sorcerer: Practices of Consciousness and Power*** (Chicago: Chicago UP): p.70.

> counterbalanced by the fact that the one chosen is the best among men – most handsome in physical form and most perfect in conduct…Thus the king is 'chosen' in two senses of the word; he is both elective and elect."[11]

The *Agganna Sutta* goes on to elaborate the socio-political order that is established following the election of the king, which is hierarchically composed of four basic strata (*Vanna / Varna*).[12] At the top are the nobles (*Khattiya / Kshatriya*), then the two categories of brahmans (*Jhayaka* and *Ajjhayaka*). The third stratum consists of the tradesmen (*Vessa / Vaishya*), and at the bottom the "lowest grade of folk" (*Sudda / Shudra*). The final dimension of this "Buddhist myth of genesis" concerns the role of the *bhikku* (the Buddhist monk).[13] The *bhikku*, who could be drawn from any of the four *vannas*, is the follower of the *dhamma* (*dharma*) who withdraws from the materialism of worldly society in search of liberation from the *karmic* cycle of rebirth and seeks ascent to the state of transcendence or *nibbana* (*nirvana*).

In this scheme of worldly order, then, it is the institution of kingship that provides order and regulation under

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[11] Tambiah (1976): p.13. Tambiah's careful framing of the concept, counterbalancing the metaphor of contract with the prescriptive attributes of the person of the *Mahasammata*, should be underscored. The interpretation of the *Mahasammata* myth as a Buddhist theory of 'social contract' is a matter of some scholarly dispute. Suffice it to call attention here to the potential contradiction that is raised within Buddhist 'political philosophy' between any reading seeking to give a social-contractual gloss to the *Mahasammata* myth, and the fundamentally non-contractual, top-down hierarchical, virtually non-reciprocal, and cosmologically ordained model of sovereign authority that is embodied in the Asokan Persona (discussed below). See Roberts (1994): pp.70-71; J.S. Strong (1983) ***The Legend of King Asoka*** (Princeton: Princeton UP); A. Huxley, '*The Buddha and the Social Contract*' (1996) ***Journal of Indian Philosophy*** 24(4): pp.406-420; Collins (1996); Collins & Huxley (1996).

[12] See S. Collins, '*The Discourse on What is Primary (Agganna Sutta): An Annotated Translation*' (1993) ***Journal of Indian Philosophy*** 21(4): pp.301-393.

[13] Tambiah (1976): p.14.

which society develops structured according to the four *vannas*, rendering the Buddhist conception of the state fundamentally monarchical.[14] As Tambiah observes, "society and its gradations develop under the umbrella of kingship, which provides the shade of law and order."[15] The metaphor of the umbrella (or parasol / canopy) is important and is frequently invoked in later Buddhist texts such as the *Mahavamsa*. It is a metaphor for not only the nature of kingly authority, but also the notions of encompassment and hierarchy that inform the structure of the Buddhist polity and state.[16] But the monarchy does not enjoy a position of exclusive superiority in this scheme, for while the *bhikku* and the king are the "two central personages" in the temporal polity, "the former is superior, 'the chief of them all.'"[17] Tambiah describes the

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[14] B.G. Gokhale, '*Early Buddhist Kingship*' (1966) ***Journal of Asian Studies*** 26(1): pp.15-22; B.G. Gokhale, '*The Early Buddhist View of the State*' (1969) ***Journal of Asian Studies*** 89(4): pp.731-738; see also B.G. Gokhale, 'Dhammiko Dhammaraja*: A Study in Buddhist Constitutional Concepts*' (1953) ***Indica***: Silver Jubilee Commemoration Volume (Bombay: Indian Historical Research Institute); U.N. Ghoshal (1959) ***A History of Indian Political Ideas*** (Bombay: OUP); B.G. Gokhale (1966) ***Asoka Maurya*** (New York: Twayne Publishers).

[15] Tambiah (1976): p.14.

[16] Two examples from two different historical periods, one illustrating this metaphor through an act of military force, and the other through the propagation of Buddhism, serves to show its importance in Sinhala historiography. The Sagama rock inscription of 1380, in describing how the guardian deity of the island enabled the war victory of King Bhuveneka Bahu V against Aryacakravarti of Jaffnapatnam, invokes this metaphor in the following terms: "thus with divine favour made Lamka [*sic*] [subject to the authority of] one umbrella and caused everything to prosper": J.C. Holt (1991) ***Buddha in the Crown: Avalokiteswara in the Buddhist Traditions of Sri Lanka*** (New York: OUP): p.103. Kirti Sri Rajasinha, a Kandyan king, was known for his munificent patronage of Buddhism, including visits and benefactions to the sixteen sites on the island the Buddha is believed to have visited. As Roberts observes: "In highlighting the sacred topography of the island in these striking acts, this king was informed by the ideas embedded in the *vamsa* traditions, in particular the *Dhammadipa* and *Sihaladipa* concepts. He was thus affirming the unity of Lanka under his parasol": M. Roberts (2004) ***Sinhala Consciousness in the Kandyan Period: 1590s to 1815*** (Colombo: Vijitha Yapa): p.67.

[17] Tambiah (1976): p.15.

relationship between king and monk as set out in the *Agganna Sutta* in the following way:

> "The king is the mediator between social disorder and social order; the *bhikkhu* is the mediator…between a state of fetters and a free state of deliverance. The king is the fountainhead of society; the *bhikkhu* is of that society and transcends it."[18]

Through this "unqualified supremacy of the moral law over governmental affairs," the Buddhist conception of political order presents a "theory of politics that is ethically comprehensive." [19] Against Max Weber's argument that ancient Buddhism was "a specifically unpolitical and anti-political status religion,"[20] therefore, it must be stressed that from the beginning Buddhist doctrine was concerned with collective social, political and moral regulation, and that its totalising articulation of the cosmos clearly went beyond a soteriological concern with the liberation of the individual from the *karmic* cycle to incorporate all of worldly existence within its cosmological framework.[21]

In the *Cakkavatti Sihanada Sutta* and the *Anguttara Nikaya*, the principles of righteous kingship (*rajadhamma*) are developed according to this "universalistic assertion" that the *dhamma* – as cosmic law and as truth embodied in the Buddha's teachings – is the "absolutely encompassing norm and that the code of kingship embodying righteousness (dharma) has its source in this dharma and is ideally a concrete manifestation of it in the conduct of worldly affairs."[22] Thus it is a "hierarchical symbiotic

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[18] Ibid.
[19] Ibid: pp.32, 33.
[20] M. Weber (1967) ***The Religion of India: The Sociology of Hinduism and Buddhism*** (Trans. H.H. Gerth & D. Martindale) (Glencoe, Ill.: The Free Press): pp.206-7; see also Tambiah (1976): pp.47, 123-124; Seneviratne (1999): Ch.1.
[21] Tambiah (1976): p.35.
[22] Ibid: p.40.

relationship in which the *dhamma* of the Buddha encompasses the king and informs the practices of kingship" and the socio-political realm is "given form through the conduct of the righteous ruler, with *dhamma* suffusing the entire social order."[23] This is the ideal of *dhammiko dhammaraja*, the Righteous Ruler.[24]

In the actualisation in the material world of this model of order, "the early Buddhist disciples had to utilise existing symbols, among them those associated with the *cackravarti*, a pre-Buddhist figure."[25] This worked in two ways: clothing the Buddha in the motifs associated with the *cakkavatti*,[26] and adorning the institution of the *cakkavatti* itself with "rich metaphors of power and omnicompetence" infused with the *dhamma*.[27] The Buddha, having achieved *nirvana*, was unavailable to intercede either as lawgiver or provider of spiritual succour in worldly life, and thus it was that "a *cakravarti* and a phalanx of gods" became incorporated into Buddhist practice in his place.[28] In the Buddha's absence, the Buddhist scheme "raised up the magnificent *cakkavatti* world ruler as the sovereign regulator and ground of society [*sic*]."[29]

The model *cakkavatti* in the Theravada Buddhist traditions of South and Southeast Asia, and certainly in Sinhala-

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[23] De Silva Wijeyeratne (2007): p.160.
[24] Gokhale (1966): pp.90-91.
[25] Roberts (1994): p.59. *Cakravarti* (Sanskrit) or *Cakkavatti* (Pali) translates as the Universal Emperor: ibid, p.58.
[26] F. Reynolds, '*The Two Wheels of the Dhamma*' in G. Obeyesekere, F. Reynolds & B.L. Smith (Eds.) (1972) ***The Two Wheels of the Dhamma: Essays on the Theravada Tradition in India and Ceylon*** (Chambersburg, Pa.: American Academy of Religion): pp.12-17; S.J. Tambiah, '*The Buddhist Conception of Kingship and its Historical Manifestations: A Reply to Spiro*' (1978) ***Journal of Asian Studies*** 48: pp.803-4.
[27] Roberts (1994): p.60
[28] Ibid: p.59.
[29] Tambiah (1976): p.52; Gokhale (1966): pp.16-18; Inden (1990): p.229 et seq.; Roberts (1994) p.60; De Silva Wijeyeratne (2007): pp.160-161.

Buddhist historiography, is embodied in the person, reign and empire of the Maurya king, Asoka (274-232 B.C.).[30] Frank Reynolds has observed how the subsequent history of Buddhism, and it might be added, of the Buddhist kingly state form, "can only be understood by taking into account the ethos created by the simultaneous veneration of the two careers" of the Buddha and Asoka.[31] The "fabulous, myth-laden history"[32] that was constructed around Asoka by subsequent generations in the Theravada Buddhist polities extends from empirical narratives of his territorial conquests, monumental architecture, charitable acts and Buddhist missionary zeal, to specific normative derivations that prescribe how an ideal Buddhist state should function. The practices, symbols, rituals, and the normative and corporeal organisation of Asoka's empire, together forming the basis of the dominant *cakkavatti* model that was followed by subsequent Theravada polities, have been extensively theorised in the literature as the 'Asokan Persona' (and cognate expressions), and I rely here on the analytical constructs of Tambiah and Michael Roberts in particular.[33] To the extent that the constituent elements of the holistic, totalising and universalist nature of the Asokan paradigm of kingship can be separated, what concerns us specifically is one dimension of this ideal-type: *viz*., the territorial and socio-political norms that cohered the Asokan polity together.

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[30] Tambiah (1976): Ch.5; see also R. Thapar (1961) ***Asoka and the Decline of the Mauryas*** (London: OUP); S. Dutt (1962) ***Buddhist Monks and Monasteries of India: Their History and Their Contribution to Indian Culture*** (London: Allen & Unwin).

[31] Reynolds (1972): pp.28-30.

[32] Roberts (1994): p.60.

[33] Tambiah (1976): Ch.5; Roberts (1994): Ch.3. For a sceptical view of Roberts' 1994 conceptualisation of the Asokan Persona, see A. Guneratne, '*Review Article*' (1998) ***American Ethnologist*** 25(3): pp.527-528. Guneratne argues that Roberts' "concept of the Asokan persona might be compared to describing contemporary French nationalism in terms of the ideology of Vercingetorix." Whatever the weaknesses of Roberts' argument, the criticism that he "effectively implies that an essentialised 'Sinhala culture' has changed little over the centuries" is not among them.

Based on Kautilya's *Arthashastra* and Asoka's rock inscriptions (the Pillar Edicts), in an early view, Romila Thapar argued that, "The Mauryan centralised monarchy became a paternal despotism under Asoka."[34] Tambiah emphatically rejects the idea that Asoka's "vast non-federal centralised empire" could be understood in terms of a tightly centralised unitary state.[35] His argument is that such a view is a "misreading [of Asoka's] rhetoric" as represented in the Pillar Edicts, which "at best suggest a ritual hegemony rather than actual political control as understood by modern political scientists."[36] Tambiah's contraposition is critically important:

> "Perhaps a plausible characterisation of the Asokan polity (held together by the ideology of the dharma) would be that at its apex was a king of kings subsuming in superior ritual and even fiscal relation a vast collection of local principalities…Such a political edifice was not so much a bureaucratised centralised imperial monarchy as a kind of galaxy-type structure with lesser political replicas revolving around the central entity and in perpetual motion of fission or incorporation. Indeed, it is clear that this is what the…*cakkavatti* model represented: that a king as a wheel rolling world ruler by definition required lesser kings under him which in turn encompassed still lesser rulers, that the raja of rajas was more a presiding apical ordinator than a totalitarian authority between whom and the people nothing intervened except his own agencies and agents of control."[37]

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[34] Thapar (1961): p.95. The evidence for this view is summarised in Tambiah (1976): p.70.
[35] Tambiah (1976): p.70.
[36] Ibid. The notion of 'ritual hegemony' should be underscored, for it foreshadows a major constitutional concept of the pre-colonial state which will be discussed in detail below.
[37] Ibid. See also p.258.

The subsequent scholarly consensus thus seems to be that the Asokan Empire (and subsequent Buddhist polities modelled after it), while centripetalising in intent, functioned in practice as a decentralised system of delegated authority along galactic lines.[38] Roberts follows Tambiah (and Thapar) in contending that "…the ideational tilt towards omnicompetence and encompassing righteousness was occasioned by the sprawling nature of the Asokan empire and its inherently fissiparous tendency." [39] He agrees too that the 'conceptual glue' of centralisation was Buddhism: "Outgoing Asokan Buddhism was not only a pacification policy, it was an ideological cement and a validation of the monarchical state."[40]

But there is a key difference between the positions of Tambiah and Roberts in relation to the form of state that Tambiah conceptualised as the 'galactic polity,' which surfaces in relation to their different understandings of centralisation within the framework of the Asokan Persona. At the theoretical level, Roberts' conceptualisation of the Asokan Persona contains a degree of emphasis on the "centripetalising force of ritual" that is less prominent in Tambiah's theory, wherein Roberts' idea of 'polytheistic centripetality' in relation to the performative role of ritualistic practice provides a necessary explanatory thesis as to how, in the context of their pulsating and fissiparous qualities, such polities were held together.[41]

Roberts draws on Buddhist doctrine as well as ethnographies of ritual practices in critically extending A.M. Hocart's theory about the 'condensation' of human settlements around a 'centre of ritual,' in which Hocart

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[38] De Silva Wijeyeratne (2007): p.169; Inden (1990): p.229.
[39] Roberts (1994): p.62; Tambiah (1976): pp.60-63. See also Thapar (1961): pp.114-45; Inden (1990): Ch.6; Holt (1991): Ch.7.
[40] Roberts (1994): p.62; De Silva Wijeyeratne endorses the notion of Buddhism as 'social glue': De Silva Wijeyeratne (2007): p.161; see also Ghoshal (1959): p.69; Reynolds (1972): p.28.
[41] Roberts (1994): p.62.

saw the origin of urban centres and state organisation in traditional societies.[42] Hocart highlighted those rituals which reflected, in Roberts' words, "an ethical bias or spirit of moral imperialism" and observed that, "In these ethical rites the particular is completely swallowed up in the general, and in consequence they are the most centralised. The god is everything."[43] This monotheism explains the tendency to centralisation: "The god is everything, and so these cults are monotheistic or pantheistic; there is no room for subordinate deities. The king is consequently the repository of all power."[44] Roberts rightly disagrees with Hocart's monotheistic taxonomy for there was no concept of a single god in the Indic pantheon. But utilising Hocart's insight into the centralising function of worship and ritual, Roberts draws on the concept of *varam* (the Buddha's warrant of delegated authority to different gods in different ways) to develop the idea of 'polytheistic centripetalism', which he defines as, "the worship of several gods, each with its specific attributes and domains [i.e., as determined by the specific *varam* granted by the Buddha], who are subsumed within a scheme which subjects them to a single head [i.e., the Buddha]."[45] Roberts draws on a number of ethnographical studies in illustrating his argument that,

> "The fissiparous potentialities of subdivided specialisms and delegated authority within such a [polytheistic] structure are counteracted by the holistic framework within which it is understood, by the attributes of the Buddha, and by the principles and mechanisms which provide the pantheon with a unity of structure."[46]

We need not here rehearse his ethnographic evidence, except to reiterate the significance of the concept of *varam*

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[42] A.M. Hocart (1970) ***Kings and Councillors*** (Ed. & Intr. R. Needham / orig. pub. 1936) (Chicago: Chicago UP): p.251.
[43] Ibid: p.82.
[44] Ibid.
[45] Roberts (1994): p.62; see also Inden (1990): pp.228, 240.
[46] Ibid: pp.62-63.

within the Buddhist pantheon and therefore of the Buddhist conception of political order.[47] In this pantheon, the Buddha occupies an apical, presiding position, and then in a descending hierarchy of rank are a number of deities, with the demons at the base.[48] The character, domain, rank and powers of these deities and demons are ordained by the Buddha's *varam*, which is a warrant of delegated authority.[49] All power emanates from the Buddha, and as such the terms of the *varam* could also be changed unilaterally, entrenching the logic of hierarchy. In Gananath Obeyesekere's words, "authority thus

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[47] Roberts relies *inter alia* on the following works: G. Obeyesekere, '*The Great Tradition and the Little in the Perspectives of Sinhalese Buddhism*' (1963) ***Journal of Asian Studies*** 22(2): pp.139-153; B. Kapferer (1988) ***Legends of People, Myths of State: Violence, Intolerance and Political Culture in Sri Lanka and Australia*** (Washington DC: Smithsonian Institution Press); Reynolds (1972); Inden (1990); and Holt (1991). See Roberts (1994): pp.63, 64.

[48] The very nature of the principle of encompassment in the Buddhist cosmic order renders it inclusive, in which "the encompassing principles defined by the Buddha and the demonic are engaged in dynamic tension": Kapferer (1988): p.11; see also p.165. In the context of cosmology determining the norms of political order, the notion that the "encompassing principle of the Buddha ensures that the gods always triumph, as the demonic is *ultimately encompassed but never excluded*" (De Silva Wijeyeratne (2007): p.163, emphasis added) has clear implications for the structure of centre-periphery relations in galactic polities. As Kapferer argues, "nation and state have a particular significance in Sinhalese Buddhist hierarchical conception. The nation is encompassed by the state symbolised in the kingship. These in turn are encompassed by the Buddhist religion or the Triple Gem (Buddha, dharma, sangha). *In this unity of the whole is the integrity of the parts*. Thus the nation or the people who compose a hierarchically interrelated social order discover their unity in the power of the state, which is enabled in its unifying power by its subordination to the Buddha": ibid, p.12, emphasis added. The suggestion of a model of 'unity in diversity' in the highlighted sentence should not mislead us into underestimating the force of the encompassing and hierarchising dynamics in this worldview. These norms are part of the ontology of the state reflected in modern Sinhala-Buddhist nationalism. See U. Gammanpila, '*The Constitutional Form of the First Republic: The Sinhala-Buddhist Perspective*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: CPA): Ch.23. See also Tambiah (1992): p.176.

[49] For a definition of *varam*, see also Roberts (2004): pp.xx.

branches outward from the apex of the pantheon and converges once again at the top."[50] Through what James Duncan calls the "magical power of parallelism" then, this cosmic model of encompassing and hierarchical authority was mirrored in the material world by the *cakkavatti*, as exemplified in the Asokan Persona.[51] In addition to the encompassing force of Buddhism *qua* common religion, therefore, the territorial coherence of these polities was secured through a conception of sovereignty embodied, by virtue of cosmic ordination, in the majestic figure of the *cakkavatti*, whose location at the apex of the fundamentally hierarchical social and political order was performatively reinforced, in in both everyday and more formal ritualistic practices, continuously.

As will become apparent in the discussion on the Kandyan kingdom later, this difference between Tambiah and Roberts assumes a distinctly sharper complexion in their respective applications of the galactic model to the political and historical actualities of the pre-colonial state in Sri Lanka. But before that, it is necessary to set out the idea of the galactic polity, the dominant theoretical model which seeks to explain the politico-constitutional form of the Theravada Buddhist state, as informed by the religio-political normativity just discussed.

The Galactic Polity and the *Mandala*: Between 'Hierarchical Encompassment' and 'Fissiparous Potentiality'

Stanley Tambiah's seminal theoretical construct, the galactic polity, is the means by which we understand how the grand cosmologically ordained conception of righteous kingship in Buddhist doctrine was implemented and realised in the Theravada Buddhist polities.[52]

[50] Obeyesekere (1963): p.145.
[51] Duncan (1990): p.49.
[52] Tambiah (1976): Ch.7.

Tambiah's construct is inspired by a pre-existing concept of the Indo-Tibetan tradition, the *mandala*, which is composed of two elements: "a core (*manda*) and a container or enclosing element (*-la*)."[53] As Giuseppe Tucci has described it, in its simplest form as a quinary geometrical grouping, the *mandala* is "divided into five sections, while on four sides of a central image, or symbol, are disposed, at each of the cardinal points, four other images or symbols."[54] It was an ubiquitous aesthetic form in Hindu-Buddhist Asian cultures, informing textile designs to architectural arrangements, and infused with cosmological principles, as a topographical model of political form for the organisation of states. In this last respect, providing the rubric for the arrangement of "a centre and its satellites," the *mandala* pattern is used,

> "in multiple contexts to describe for example: the structure of the pantheon of gods; the deployment spatially of a capital region and its provinces; the arrangement socially of a ruler, princes, nobles, and their respective retinues; and the devolution of graduated power on a scale of decreasing autonomies."[55]

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[53] Ibid: p.102.

[54] G. Tucci (1971) ***The Theory and Practice of the Mandala*** (London: Rider & Co.): p.49, cited in Tambiah (1976): p.102.

[55] S.J. Tambiah (1985) ***Culture, Thought, and Social Action: An Anthropological Perspective*** (Cambridge, Mass.: Harvard UP): p.258. A general point might be raised here about the use by anthropologists and historians of such terms as 'autonomy' and 'devolution,' which are clearly employed in more broader and generic senses than the narrower and relatively exact way in which lawyers more inclined towards textual positivism would understand or use them. A good example is the last sentence in Tambiah's quote above. In using the term 'devolution,' implying a transfer of power away from a centre towards the periphery, the idea that Tambiah is trying to convey is a scale of 'increasing' rather than 'decreasing' autonomies. Other examples in related literature include the way in which Tambiah and de Silva Wijeyeratne (himself a lawyer) have attempted to link their pluralistic and devolutionary conceptions of the galactic polity, to federalism in contemporary Sri Lankan constitutional debates concerning the accommodation of ethnic pluralism. See S.J. Tambiah, '*Urban Riots and Cricket in South Asia: A Postscript to 'Levelling*

As we have seen, in the Buddhist scheme the institution of the *cakkavatti*, as the propagator of the *dhamma* and sovereign regulator, functions as the link between the cosmic heavens and "this world of humans."[56] Extending this further, Tambiah argues that the Buddhist polity was modelled "on the basis of parallelism between the suprahuman macrocosmos and the human microcosmos."[57] In this way, "The kingdom was a miniature representation of the cosmos, with the palace at the centre being iconic of Mount Meru, the pillar of the universe, and the king, his princes, and ruling chiefs representing the hierarchy" of the pantheon of gods.[58] This mirroring of the cosmos by *mandala*-type states occasioned a particular topographical form for such states, in which power radiated in "a scheme of activation from the centre to the periphery in successive waves."[59]

Crowds" (2005) ***Modern Asian Studies*** 39(4): pp.897-927 at p.927; de Silva Wijeyeratne (2007): p.173. In the way constitutional theorists and practitioners would understand federalism – as "ideological position, philosophical statement [or] empirical fact" (*vide* M. Burgess, '*Federalism and Federation: A Reappraisal*' in M. Burgess & A-G. Gagnon (1993) ***Comparative Federalism and Federation: Competing Traditions and Future Directions*** (London: Harvester Wheatsheaf): Ch.1 at pp.7-8) – such a link as Tambiah and de Silva Wijeyeratne seek to draw would require a substantial leap of conceptual faith. For different reasons, Roberts too has criticised the manner of usage of some of these terms by his fellow historians / anthropologists: Roberts (2004): pp.64, 74 (see below). That said, as Alan Strathern's response to Roberts demonstrates (see below), except in clear cases where loose usages result in misleading or erroneous perceptions – such as in the example above in which an intuition of similarity between the galactic polity and federalism as devolutionary models of polity /constitutional form have led to superficially made arguments that the pre-modern existence of one should inevitably lead to the adoption of the other in the present – there is no reason to disparage the broad use of terminology *per se*, simply because it offends legal positivist sensibilities.

[56] Tambiah (1976): p.108.

[57] Ibid: p.109.

[58] Ibid.

[59] Ibid: p.111.

Such a cosmo-topographical approach to state form has certain implications for conceptions of territory and jurisdiction; implications which assume even greater significance by the apparent distance between them and modernist understandings of such concepts within the paradigm of a unitary nation-state. The fulcrum of the geometric design underlying *mandala*-states is the capital, the location of the *cakkavatti* court, which Tambiah describes as "centre-oriented space (as opposed to bounded space)."[60] This implies that the exemplary importance in prestige accorded to the centre was not, as in the modern logic of the unitary state, synonymous in practical terms with territorial or jurisdictional control over the peripheries: "This concept of territory as a variable sphere of influence that diminishes as royal power radiates from a centre is integral to the characterisation of the traditional polity as a *mandala* composed of concentric circles."[61]

Typically, there were three such concentric circles, representing centre-periphery relations, although there could be more in larger polities. As already noted, at the centre was the *cakkavatti* (ruling the capital region directly); then the polities of lesser princes or governors, and in the outer circle were "more or less independent 'tributary' polities."[62] The capital itself was physically ordered according to the *mandala* arrangement, with the royal palace at the centre; and so was each polity in each undulating concentric circle, so that despite differences in size, power and prestige, the lesser unit was a "reproduction and imitation" of the larger.[63] Relations

[60] Ibid: p.112; Duncan (1990).
[61] Ibid.
[62] Ibid. De Silva Wijeyeratne refers to this as 'semi-periphery' and 'periphery': De Silva Wijeyeratne (2007): p.170. In a Marxist sociological analysis of the 'Kandyan social formation,' Newton Gunasinghe seems to have the same distinction in mind when he speaks of 'core-land' and 'peripheral area': N. Gunasinghe (1990) ***Changing Socio-economic Relations in the Kandyan Countryside*** (Colombo: SSA): pp.33-35; see also Roberts (2004): p.40, n.3.
[63] Tambiah (1976): p.113; Duncan (1990); De Silva Wijeyeratne (2007): pp.166-172.

between the units within a *mandala*-type state, and indeed between neighbouring polities organised in a similar way, were constantly changing according to vagaries of political and economic power and battlefield fortunes.[64] Tambiah portrays a vivid image of this type of polity:

> "Thus we have before us a galactic picture of a central planet surrounded by differentiated satellites, which are more or less 'autonomous' entities held in orbit and within the sphere of influence of the centre. Now if we introduce at the margin other similar competing central principalities and their satellites, we shall be able to appreciate the logic of a system that is a hierarchy of central points continually subject to the dynamics of pulsation and changing spheres of influence."[65]

These frequently "expanding and shrinking" [66] organisational arrangements (it seems too much of a positivist imposition to describe it in terms of a static 'institutional architecture') and the 'pulsating' process of intra-state and inter-state political relations they framed, mirrors the Buddhist cosmological ethos of constant and perpetual movement between order, fragmentation and reordering. In Ronald Inden's more recent work, this picture is affirmed when he observes that these polities comprised of "continually reconstructed and reconstructing agents with both dispersed and unitary moments."[67] In mundane terms, within the possibilities and constraints of everyday politics, different rulers within these systems made different uses of their 'potentialities': "The galactic polity was no effective cybernetic system; it lacked finely fashioned regulative and feedback mechanisms that produced homeostasis and balance."[68]

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[64] Tambiah (1976): pp.121-131.
[65] Ibid: p.113.
[66] Ibid: p.112.
[67] Inden (1990): p.138 and Ch.6, also p.267.
[68] Tambiah (1976): p.123.

The question then arises as to how these systems – representing "a galactic constellation rather than a bureaucratic hierarchy [administering a strictly bounded territory]"[69] – of multiple 'centre-oriented spaces' with an increasing scale of autonomy corresponding to physical and spatial distance from the centre, managed to hold the whole together. While it seems to follow from a modernist understanding of territorial jurisdiction that the absence, *inter alia*, of a Weberian bureaucratic structure facilitated increasing spatial autonomy at the peripheries, it should be recalled that these polities were fundamentally centre-oriented and hierarchical in their conceptions of both symbolic prestige and *realpolitik* authority, as underscored in the discussion on the Asokan Persona above. De Silva Wijeyeratne reminds us of not only the centrality of hierarchical encompassment to this state form, but also how in the Sri Lankan context, they have transuded into the modern politics of pluralism:

> "This cosmology constitutes an ontological horizon that gives meaning to a multiplicity of Sinhalese Buddhist practices, including the discursive realms of modern Sinhalese Buddhist nationalism, as well as a defence of a highly centralised state structure that leaves little room for regional autonomy."[70]

The several means that comprised the centripetal dynamic offsetting the devolutionary and fissiparous nature of these polities included the Buddhist-Asokan paradigm of kingship, with its totalising cosmological framework ordaining the natural order of being.[71] The

[69] Ibid: p.114.
[70] De Silva Wijeyeratne (2007): p.163.
[71] In addition to the enmeshed symbiosis, rather than separation of, religion and politics discussed before, there was also no attenuation of monarchical authority through a separation of powers or through a 'feudal' distribution of functions involving a framework of reciprocal rights and privileges that constrained the omnipotence of the king. In this regard, Roberts argues that the application of feudalist categories

key idea here was that "the centre represents the totality and embodies the unity of the whole" and in this context, a major feature of the galactic polity was "the nesting pattern whereby lower-order centres and entities are progressively contained and encompassed by the higher-order centres or entities."[72] Roberts would concur:

> "Empires or polities informed by such a cosmology, therefore, involved machineries of administration or overlordship which were not merely pulsating in the spatial sense clarified by Tambiah's picture of galactic polities, but involved a scale of forms with overlapping hierarchies and jurisdictions."[73]

These norms were actualised in an elaborate framework of rituals and symbols, and encompassed the polity with the sovereign aura of the kingly centre while reinforcing the hierarchical scheme of representation within the cosmic and social order of not only human beings, but also gods up above and demons down below. In pre-British Sri Lanka, "The myriad forms of obsequiousness that marked the Sinhalese Buddhist social order were…replete in the spatial organisation of the Sinhalese Buddhist polities." [74] Conceptions of sovereignty, collective identity and political order are therefore difficult to understand without an appreciation of the pivotal role of ritual in the social life of these polities. As noted at some length above, this is where Roberts' 'polytheistic centripetality' of the Asokan Persona, and Obeyesekere's observation about convergence in the Sinhala-Buddhist pantheon prove particularly relevant.[75] We can obtain a sense of what this all meant in actual terms by considering how these norms and models were reflected in the politico-constitutional arrangements and

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to the Sinhala-Buddhist kingdoms is fundamentally misplaced. We will return to these issues in greater detail in the following section.

[72] Tambiah (1976): p.114.

[73] Roberts (1994): p.64.

[74] De Silva Wijeyeratne (2007): p.168.

[75] See also Roberts (2004): pp.60-63, esp. p.62.

ritualised administrative practices of the Kandyan Kingdom.

The State and Polity in the Kandyan Kingdom

The origins of the Kingdom of Kandy lie in the complex politics of late fifteenth century Sri Lanka involving the Sinhalese kingdoms of Kotte and Sitavaka and the Portuguese.[76] Having emerged as a satellite of Kotte, it allied with Kotte and the Portuguese during the ascendency of Sitavaka in the middle of that century, with the result that it was for a time annexed by Sitavaka and ceased to exist between 1581 and 1591. Following the sudden decline of Sitavaka in the 1590s, and the failure of the Portuguese to establish a client regime in Kandy, the Kingdom of Kandy emerged under Vimaladharmasuriya I (c.1591-1604) as "the only Sinhala state and heirs to the idea of *Sinhalē*" on the island.[77] Located on the Kandy plateau of the central highlands, in the city known as Senkadagala or Mahanuvara in Sinhalese, it remained an independent state throughout the latter Portuguese (1591-1658), the whole of the Dutch (1658-1796), and the early British (1796-1815) periods in which these European powers controlled the maritime provinces of Ceylon. In consequence of a palace coup by Kandyan nobles against the last King of Kandy, Sri Wickrama Rajasinha (1798-1815), in which the First Adigar,[78] Ehelepola, played the

[76] While throughout this chapter, I use the English word 'Kandy,' it should be noted that in the historical period under discussion and indeed thereafter, both the city and the kingdom were/are known in Sinhalese by a multiplicity of other names. Kandy is an Anglicisation of the Portuguese 'Candea', itself deriving from the Sinhalese *Kanda Uda Rata* (literally, 'the country on the hill' or 'Up Country'), denoting one of the Sinhalese terms for the Sinhala kingdom located in the central highlands of the island. *Pāta Rata* (literally, 'Low Country') denotes the coastal areas outside the *Kanda Uda Rata*. For a comprehensive taxonomy of Sinhalese designations of the island *qua* Sinhala kingdom, see Roberts (2004): pp.58-59.

[77] Roberts (2004): p.40.

[78] The office of adigar (*adhikarama* in Sinhala) was the designation of the two senior ministers in the Kandyan state. The two senior nobles

prominent role, the British succeeded where others had failed in finally deposing the Kandyan monarchy in March 1815.[79] The territory of the last Sinhala kingdom was ceded to the British Crown by the treaty known as the Kandyan Convention of 1815 between Sir Robert Brownrigg and the senior Kandyan *disavas*.[80]

The principles of the *mandala*-state introduced earlier are reflected with striking propinquity in the politico-spatial organisation of the Kandyan kingdom in the late eighteenth century.[81] It will be recalled that the basic form of the *mandala*-state was the arrangement of a centre with its peripheries. In the Kandyan kingdom, the "apical power centre constituted by the Tooth Relic-King-Sangha"[82] was located in the capital, with its surrounding nine divisions (*kanda uda pas rata*) branching out into the valleys around the Kandy plateau.[83] This, according to

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served as first and second adigars in the King's Council of Ministers (*amathya mandalaya*): L.S. Dewaraja (1972) ***The Kandyan Kingdom of Ceylon, 1707-1760*** (Colombo: Lake House): Ch.VIII; K.M. de Silva (2005) ***A History of Sri Lanka*** (Colombo: Vijitha Yapa): p.198, n.2.

[79] See also Roberts (2004): pp.48-54.

[80] See generally, K.M. de Silva (2005): Ch.18; C.R. de Silva (1987) ***Sri Lanka: A History*** (New Delhi: Vikas): Ch.12.

[81] Duncan (1990): pp.154-180.

[82] Roberts (2004): p.40. The spiritual significance of the Temple of the Tooth, containing the Buddha's tooth relic, cannot be overstated in the Sinhalese Buddhist world. Its central role in the Kandyan state is reflected in the ritual practices associated with kingship such as the coronation rites and the *perahera*. John Holt has noted the "conflation of the roles of bodhisattvas [i.e., the Buddha-to-be in his present incarnation], kings and gods vis-à-vis the *dhamma* in Theravada tradition" in such a way as to make "the interests of the gods and royalty…become thoroughly entwined": Holt (1991): pp.61, 111. More generally in relation to the importance of the temple in Buddhist life, Holt has demonstrated how the temple is "a genuinely *situating* experience" for the Buddhist devotee, and how the murals and paintings of temple image houses are a "visual liturgy": Holt (1991): p.20. See also H.D. Evers (1972) ***Monks, Priests and Peasants*** (Leiden: E.J. Brill): pp.65-68.

[83] As Lorna Dewaraja has established, in the administrative system of the Kandyan system there were two kinds of territorial divisions: *ratas* and *disavanies*. By the eighteenth century, the area known as *kanda uda pas rata* comprised of nine *ratas* (originally five as the name

Roberts, was the "'agrarian heartland' and political core of the Kandyan state," and the "spatial location of the hegemonic centre." [84] Reiterating the undulating concentric circles of the galactic polity, Roberts observes how the periphery in the Kandyan scheme could be differentiated according to an inner and outer periphery.[85] In a remark that assumes significance in the discussion to follow, Roberts notes that, "To the degree that the state of *Sinhalē* embraced the whole island in the conceptions of Sinhalese of that era, the *pāta rata*, or Low Country, can also be placed within the 'outer periphery'."[86] As we know, during the Kandyan period, these areas were substantially under the control of the European powers. Thus, notwithstanding the absence of strict territorial or jurisdictional control understood in modern positivist terms, ideationally the notion of *Sinhalē* as *cakkavatti* kingship encompassed the whole island in the view of the Sinhalese in Roberts' argument.

Lorna Dewaraja's extensive empirical work has described how the administrative structure of the Kandyan kingdom was organised and functioned.[87] According to

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denotes) on the plateau and in close proximity to the royal city. With the exception of two, Valapane and Udapalata, which lay in the mountains, all the other *disavanies* lay in the territories and valleys sloping down from the Kandy plateau to the littoral fringes of the island. They were, namely, the Hatara Korale, Hat Korale, Uva, Matale, Sabaragamuva, Tun Korale, Nuvarakalaviya, Vellassa, Bintenna and Tamankaduva. Of these, the first four, lying in the mountainous areas adjacent to the capital territory and constituting the inner periphery, were designated as *maha* or greater disavanies. The rest were styled *sulu* or lesser disavanies. Dewaraja points to evidence that in the mid-eighteenth century, there were a further number of *sulu disavas* in Puttalama, Munnessarama, Panama, Tambalagamuva, Madakalapuva (Batticaloa), and Kottiyarama (Trincomalee). It is significant that the last three of these are in what is the present-day (post-British) Eastern Province, which is part of the territory claimed by Tamil nationalists as a traditional homeland. Dewaraja (1972): p.168.

[84] Roberts (2004): p.40.

[85] See also Gunasinghe (1990): pp.33-35; De Silva Wijeyeratne (2007): p.170.

[86] Roberts (2004): p.40.

[87] Dewaraja (1972): Chs. VIII and IX.

her, this system was animated by the two basic features of the theoretically absolute monarchy, upon which the entire political and social order was founded, and a "bureaucratic nobility" appointed by the monarch. Entrance to and gradations within this administrative aristocracy was rigidly determined by the "unwritten yet inexorable laws of caste."[88] Indeed, the political economy of the Kandyan society that this structure administered was wholly based on a caste system. A caste-based tenurial system regulated economic production and exchange, and the institution of *rajakariya* provided a form of corvée labour for the state and the aristocracy.[89]

There are several aspects of this administrative structure that should be underlined for our purposes. Firstly, within the central government as well as between it and the provincial authorities, powers and duties appear to have been allocated functionally, but ambiguously and imprecisely: "In effect this meant that in several of the regions of the heartland, if not everywhere, there was crosshatching of administrative and judicial claims/powers." [90] Secondly, this imprecision in institutional boundaries both facilitated and was the consequence of the absence of a separation of powers, both in relation to the types of power, and the functionaries and institutions exercising power. Epitomised in the king, and at both central and provincial levels thus, the same official would exercise executive, legislative and judicial powers. Flowing from this, thirdly, is the nature of the absolutism that characterised political and social power in the Kandyan kingdom, which also relates to a broader historical debate about the propriety of classifying Kandy (and predecessor Sinhala states) as a feudal society. Since this debate engages questions of hierarchical order and the kinds of ritual practices that actualised this order in political and social life, it would be

[88] Ibid: p.150.
[89] Roberts (2004): pp.40-41.
[90] Ibid: p.41.

useful to briefly recapitulate the main views in this debate by way of concluding these preliminary remarks.

The concept of feudalism has been used extensively in describing the pre-colonial state from ancient Anuradhapura to the early modern Kandyan kingdom in contemporary historical scholarship. This is a result, as Roberts notes, of a tendency to emphasise the "political fragmentation" of the pre-British polities. From a positivist retrospective position, modern historians have tended to regard the pre-British state as characterised by substantial decentralisation, due to such factors as weak central authority, communications and transport infrastructure. Added to this was the dominant economic model of production based on "an obligation of service as a condition of holding land."[91] Resonating with the historiography of European feudalism, these two factors are the principal grounds of the feudalist interpretation of the pre-British polity, although as K.M. de Silva has pointed out, the vital difference between these two contexts was that in Sri Lanka, the nature of the relationship between 'lord and vassal' was conditioned fundamentally by the caste system.[92]

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[91] K.M. de Silva (2005): p.51; see also Ch.8.

[92] Ibid: p.51. It might be noted that the concept of feudalism has been extended to the Tamil chieftaincies in the Vanni as well. See S. Pathmanathan, '*Feudal Polity in Medieval Ceylon: An Examination of the Chieftaincies of the Vanni*' (1972) ***Ceylon Journal of Historical and Social Studies*** 2: pp.118-130; S. Arasaratnam, '*The Vanniar of North Ceylon: A Study of Feudal Powers and Central Authority*' ***Ceylon Journal of Historical and Social Studies*** 9: pp.101-112. Note also the discussion of the theme of feudalism in the political economy of the 'Kandyan social formation' from a Marxist perspective in Gunasinghe (1990). Gunasinghe's insight into the coercive role of the state in economic production leads him to a valid argument about the "absolute monarchy" as the key component in the "articulation of the structure" of the Kandyan state: Gunasinghe (1990): p.33. However, as Roberts contends, Gunasinghe's analysis "suffers from the conventional Marxist failings of overdetermined system functionalism and the rigid application of rational, either/or distinctions unsuited to pre-capitalist settings" and "devalues the force of cosmological thinking by viewing the symbolic order as a superstructural

In terms of the limitations on monarchical power that a feudally organised polity are presumed to impose, in the Sri Lankan case particular attention has been paid to the force of customary law (*sirit*) and the secular power that was added to the Sangha through its extensive monastic landholdings (*viharagam* lands), in addition to the 'baronial' power of the landholding aristocracy on which, conceptualised as "bureaucratic nobility," Dewaraja has placed emphasis as a restraining influence on the king.[93] It is interesting to note, however, that Dewaraja, as the authoritative positivist historian of the Kandyan state, entirely avoids the use of the term feudalism, although she provides no reasons for her reticence. Roberts, on the other hand, presents a sustained argument against. Whereas in Western feudalism the relationship between landlord and tenant was defined by a scheme of reciprocal rights, that relationship as mediated by the rite of *dakum* in pre-colonial Sri Lanka "was characterised by striking measures of hierarchy, weak reciprocity and an unilateral flow of gifts from the inferior to the superior."[94] In Roberts' view, without "accepting the Western imperialist picture of 'Oriental Despots,' one can emphasise the absolutist authority wielded by most monarchs" of the Sinhalese kingdoms, limited only by the moral suasions of the *dasarajadhamma* (the Ten Royal Virtues).[95]

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epiphenomenon determined by the order of politics/economics": Roberts (2004): p.43.

[93] L.S. Dewaraja, S. Pathmanathan & D.A. Kotelawele, '*Religion and State in the Kandyan Kingdom: The 17th and 18th Centuries*' in K.M. de Silva (Ed.) (1995) ***University of Peradeniya History of Sri Lanka***, Vol.II (Colombo: Sridevi): p.321. See also Roberts (2004): p.42-43.

[94] Roberts (2004): p.44, see also pp.60-64.

[95] Roberts (2004): p.42; see also M. Roberts, '*Caste Feudalism in Sri Lanka? A Critique through the Asokan Persona and European Contrasts*' (1984) ***Contributions to Indian Sociology*** 18: pp.189-220 at pp.194-196, 207-214. But for the odium attached to the caricature of 'Oriental Despots' due to Victorian racial prejudice, one may reasonably wonder however what the difference in this distinction is.

Reflecting the Buddhist cosmological understandings of sovereignty embodied in the *cakkavatti* model of kingship, and institutionalised pervasively in the political, social and economic life of the community through the caste system, "extreme hierarchical practices" were "enshrined throughout society."[96] Critically, Roberts reminds us that in dealing with the Kandyan kingdom, we are addressing a social order that entertained no separation of politics and religion, in the context of a dominant religio-political philosophy that was fundamentally hierarchical as an explanatory and normative thesis. The emphasis on hierarchy "was the most marked at the apex. The Sinhala monarch possessed the awe-inspiring capacities of a *devo* or god. The monarch was also a central figure in a Buddhist project."[97] Roberts extensively illustrates this argument by reference to the consecration rites of coronation that rendered the Sinhala monarch, not only the *cakkavatti* king of *Sinhalē* (the idea of the *Dipacakravarti*, or Lord of the Island), but also a god (*devo*) and a *bosat* (a Buddha-to-be).[98] The rite of *abhiseka* (coronation) was a

[96] Roberts (2004): p.42. Another important way in which the cosmic hierarchy and the *mandala* pattern was visually and metaphorically actualised in the Sinhala kingdoms (as in other Theravada polities) was through the principles of architecture and town planning. As de Silva Wijeyeratne notes, "their physical layout also drew on cosmological metaphors and pantheons, as the cosmos was symbolically refracted in the material domain of the polity": De Silva Wijeyeratne (2007): p.168; see also R. Heine-Geldern, '*Conceptions of State and Kingship in Southeast Asia*' (1942) ***Far Eastern Quarterly*** 2(1): pp.15-30. James Duncan's work is the authoritative work on these aspects of the Kandyan polity, in which he has shown how "Mount Meru [i.e., the cosmic mountain which is the central pillar or axis of the Indic pantheon] became a paradigm for the spatial organisation of state, capital, and temple": Duncan (1990): p.48; see also pp.48-55.

[97] Roberts (2004): p.44.

[98] See Roberts (2004): pp.44-52. Roberts' rebuttal of the post-Orientalist contention that ethnic difference was politically not salient in the pre-British polity, which among other empirical arguments is based on the evidence of the Tamil-speaking Nayakkar dynasty of Kandyan kings are especially important: see pp.44 et seq. Essentially, Roberts' argument is founded on the transformative import of the coronation rite that renders the king both Sinhala and Buddhist, although in circumstances of political disaffection, the king's ethnic

"constitution and renewal of sacral power."[99] These ideas and rituals not only clothed the king with the Buddhist righteousness associated with the Asokan paradigm, but also reproduced the ideology of the *vamsa* literature centred on the *Mahavamsa*. This ideological historiography "presents a picture of the Sinhalese as a people chosen to preserve Buddhism in its pure form within the chosen location of *Sihaladipa* [the Island of the Sinhalese]."[100] But recalling Tambiah's observations on the concept of the *dhammiko dhammaraja* discussed earlier in this chapter, the *Mahavamsa*, as H.L. Seneviratne argues,

> "elaborates this position further to enthrone the Buddha, Dhamma…and the…Sangha as the true sovereign of Sri Lanka, the king being merely an instrument. On many occasions this principle is given expression by the king abdicating in favour of the legitimate overlord and re-ascending the throne after publicly affirming the supremacy of Buddhism."[101]

It is in these rites and practices and their performative meaning to the population of *Sinhalē* that we begin to see how the latter idea functioned as an ideology of socio-political order. As Seneviratne has also noted, the transformative power of kingship rituals was such that, in addition to the sacralisation involved in *devo* and *bosat* status, they could also alter the king's personal identity *virtute officii*: "when a king is a Buddhist he automatically *becomes* Sinhalese."[102]

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and religious authenticity may be questioned as happened during Ehelepola's palace plot against the last King of Kandy, leading to the latter's deposition and the fall of the kingdom to the British, as well as in a previous event known as the Moladande Rebellion.

[99] Ibid: p.47.

[100] Ibid: p.45.

[101] H.L. Seneviratne, '*Identity and the Conflation of the Past and Present*' in H.L. Seneviratne (Ed.) (1997) ***Identity, Consciousness and the Past*** (New Delhi: OUP): p.8.

[102] Ibid: p.10. Emphasis in original.

Collective Consciousness: The Kingdom of Kandy as *Sinhalē*

With the understanding of the nature of the Kandyan monarchy that the preceding account has given us, I want to explore further how the prevailing conception of collective self-hood sustained the monarchical state. In modern terms, the corresponding relationship is that between the president and the nation. A recent account of pre-British collective consciousness is offered by Michael Roberts in developing the idea of *Sinhalē* in relation especially, but not exclusively, to the Kandyan period. This section explores Roberts' theory of *Sinhalē* further, focussing in particular on its implications for conceptions of territory and collective consciousness in the Kandyan era.[103] As the preceding discussion amply demonstrates, the two closely interrelated 'constitutional' norms that figure prominently in the politico-historical discourse of Theravada Buddhist polities are those of 'hierarchy' and 'encompassment.'[104] If the theory and practice of political order embodied in the Asokan Persona articulates the norm of hierarchy (while also 'encompassing' society within the Buddhist fold), in the pre-British Sinhala kingdoms, and certainly by its final phase in the Kandyan period, it is the idea of *Sinhalē* that represents the norm of encompassment (while also 'hierarchising' society through, *inter alia*, the rite of *dakum* (tribute) and the caste system).[105]

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[103] Both K.M. de Silva and Alan Strathern have described the Sinhala consciousness of the Kandyan era as a 'proto-nationalism': see Roberts (2004): p.16 and A. Strathern, '*Review of Sinhala Consciousness in the Kandyan Period 1590s to 1815 by Michael Roberts*' (2005) ***Modern Asian Studies*** 39(4): pp.1007-1020.

[104] Indeed, their closely interrelated nature is also reflected in the way in which the two terms are often used as adjective and noun in relation to one another in the literature: *viz*., 'hierarchical encompassment' or 'encompassing hierarchy.'

[105] See esp. Kapferer (1988): pp.7,12. While I do not deal with Kapferer's important contributions directly in this chapter, De Silva Wijeyeratne (2007) draws heavily on the development of hierarchy

In relation to the Kandyan period, Roberts' primary contention is that the territorial reach of *Sinhalē* denoted the whole island, rather than merely the areas under the direct control of the King of Kandy; which he further argues is a conception of the territorial scope of Sinhala kingship that was well-established in Sinhala-Buddhist historiography long before the Kandyan era. Thus even the coastal areas under the control of Europeans and the native people living in those areas were regarded as coming within the "umbrella of *Sinhalē*," with the Kandyan areas constituting "the heart of this concept."[106] Led in part by the territorial and departmental distinction between 'Kandyan Provinces' and 'Maritime Provinces' on which the British administration of the island was based in the period between the cession of Kandy in 1815 and the entrenchment of the unitary logic by the Colebrooke-Cameron reforms of 1833, and in part by modernist conceptions of territorial and jurisdictional control, contemporary historians have tended to regard the authority of the King of Kandy as politically fragmented.

This had led to dismissals of the king's authority outside areas of his direct control as merely nominal and politically meaningless, the sovereignty over the claimed territory of the kingdom as legally fictive, and in addition to the effective power of the Europeans in the littoral, having the consequence of opening up the space for considerable autonomy at the peripheries, especially in the Tamil-speaking Vanni chieftaincies of the North.[107]

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and encompassment in Kapferer's theory of Sinhala-Buddhist nationalism.

[106] Roberts (2004): p.54.

[107] A. Liyanagamage (1968) ***The Decline of Polonnaruva and the Rise of Dambadeniya*** (c.1180-1270 A.D.) (Colombo: Ceylon Government Press); S. Arasaratnam, '*Dutch Sovereignty in Ceylon: A Historical Survey of its Problem*' ***Ceylon Journal of Historical and Social Studies*** 1: pp.105-121; Arasaratnam (1966); and T.B.H. Abeysinghe, '*Princes and Merchants: Relations between the Kings of Kandy and the Dutch East India Company in Sri Lanka, 1688-1740*' ***Journal of the Sri Lanka National Archives*** 2: pp.35-58: cited and

Roberts' response to this is that such conclusions are based on "twentieth century notions of sovereignty and statehood as well as materialist forms of determinism."[108] He concedes that *Sinhalē* may have in some contexts been used to distinguish the territory directly under the control of the Kandyan king from those under the control of the Dutch and the British. However,

> "among the dominant elements in the Kingdom of Kandy, its conventional usage was to refer to the whole island and the domain of their king, a monarch who was regarded as *cakravarti* of the whole island. This practice derived from a meaningful and powerful heritage that presented the island as a chosen and land and its Sinhala people as a chosen people [for the preservation of pristine Theravada Buddhism]…The term *Sihala* is employed in the…*Dipavamsa*…and the *Mahavamsa*…as part of this mythology."[109]

Thus, contrary to the suggestion in the post-Orientalist position that this – in comparison to the modern state – unbounded conception of territory in the pre-colonial kingdoms meant that territorial control was politically inconsequential to state form,[110] we have a picture in which in fact territory was central to the notion of collective selfhood. It was just that territory was understood in very different terms to the modern sense, and according to a "political cosmology that was radically

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discussed in Roberts (2004): pp.57,59. See also, at p.54, Robert's rebuttal of both the factual basis and interpretative reasoning of Leslie Gunawardana's claim that, "While the use of the term *Trisimhala* to connote a wider region in the island persisted, the term Sinhalē, in its territorial sense, appears to have been used primarily to denote the Kandyan kingdom": R.A.L.H. Gunawardana, '*The People of Lion: The Sinhala Identity and Ideology in History and Historiography*' in J. Spencer (Ed.) (1990) ***Sri Lanka: History and Roots of Conflict*** (London: Routledge): Ch.3 at p.68.

[108] Roberts (2004): p.59

[109] Ibid: p.56.

[110] See e.g., E. Nissan & R.L. Stirrat, '*The Generation of Communal Identities*' in Spencer (1990): Ch.2.

different to ours."[111] As Roberts asks, "What if the ruling elements of that day and the people under them conceived of obeisance as subordination to superior others? What if 'rule' was the receiving of homage through prostrations and gifts?"[112] It is in answer to these questions that Roberts develops the concept of 'tributary overlordship' in explaining the "political ideology" that underpinned the coherence of the Kandyan state, and the subscription of the people to which is evidenced through the pervasive rite of *dakum* among other practices.[113]

Gananath Obeyesekere's ethnographical work on the 'ideology of status' in Sinhala society is critical to understanding how *dakum* practices "are part of a wider set of norms that govern a whole class of similar types of social relations" including the political relationship between rulers and the ruled.[114] As Obeyesekere has observed,

> "The Sinhala New Year is an occasion for the tenant to pay *dakum* to his lord, the son to his father, the junior kinsmen to the senior, the low in status to the high. In the realm of kingship, *dakum* is the occasion where the rulers of the provinces pay court to the king. The larger population also may pay homage to the king at the annual processional events like the parade of the tooth relic [*dalada perahera*], where the rulers of

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[111] Roberts (2004): p.60.
[112] Ibid.
[113] Ibid. Roberts' 'tributary overlordship' is very similar to what C.R. de Silva in more rudimentary terms described as 'ritual sovereignty': C.R. de Silva, '*Sri Lanka in the Early 16th Century: Political Conditions*' in K.M. de Silva (1995): pp.11-36. It is also akin to Nicholas Dirks' 'ritual kingship': N. Dirks (1987) ***The Hollow Crown: An Ethnohistory of an Indian Kingdom*** (New York: CUP). See also de Silva Wijeyeratne's reference to 'virtual sovereignty': De Silva Wijeyeratne (2007): p.166.
[114] G. Obeyesekere (1967) ***Land Tenure in Village Ceylon*** (Cambridge: CUP): pp.215-223.

> the divine as well as secular appear (*dakum*) before the public."[115]

As this summation indicates, *dakum* was a pervasive rite, in a society that made no distinction between the public and the private, or the religious and the political, and in which a cosmologically ordained order of hierarchy enjoyed the total religio-political subscription of the population as the natural order of things. The resonance of the rite of *dakum* with the concept of *varam* discussed earlier should be noted.[116] The hierarchy of delegated authority coupled with weak reciprocity in the Buddhist pantheon is replicated in the practices of the material world. Drawing on a wide range of existing historical and anthropological scholarship, as well as interpretations of primary materials, Roberts presents detailed evidence on how the rite of *dakum* was exercised in Kandyan society.[117] What emerges is 'tributary overlordship' as the concept of shared, communal loyalty that explains in part the meaningfulness of the Kandyan state to and amongst the (at least) Sinhalese Buddhist natives of the island: a distinctive form of collective consciousness, hierarchically focused on the Sinhala and Buddhist king, which was performatively expressed through an elaborate set of customs relating to tribute-paying homage flowing from inferior to superior, and with little or no reciprocal obligations in the opposite direction. In this way, taken together with other factors contributing to the formation of collective sentiment among the Sinhalese including Buddhism, the idea of *Sinhalē*, in a generic rather than the specifically Andersonian sense, constituted a tangible

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[115] G. Obeyesekere (1987) ***The Cult of the Goddess Pattini*** (New Delhi: Motilal Banarsidas): p.55.
[116] See also Roberts (2004): p.70.
[117] Roberts (2004): p.60-64. As Alan Strathern has noted, one of the most original features of Roberts' 2004 monograph is the use of the *hatan kavi* or war poems representing an oral mode of communication that was not only socially widespread but also sentimentally evocative, in order to demonstrate the prevalent political self-understandings of 'we-ness' and kingship in pre-British Sinhala society: see Strathern (2005): p.1007.

'imagined community.'[118] The "gaze and emblem" of the community's "felt freedom"[119] was the entire panoply of ideas, norms, myths, rites and practices that constituted "the imagery of kingship" which was integral to "the hierarchical ideology through which the social order was articulated."[120]

Roberts presents a sustained critique of the post-Orientalist reliance on Gellner and Anderson, and the modernist or functionalist account of nationalism. The key modernist assumptions with regard to the pre-modern

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[118] In an observation that adds comparativist credence to Roberts' conceptualisation by drawing attention to like notions of collective identity in other Theravada Buddhist polities, Strathern notes that "the principles of [Roberts'] 'tributary overlordship' are largely taken for granted in Southeast Asian scholarship": Strathern (2005): p.1019.

[119] "The gaze and emblem of the nation's 'felt freedom' is the sovereign state" was the way in which Benedict Anderson enunciated the relationship between the nation and the state in the modernist Westphalian model. As he also observed in relation to the late eighteenth century circumstances which gave rise to modern nationalism in Europe, the "concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm": B. Anderson (1983) ***Imagined Communities: Reflections on the Origin and Spread of Nationalism*** (London: Verso): pp.7, 13-16. The contemporaneous Kandyan state, which did not face the political challenges of the sort presented by the European Enlightenment and revolutions, was in these terms a clearly pre-national polity in which cosmologically ordained hierarchy held sway. In the formation of modern Sri Lankan nationalisms, therefore, the post-Orientalists are right in stressing the role of colonialism, which is the political event through which the European conception and language of nationalism entered the Sri Lankan lexicon. However, they are wrong to regard nationalism as invented and purely the result of British colonialism. The evidence presented by Roberts shows that a discernible collective consciousness did exist prior to the nineteenth century. The more relevant enquiry therefore is how such pre-British conceptions of collective self and statehood percolated into, and informed and shaped especially the Sinhala-Buddhist and Tamil nationalist movements in the late colonial and postcolonial eras, once the categories and language of European nationalism had begun structuring political rhetoric, culture and discourse among the island's native peoples.

[120] J. Brow (1996) ***Demons and Development: The Struggle for Community in a Sri Lankan Village*** (Tucson: Univ. of Arizona Press): p.39.

or traditional societies are that: the state of communications and mobility were so weak as to enable collective solidarity only in the most localised environments; that hierarchy and heterogeneity meant that notions of equality and homogeneity essential to the sense of nation were absent; and that extensive boundary crossing denoted the political irrelevance of bounded territory central to national consciousness. *Per contra*, Roberts' evidence shows, in Alan Strathern's words, "oneness in hierarchy" and "a sense of patriotism expressed through xenophobic antipathies and a conviction of sovereign right to territory."[121] As Strathern also points out, *Sinhalē* as articulated through tributary overlordship resonates with the concept of 'politicised ethnicity' that Victor Lieberman has developed in relation to Southeast Asian polities, as "a sense of political community not only proved compatible with, but in fact depended on the maintenance of a deeply hierarchical social ethic."[122]

In the next step of establishing how tributary overlordship functioned, Roberts draws upon the *mandala*-type organisation of the Kandyan state, and especially its capital as synecdoche. In this respect, while Roberts' arguments on the significance of the exemplary centre are strongly substantiated, we need to consider his views more critically in the light of Strathern's critique of aspects of his reasoning, and Roshan de Silva Wijeyeratne's attempt to present a more pluralist and decentralising interpretation of the politico-administrative practices of Kandyan state.

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[121] Strathern (2005): p.1013. It should also be noted that Strathern's comment is made in the context of his close attention to Robert's "chief corpus of primary evidence…the *hatan kavi*, or war poems" (p.1007) of the Kandyan period and before. As Strathern affirms, the war poems provide "a vivid picture" and "unambiguous evidence" as to how "oneness in hierarchy" as an imagined community looked like: p.1013.

[122] V. Lieberman (2003) ***Strange Parallels: Southeast Asia in Global Context, c.800-1830*** (New York: CUP): p.43. See also Strathern (2005): pp.1018-1019.

State Form: The Kingdom of Kandy as a *Mandala*-State

Tambiah has himself applied his conceptualisation of the galactic polity to the political facts of the Kandyan kingdom.[123] In this, he notes how pulsating *mandala*-type states were "centre-oriented formations with shifting and blurred (rather than bounded exclusive spaces)" characterised by "checks and balances", "contesting factional formations of patrons and clients", and "devolutionary processes of power parcelization [*sic*]."[124] The political dynamics of the Kandyan kingdom demonstrated these features, in which "administrative involution was profuse," "[t]here was a diminishing replication of the central domain in the satellite units," and "[t]he king's authority waned as the provinces stretched farther away from the capital."[125] All these features "allowed for and produced social and political processes that were flexible, accommodative, and inclusionary as well as competitive, factional, and fragmenting."[126] The absence of a notion of bounded space allowed the provision of "niches for immigrant groups, or stranger groups of different 'ethnic' origins and different 'religions.'" [127] In sum then, Tambiah's visualisation of the Kandyan kingdom as galactic polity

[123] Tambiah (1992): pp.173-175. It is perhaps relevant to note by way of background that in this book, Tambiah associates himself (at p.131 and fn.6) with the post-Orientalist perspective of the authors in Spencer (1990). In this and his preceding 1986 book on Sri Lanka, Tambiah adopts the stance of an "'engaged political tract' rather than 'distanced academic treatise'": Tambiah (1986), p.ix. In this regard, note the vexed political context of Sri Lanka in the 1980s and early 1990s, especially following the anti-Tamil pogrom of July 1983, in which many liberal minded academics felt impelled to combat the onset of extreme chauvinism on both sides of the ethnic divide by adopting critical positions on nationalism.
[124] Tambiah (1992): p.173.
[125] Ibid: p.174.
[126] Ibid.
[127] Ibid.

highlights the flexible, pluralist and inclusive qualities of that state form, but with a major caveat. This inclusiveness was of the encompassing and therefore assimilationist, or to use his term, 'incorporationist,' type: "it was this galactic blueprint that positively enabled the Sinhalisation and Buddhicisation of south Indian peoples and gods to continue uncoerced."[128] Extending Louis Dumont's thesis in *Homo Hierarchicus*, Tambiah has seen such "subordinating incorporation"[129] as a "standard South Asian mode of differentially incorporating into an existing society sectarian or alien minorities: inferiorize [sic] them and then place them in a subordinate position in the hierarchy."[130]

Roberts disagrees with Tambiah's emphasis on extreme decentralisation, pluralism and fragmentation, because to him the evidence of the rituals and practices associated with the "power and glory of the *cakravarti* ruler at the head of the *mandala*-like state known as *Sinhalē*" occasioned a far more centralised and integrated model of state, albeit one understood not by the application of modern frameworks of territorial jurisdiction, but according to the logic of tributary overlordship: "the design of the state as well as the Buddhist pantheon was hierarchical. In consequence, the immigrant gods and peoples were either assimilated or domesticated in the long run; or received satellite positions that placed them on the periphery of social power."[131]

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[128] Ibid: p.175, See also Tambiah (2005): p.297.
[129] Strathern (2005): p.1014.
[130] Tambiah (1992): p.145. L. Dumont (1980) ***Homo Hierarchicus: The Caste System and its Implications*** (Trans. M. Sainsbury, L. Dumont & B. Gulati) (Chicago: Chicago UP).
[131] Roberts (2004): p.64. Once again, Roberts' adduces a substantial body of evidence in establishing the centrality and epitome-like quality of the centre, which "stood as a sign, a synecdoche, for the whole polity": p.65. This material covers the topographical principles of architectural design and such vital ritual institutions as the *Esala perahera*, the *karti mangalya,* among numerous other matters. See, ibid, pp.64-68.

A key question that arises here is as to the relationship between the King of Kandy-as-*Sinhalē* and the Tamil-speaking entities in the Vanni region of the North, in the context of the Kandyan kingdom as a *mandala*-state.[132] One of the contextual factors that have to be borne in mind in examining the emergence of the Vanni chieftaincies and their relationship with one or other suzerain is the turbulent political situation in the island in the long period spanning the late fourteenth sixteenth to the mid seventeenth centuries.[133] This period is a kaleidoscopic canvass of waxing and waning power between several fluctuating power-centres and politico-military actors including the three Sinhala kingdoms of Kotte, Sitavaka and Kandy, the Tamil kingdom at Jaffna, the Portuguese, and at the empennage of the epoch, the Dutch as well. Thus as K.M. de Silva has observed,

> "In their own territories the Vanni chieftains functioned very much like feudal lords…and they owed their allegiance to one or other of two kingdoms, depending on the political situation which, during much of late fourteenth and early fifteenth centuries, could often mean an accommodation with the Tamil kingdom or the principal Sinhalese kingdom."[134]

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[132] While we are concerned only with the Tamil chieftaincies of the northern Vanni, it should be noted that this is an area of historiography that is extremely complex and even obscure. The Vanni was a vast area the extent of which depends on the historical period under consideration. Likewise, the origins and ethnic identity of the people who inhabited the Vanni would also differ depending on which of its areas and which period one is considering. All of these issues are made even more complicated by the scarcity of information. See the overview of these issues in Roberts (2004): 70-78.

[133] See generally, K.M. de Silva (2005): Chs.7-18; C.R. de Silva (1988): Chs.8-12. See also A. Strathern, '*Sri Lanka in the Long Early Modern Period: Its Place in a Comparative Theory of Second Millennium Eurasian History*' (2009) ***Modern Asian Studies*** 43(4): pp.815-869.

[134] K.M. de Silva (2005): p.134.

In the reference to the Vanni chieftains as autonomous feudatories, de Silva's observations comport with the general scholarly consensus on the nature of these entities and their relationship with a higher monarch:[135] "The general tendency among historians has been to assume that these outlying chieftaincies strove for autonomy and were fissiparous units." [136] However, given Roberts' critical views on the use and relevance of the concept of feudalism (discussed above), here too his argument is that these characterisations are informed by "twentieth century notions of administrative authority." [137] In advancing the idea of tributary overlordship as the more appropriate way of explaining the centre-periphery relationship, he argues that the key to understanding this is "the character of allegiance and the meanings attached to the practice of 'the tribute' and/or 'the gift' in that era."[138] While conceding that the subordination of the Vanni chieftains to the King of *Sinhalē* was not "fixed in stone"[139] in the context of the "paradoxes…pulsations and oscillations"[140] that characterised the operation of galactic polities, Roberts' argument is that,

> "the King of Kandy-as-*Sinhalē* inherited a pattern of rulership over distant territories in which powerful local chieftains, or little kings, acknowledged his *cakravarti* status as *Trisinhalesvara* [i.e., like *Dipacakravarti*, one of the titles of the Sinhala monarch signifying his overlordship over the whole island] by either occasional or regular acts of homage. These acts were usually rites of *dakum* involving gift-giving…or abject words of

[135] Ibid: Ch.8; Roberts (2004): p.74.
[136] Roberts (2004): p.76.
[137] Ibid: p.74.
[138] Ibid.
[139] Ibid: p.75. Indeed, before Kandy established itself as the sole Sinhalese kingdom, "the kingly chieftains of the northernmost sections of the Vanni acknowledged the overlordship of the Kingdom of *Yalppanam* [Jaffna] once the latter had established itself by the fourteenth century": ibid, p.77.
[140] Tambiah (1985): pp.280-281.

> excuse for the failure to do so. Such practices were saturated with political meaning."[141]

With all this in mind, we may now introduce Strathern's critique of Roberts' reasoning in regard to tributary overlordship and its implications for the concomitant rejection of the use of terms such as feudalism and autonomy in relation to early modern Sri Lanka. Greater force is perhaps added to Strathern's critique by virtue of being situated within a broader affirmation of the thrust of Roberts' main argument and the latter's concern with the "indigenous or emic viewpoint."[142] Like Roberts, Strathern regards it as important "that we understand that from the perspective of the Kandyan court the whole of Sri Lanka came under its canopy, and that we do not reduce the playing out of this ideology to mere coercion: no doubt it could cultivate genuine loyalties among peripheral chieftains."[143] However,

> "[Roberts'] emphatic championing of ideology over pragmatics can come to seem a rather artificial intervention. It is surely equally valid for historians to pursue an etic perspective as regards what all this entailed in terms of economic and political control, and surely possible to do this without being blinkered by 'twentieth century notions of administrative authority'."[144]

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[141] Roberts (2004): p.76. One example from his plethora of evidence is how various headmen of the Vanni regions pledged loyalty and contributed resources to the first great rebellion against the British in 1817-18, which sought to restore the Kandyan monarchy. "These expressions of allegiance to the old order from such outlying localities is suggestive because British rule could not have had a severe material impact on such places in the course of two years [i.e., since 1815 and the fall of the last king]. In other words, they suggest that the chieftains and headmen of the Vanni, the epitome of fissiparous principalities in the imagination of modern scholars, remained attached to the idea of Sinhala kingship": ibid, p.76.
[142] Strathern (2005): p.1012.
[143] Ibid.
[144] Ibid.

Roberts' aversion to the etic approach therefore paradoxically heightens the "contrast between symbolic and pragmatic power" and "runs the risk of eliding the dynamism" of Tambiah's galactic model.[145] Strathern provides two illustrations that are very germane to our concerns. In the first, we see Roberts dismissing Dewaraja's reference to the Kandyan rulers "having broken away from the authority of the Kotte king"[146] as "informed by a misleading materialist logic."[147] But as Strathern points out, in the sixteenth century "there is no question but that the kings at Kotte imagined themselves heir to a *cakravarti* tradition of lordship over the island, but that did not stop Kandy attempting to break away and claim such titles for itself."[148] In other words, tributary overlordship in the pulsating dynamics of the galactic polity was no definitive guarantee against peripheral challenges to the centre's cosmic sovereignty. While Roberts accepts this, and even provides examples of acts of insubordination by peripheral functionaries, the underlying thrust of his argument is that such events did not disturb the overarching coherence of the encompassing authority of the King of *Sinhalē*. Strathern's point suggests that a less *parti pris* attitude to centre-periphery relations is justified.

Strathern's second point concerns Roberts' objection to the use of the term feudalism. While agreeing with the latter's contention on the absence of reciprocal rights in the tributary relationship between liege and vassal in the Sinhalese kingdoms, Strathern nonetheless finds it difficult to regard K.M. de Silva's use of feudalism (see above) as "offensive," because de Silva "uses it to refer simply to high levels of political decentralisation and the assumption that producers were subject to an obligation of service as a condition of holding land."[149] The use of feudalism in this broad sense, in which the King of Kandy

[145] Ibid: p.1013.
[146] Dewaraja (1972): p.15.
[147] Roberts (2004): p.40, n.1.
[148] Strathern (2005): p.1013.
[149] Ibid.

unfailingly treated the Europeans as his vassals (and who were granted an entitlement to certain rights and privileges in the maritime areas specifically in that capacity), could even "explain why Sinhalese, Portuguese and Dutch could all find a rough-and-ready common diplomatic language in the rites of homage or tribute presentation (*dakum*)."[150]

Consequently, we could conclude that it is not inappropriate to envision political space in the periphery in terms of autonomy, and the political space of the whole as fragmented. The tendency of galactic polities, noted by Tambiah and others, for the institutional form of political power at the periphery to be designed by emulation and replication of the centre, supports this conclusion.[151] As Roberts has himself noted, some of the Sinhala terms by which the Vanni chieftains were known included *Vanni Rajavaru*, *Vanni Nirindu* and *Vanni Ranno*: "This is significant: the term may have carried connotations that are weightier than our concept of 'chieftain' because all these terms translated as 'king.'"[152] Moreover, it was likely that, given the high importance within galactic polities of *realpolitik* factors such as relative military or economic power, and geographic factors such as distance from the centre and the nature of the terrain, different peripheral entities enjoyed different relationships with the centre in relation to autonomy.[153] Thus we can envisage the

[150] Ibid.
[151] Kemper (1991): p.65
[152] Roberts (2004): p.74.
[153] For instance, Roberts' (and virtually all others') description of the Vanni based on sources from the seventeenth to nineteenth centuries is surely pertinent in a consideration of the relationship between regional rulers in this territory and the Kandyan court in the wet zone agrarian heartland of the central hills and valleys. Characteristic features of the Vanni included thick "dry zone jungle and scrub; a sparse population that tended to eke out a subsistence; malarial conditions and plentiful wild animals, including numerous elephants [and man-eating leopards]. Within this expanse, only pockets, usually on the coast or nearby, could be said to escape this description": ibid, pp.70-71. See also H.L. Seneviratne, '*Religion and Legitimacy of Power in the Kandyan Kingdom*' in B.L. Smith (Ed.) (1978) ***Religion and***

pattern of centre-periphery relations as not only protean and temporally contingent, but also asymmetric. What is more, all of this was possible within a framework in which the notion of *Sinhalē* remained ideationally meaningful in the political and social imagination of the people.[154]

Conclusion

This overview of the insights of historical anthropology in relation to the dominant pre-colonial state form enriches our understanding of the cultural and historical myths, memories, and symbols that constitute the residual resources with which Sri Lankans and in particular Sinhala-Buddhists approach contemporary politics and constitutional questions. Many years ago, at the beginning of Sri Lanka post-colonial existence, Evelyn Ludowyk made a prescient remark when he observed,

> "Take the Sinhalese, its major group. Beneath the patina of several centuries of civilization, of considerable sophistication of thought and sensibility there lurks something of an older world, not properly assimilated with what replaced it or with the new, and even now disturbing by its presence. This may be little more than the effect on the observer of the complexity of the culture of a mixed group of people with long and various traditions. But this is no ordinary complexity; it deepens as the major events of a long history are unfolded. At all times

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Legitimation of Power in Sri Lanka (Chambersburg: Penn.: Anima Books): pp.177-187; H.L. Seneviratne (1978) ***Rituals of the Kandyan State*** (Cambridge: CUP): p.114; De Silva Wijeyeratne (2007): p.170.

[154] While we may be confident, on the strength of Roberts' theory of collective consciousness, that the idea of *Sinhalē* certainly held meaning among the Sinhalese inhabitants of the island (perhaps even non-Buddhist Sinhalese in the European controlled areas), in spite of the fact of paying tribute to the Sinhala king, we need to place a question mark over whether this idea held the same meaning for, and generated the same sense of loyalty among, (non-Buddhist) Tamil-speakers in the Vanni and beyond.

> there seem to have been continually present in the culture seemingly incongruous and irreconcilable elements."[155]

Speaking specifically of the *Mahavamsa*, he continued, "The records of 1500 years ago are not the dead hand of the past, they are the voice of the living present."[156] These emic factors are central to contemporary constitutional politics. Applying solely modernist and positivist categories of constitutional self-understanding often if not always leads to misleading conclusions. Seen this way, it would seem that Sri Lankan constitutional law has a long way to go in theorising the continuum between the traditional and the modern in the relationships between, on the one hand, culture and history, and on the other, politics and law. I have not attempted to draw direct connections in the discussion above, but it should be readily apparent how startlingly obvious are the connections between modern constitutional institutions and principles like the presidential executive, the unitary state, the foremost place for Buddhism, and the primacy of the Sinhalese language, and the traditional characteristics of the pre-modern Sinhala-Buddhist state such as Buddhist kingship, the idea of *Sinhalē*, hierarchical encompassment, and tributary overlordship. Again as Ludowyk noted,

> "[The Mahavamsa's] thirty-seven chapters arranged its own highly subjective record of the past so decisively that later history was influenced by it. The clearest outlines of its own reconstruction of its events were: the identification of religion with the state; the dependence of the stability of the country on this; the development of a strong sense of Sinhalese nationalism out of the opposition to Tamils."[157]

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[155] E.F.C. Ludowyk (1962) ***The Story of Ceylon*** (London: Faber & Faber): p.24.
[156] Ibid: p.49.
[157] Ibid: p.67.

We must not be enslaved to the limitations imposed by an essentialist reading of these insights, but it is nonetheless true that if constitutional law – in both its descriptive and normative dimensions – is to respond to the functional dynamics of the polity (or at least the decisively dominant ethno-nation within the polity) in any meaningful way, then constitutional lawyers must learn to actively incorporate these insights into their core tasks of analysis and prescription. The undoubted benefits of constitutional comparativism and (especially liberal) normativism cannot be gained unless there is analytical realism about the role of culture and history in the practice of constitutional politics. In reforming the Sri Lankan executive presidency, liberal constitutionalists in particular have to pay more attention than they have in the past to these matters, and fashion arguments towards liberal aims by taking into account the limitations and opportunities that are present within this milieu.

14

Cosmology, Presidentialism and J.R. Jayewardene's Constitutional Imaginary

Roshan de Silva Wijeyeratne[1]

[1] This is an edited version of R. de Silva Wijeyeratne (2014) ***Nation, Constitutionalism and Buddhism in Sri Lanka*** (London: Routledge): Ch.8. I am grateful to Routledge for permission to publish a version of Chapter 8 in this collection.

Introduction

The background to the return to power of the United National Party (UNP) in 1977 was the slow but steady disintegration of the Sri Lanka Freedom Party (SLFP)-led United Front government in the mid-1970s. First, in 1975, the Lanka Samasamaja Party (LSSP) was expelled from the coalition and by the end of 1976 the breach between the SLFP and Communist Party (CP) was irrevocable. Cynically, the SLFP tried to negotiate a deal with an increasingly frail Chelvanayakam and Federal Party (FP) to extend the life of parliament on condition that the government address the discrimination that confronted the Tamils. When Chelvanayakam died in March 1977, the negotiations came to an end. In the election of July 1977, the UNP under J.R. Jayewardene achieved a landslide victory, decimating the SLFP and leaving the LSSP and CP with no parliamentary representation. The TULF, under its new leader Appapillai Amirthalingam, emerged as the official opposition – one committed to Eelam.

With respect to Tamil nationalism, in 1975, the Tamil United Front changed its name to the Tamil United Liberation Front (TULF), which in May 1976 adopted the Vaddukodai resolution committing the TULF to the establishment of a Tamil State of Eelam. The territory of the new state was composed of the Northern and Eastern Provinces. This was contentious, given that the Jaffna kingdom in its most expansive period extended down the north-west coast, but not the north-east coast.[2] As a reactive form of nationalism, the Tamil variant was no less prone to phantasms than its Sinhalese Buddhist interlocutor, but these were phantasms driven by the state's desire to destroy the contiguity of Tamil habitation between the Northern and Eastern Provinces, a process that intensified under the Jayewardene regime.[3] Like its predecessors, the new government was at ease with invoking an Asokan aesthetic.

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[2] A.J. Wilson (1994) ***S.J.V. Chelvanayakam and the Crisis of Sri Lankan Tamil Nationalism*** (London: Hurst): pp.125–129; K.M. de Silva (1986) ***Managing Ethnic Tensions in Multi Ethnic Societies: Sri Lanka, 1880-1985*** (Lanham, MD: University Press of America): pp.403–406.

[3] See <http://www.uthr.org/Reports/Report11/appendix4.htm> accessed 20th November 2011.

UNP Rule, Buddhist Righteousness and Authoritarianism

In the course of the 1977 general election Jayewardene invoked the Buddhist imaginary. His purpose was to initiate a period of governance according to the principles of *sādacharaya* (virtue), echoing the values of a righteous Buddhist king in the Asokan mould.[4] Consistent with the principles of modernist Buddhism, the new government set out to 'assist the *sāsana* by fostering moral behaviour on an individual basis'.[5] This was also the perfect ontological ground for the liberal economics of the regime – throwing open the doors to foreign investment and all manner of market driven excess of which the new regime would be significant architects. In stressing the moral conduct of the Sinhalese individual, this was a significant departure from the emphasis on the Sinhalese national collective that was associated with the Bandaranaike's and the SLFP. That said Jayewardene's reliance on Asokan metaphors ensued that the Sinhalese collective was never far from his horizon – he would prove adept at mediating market-driven individualism with the claims of the Sinhalese Buddhist collective.

Jayewardene exploited 'popular feeling for Buddhist moral leadership'[6] in the shadow of the Sirimavo Bandaranaike government's breach of democratic norms. This found expression in a set of practices that refracted older Asokan rituals that brought the centre, periphery and semi-periphery into a unified relation – unity being a virtuous ideal in Buddhist historiography. Thus, in redefining the administrative districts of the island, Jayewardene had saplings from the sacred bo tree in Ānuradhapura 'planted in the administrative capitals of the island's nine provinces'.[7] The meaning generated by such action was conditioned by the same ontological ground that oriented the Buddha's earlier act of claiming the island for the dhamma, with

[4] S. Kemper (1991) ***The Presence of the Past: Chronicles, Politics and Culture in Sinhala Life*** (New York: Cornell UP): pp.167–168; S.J. Tambiah (1976) ***World Conqueror and World Renouncer: A Study of Buddhism and Polity in Thailand against a Historical Background*** (Cambridge: CUP): pp.159–178.
[5] Kemper (1991): p.166.
[6] Ibid (1991): p.171.
[7] Ibid.

the past providing an insight into living well in the future. Its encompassing logic (which would have been received differently in the Tamil-dominated north-east of the island) was echoed in his decision to move parliament from Colombo to Jayawardhanapura in Kōttē, which was close to the centre of power during the time of the Kōttē kingdom.

Jayewardene fashioned himself as a Sinhalese Buddhist monarch in a line that went back 2500 years to Vijaya. In engaging a set of practices that refracted the hierarchical logic of the *Asokan Persona*, Jayewardene's initial steps in government were designed to create a righteous society (*dharmista samājaya*)[8].[9] This was particularly marked in relation to his revival of an agricultural ceremony that harked back to pre-European Buddhist kings. The ceremony itself entailed entering a rice field 'behind a pair of bullocks to plow the first furrow of the sowing season – that gave expression to the king's involvement'[10] in paddy cultivation. His gesture was consistent with earlier UNP prime ministers who had made an ideological elision between their agricultural policies and the hydraulic culture propagated by Buddhist kings in the pre-Kandyan period.[11] Jeyewardene thoroughly identified with the monarchical role that such a performance sought to refract and anticipated the drift towards authoritarianism that Jayewardene's rule in the 1980s would embody.

On becoming prime minister, Jayewardene enacted his fidelity to the motivating hierarchy of the *Asokan Persona* when he spoke from the octagonal pavilion (*pattirippuva*) of the Daladā Māligāva, looking down on the gathered crowd and stating that his

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[8] M. Roberts (1994) ***Exploring Confrontation: Sri Lanka – Politics, Culture, and History*** (Geneva: Harwood): pp.111–115; see also A. Abeysekara (2002) ***Colors of the Robe*** (Columbia, SC: University of South Carolina Press): pp.93–94.

[9] The Asokan Persona signals a group of hierarchical cultural and ritual practices that in both precolonial and postcolonial Sri Lanka inform the imaginary of the state and the diverse ethno-religious relationships that the state institutes. In the pre-British period, the Asokan Persona was transmitted through the all--encompassing logic of Buddhist kingship. The Pāli chronicles confirm the emergence and consolidation of a Sinhalese Buddhist consciousness.

[10] Kemper (1991): p.172.

[11] Ibid: p.164–165.

government 'would usher in an age of peace'.[12] In a discursive move that bore no relation to the historical record (but one thoroughly consistent with the content of Sinhalese Buddhist nationalism), he stressed 'continuity with the precolonial past'.[13] He mischievously noted that:

> "When the country enjoyed freedom it is from here the kings addressed the people. Those who became Prime Minister with your assistance spoke from here …"[14]

King Śrī Vikrama Rājasinha had built the *pattirippuwa* in 'order to watch spectacles from an elevated height'[15], but he was the only monarch to have spoken from it, and Jayewardene was the first elected leader to do so. Like his predecessors, Jayewardene was at ease when invoking the hierarchical ritual structure of the *Asokan Persona*. It shared an ontological ground that conditioned not just Sinhalese Buddhist myth, but also the Sinhalese Buddhist world of the everyday. However, the medium of the bureaucratic state ensured that the hierarchical rituals of the *Asokan Persona* that Jayewardene mimicked were subject to a Sinhalese Buddhist nationalist revaluation. The institutional reforms of both Bandaranaikes ensured that the state's reflexive mode of being was one motivated by a Sinhalese Buddhist nationalist cultural milieu. It was one that Jayewardene would proceed to exploit it in his monarchical persona.

While Jayewardene remained hostile to monkish political activism, his cultivated persona as an Asokan king was challenged in 1977 when lay Buddhist activists asked him to transform the semi-theocratic republic into a fully fledged Buddhist republic. However, Jayewardene's free-market ethos extended to a reluctance towards instituting a state-sanctioned religion. He responded by passing on the burden for the creation of a *dharmista samājaya* to an expanded Ministry of Cultural Affairs and by creating a Department of Buddhist Affairs that was to take over responsibility for the *sāsana*. Consistent with his free-market

[12] Ibid: p.173.
[13] Ibid.
[14] Cited in ibid: pp.173–174; see also Roberts (1994): p.138.
[15] Kemper (1991): p.173.

instincts, Jayewardene said that while the state would assist Buddhist organisations in proselytising the dhamma, the creation of a *dharmista* society depended more on 'individuals acting as individual moral agents',[16] than on legislation. Maximising the potential for individual Buddhist morality, the new Minister for Cultural Affairs, E.L.B. Hurulle, set out to revive Sinhalese Buddhist civilisation in rural Sri Lanka. He appeared oblivious to the Buddhist modernist revival all around him, although such a narrative had symbolic purchase given the Sinhalese Buddhist nationalist capture of the rural heartland since Dharmapala had first invoked its centrality in the nineteenth century. At the core of Hurulle's Buddhist imaginary was the resurrection of an Asokan practice, albeit in a thoroughly modernist vein: the 'appointment of cultural officers in each electorate to foster culture at the village level'.[17]

Jayewardene's modernist imperative had to find a way to compensate for his hostility towards the Rahulite monks who continued to dominate the public persona of the Sangha. His hostility towards political *bhikkhus* was long-standing – he had in 1982 spoken out against the lay and monk activists of the Sinhala Bala Mandalaya, which echoing Dharmapala, stressed the importance of Sinhalese Buddhist unity along racial, religious and territorial lines. However, his opposition was not based on sensitivity towards the minorities, but on a modernist 'conception of Buddhism as a religion of individual responsibility'.[18] It was a Dharmapalite gesture that shifted Buddhism's ontological concerns to a much more mundane epistemological terrain concerned with crude economic utility. However, as an Asokan-style monarch, he mollified the suspicions of Buddhist activists by increasing the level of state patronage to the public display of Buddhist ritual, and the restoration of Buddhist 'sacred' sites, as well as initiating an extension of the *Mahāvamsa* – all practices that had an ontological ground, but which within the idiom of modernity became a vehicle for the consolidation of a Sinhalese Buddhist popular history cum sovereignty.[19]

[16] Ibid: p.176.
[17] Ibid: p.175.
[18] Ibid: p.178.
[19] Ibid: pp.179–180.

Jayewardene made public funds available for the task of extending the *Mahāvamsa*. Initially in charge of the project was Nandadeva Wijesekera, a former chair of the Official Languages Department. Under Wijesekera's stewardship, the *Mahāvamsa, Nutana Yūgaya* (new *Mahāvamsa*) became an ideological vehicle to 'celebrate the historical career of the Sinhala people and their culture'.[20] It also enabled the UNP, a party that sporadically had opposed the Sinhalisation of the state since the 1950s, the opportunity to fashion a 'Buddhist identity for itself'[21], a project that owed everything to the modernist reimagination of both Sinhalese Buddhist historiography and the rituals that characterised the *Asokan Persona*. The result was an over-determined reproduction of the hierarchical categories of the *Asokan Persona* that, oriented by the hierarchical (but one possessive of a fragmenting aspect) cosmic order, was now imagined through the medium of a unitary state.

The new *Mahāvamsa* was divided into two volumes, the first covering the period from 1935 to1956, the year of Bandaranaike's election victory. The second would cover events between 1956 and 1978, the year in which the second republican constitution was promulgated. Unlike the *Mahāvamsa-Cūlavamsa* proper, the focus of this new extension was significantly different – not so much an ontologically grounded account of Buddhist kingship, polity and society, but rather one whose authorising ground was epistemic. Its account, written in an accessible form of Sinhala (and not Pāli), was intended to communicate to the Sinhala-speaking laity a matter-of-fact account of how developments in Sinhala literature, music, dance and architecture in the years between 1935 and 1978 had contributed to both the renaissance and 'continuity of Buddhist civilisation'[22] among the Sinhalese people.

When Volume 1 was published in May 1987, its epistemic ground was summed up in the introduction as follows: 'history should be understood by recognising that the nation's faith in religion

[20] Ibid: p.180.
[21] Ibid: p.181.
[22] Ibid: p.186.

[Buddhism] is its context (*pasubima*).[23] The introduction speaks of a Buddhist 'religion' in the reductionist terms that came to dominate the Orientalist imaginary – it was a version that bore no relation to the diversity of *dharmaśāstric* practices that early Buddhism mediated.[24] It is only within this epistemological horizon that we can understand the author's introductory observation that the years since independence have witnessed a drive 'to recover the lost rights of the cultural heritage of the Sinhala Buddhists'.[25] Its demeanour is nationalist, transferring the Sinhalese Buddhist nation's plot on to the 'citizens and leaders of the new nation – who played a role in reclaiming the cultural heritage of Sinhala Buddhists'.[26] Its audience was the Sinhalese Buddhist laity, who in the new *Mahāvamsa* had replaced 'kings and colonial governors as the agents of Sinhala history'.[27] As with all ideological projects, there was an elision of past and present – about how the imaginary of the Sinhalese Buddhist present spoke to that of the past, about how Sinhalese Buddhists should *see their world*.[28] [29]

The ideological elision of past and present continued to provide symbolic capital to other dimensions of government policy. That Jayewardene imagined himself an Asokan[30] monarch lent itself within the horizon of the bureaucratic state to further acts of centralisation as evoked in the promulgation of the second republican constitution in 1978. The constitution was drafted by a Parliamentary Select Committee, in which the TULF, given its mandate to negotiate the terms of a separate state, refused to

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[23] Ibid: p.188.
[24] P. Olivelle, '*Dharmasastra: A Textual History*' in T. Lubin, D.R. Davis Jr. & J.K. Krishnan (Eds.) (2010) ***Hinduism and Law: An Introduction*** (New York: CUP): pp.31–57.
[25] Kemper (1991): p.188.
[26] Ibid: p.189.
[27] Ibid.
[28] Ibid: p.191–193.
[29] Jayewardene spent much time facilitating the emergence of an avowedly apolitical Buddhism that delegitimized monkish political activism through the establishment of a Buddhist and Pāli University, which would train monks to propagate the dhamma both locally and overseas. This short-lived act of institutionalized repression, gave way in the mid-1980s to over-determined monkish support for the JVP. Abeysekara (2002): pp.97–104.
[30] Abeysekara (2002): p.93.

participate.[31] The new constitution combined the Westminster system of cabinet government with a centralised Gaullist styled executive-presidency.[32] While the 1978 Constitution obviated the immediacy of the anti-Tamil discrimination that had being placed on the statute book by SLFP-led governments, it became the screen for Jayewardene's Asokan pretensions.

The 1978 Constitution was full of contradictory imperatives, while essentially centralising, it also ameliorated the institutionalised anti-Tamil discrimination put in place by earlier SLFP-led governments.[33] Many of these gestures however were symbolic, as far as the position of the Tamil language was concerned, it still remained fundamentally subordinate to Sinhala as per the onus of the State to promote, preserve and protect Sinhala. The Tamil Language (Special Provisions) Act was incorporated into the Constitution, thus ensuring that ordinary legislation and regulations under delegated legislation could not be invoked to do further injury to the use of Tamil in judicial, administrative and public matters. But as with the passage of the Tamil Language Regulations in 1966, the problem was one of enforcement, with the Sinhalese higher bureaucracy showing little enthusiasm towards implementing what had, under the 1978 Constitution, become a *de facto* parity of status between Sinhala and Tamil.[34] However, in what appeared an advance on the existing status, the provisions on language (Chapter IV) were declared justiciable under Article 126(1) of the constitution.[35]

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[31] The 1978 Constitution was supported by some Tamil political leaders in the belief that an executive president could insulate him/herself from the pressure of Sinhalese nationalists and hence arrive at a lasting political settlement: de Silva (1986): pp.257-261, 403–406.

[32] C.R. de Silva, '*The Constitution of the Second Republic of Sri Lanka (1978) and Its Significance*' (1979) ***The Journal of Commonwealth and Comparative Politics*** 17(2): pp.192–209.

[33] In a significant conciliatory gesture, the new regime reversed the discriminatory university admissions policy that had been in force under the UF government. de Silva (1986): pp.306–311.

[34] de Silva (1986): pp.296–300.

[35] Fundamental Rights (Chapter III) under the constitution are justiciable (Article 17). However, the jurisdiction of the Supreme Court is so limited as to render the fundamental rights provisions of the constitution 'largely illusory'. International Crisis Group (2009) ***Sri Lanka's Judiciary: Politicised Courts, Compromised Rights*** (Brussels: ICG): p.9, such that between 1978-1987 there was only one petition to the Supreme Court complaining of a breach of the language provisions,

The limited protection the constitution guaranteed to the Tamil language failed to take account that the axis on which constitutional Tamil nationalism turned had moved on from language to an emphasis on radical autonomy to the north-east of the island, as Tamil separatist groups increasingly circumscribed the policy options of the TULF.[36] The constitution provided for a hierarchical model of government, guaranteeing the president (under Articles 42–61) an extraordinary level of power in relation to the executive (including the prime minister, the cabinet and the Public Service Commission, which was to have overall responsibility for the public service) and judicial (Articles 105–117) branches of government.[37] However, it was the logic of Jayewardene's performative mode as president that made possible a link between the constitution's hierarchical *telos* and the ordering/reordering capacity of violence directed at those who would disorder the state's logic of power – the arrangement of difference 'in hierarchical unity'.[38] Like an Asokan monarch, Jayewardene encompassed all before him, with the centralisation of power in the president's office refracting the hierarchical logic of the *Asokan Persona*; mediated through the bureaucratic state, this rendered ever more authoritarian possibilities imaginable.[39]

Jayewardene's approach thus made concessions on the spatial organisation of the state near impossible to countenance. Tamil nationalist politics was taking a violent turn as the LTTE and other groups targeted the institutions of the state, which entailed targeting Sinhalese public servants – particularly in the north. The TULF was increasingly in the position of the tail wagging the LTTE dog, and Jayewardene – like a demonically possessed being

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ibid: pp.16–22. Furthermore, an incumbent president is immune from judicial review: International Crisis Group (2010) *War Crimes in Sri Lanka*, Asia Report No.191 (Brussels: ICG).

[36] de Silva (1986): pp.327–331.

[37] The reconstitution of the Public Service Commission under the 1978 Constitution did not facilitate the re-emergence of the principle of impartiality in the appointments process to the public service.

[38] B. Kapferer (1997) ***The Feast of the Sorcerer: Practices of Consciousness and Power*** (Chicago: Chicago UP): p.172.

[39] The assault on judicial independence was born of the intolerance to 'alternative centres of political power'. ICG (2009): p.4; R. Hoole (2001) ***Sri Lanka: The Arrogance of Power*** (Colombo: University Teachers for Human Rights (Jaffna)): pp.87-90.

– faced encompassment by both the greater demonic force of the Tamil margin and the seemingly beneficent force of Sinhalese Buddhist nationalist opposition to what they portrayed as a policy of appeasement to Tamil separatism.

Jayewardene's response was contradictory. On the one hand, he initiated legislation to ban the LTTE, requesting parliament to pass what would become the Prevention of Terrorism (Temporary Provisions) Act (PTA).[40] On the other, he appointed a Presidential Commission to explore the possibility of introducing a measure of devolution to address the Tamil demand for administrative autonomy to the north-east. The result was the passage of the District Development Councils Act 1980. It was passed in the face of opposition from the SLFP and Buddhist activists. But, fearful of the devolutionary potential granted to these councils (and twenty-four councils were planned), their powers in the areas of rural development, education, employment, health services, housing, and land use and settlement were rigidly curtailed by the centre through a District Minister (appointed by the president), who would enforce the will of Colombo. The District Minister would provisionally act as a counter to the performative consequences of such autonomy. In practice District Councils were to function as an advisory body to the District Minister.[41]

As the election approached, and following the murder of three Sinhalese policemen in Jaffna, Sinhalese paramilitaries set fire to Jaffna Library in May 1981, thus destroying the most significant Tamil literary archive in the island.[42] When the elections were held in June 1981, the TULF became the largest party in the Tamil-dominated districts of the north-east. However, the District Development Councils failed in their intended purpose – Tamil autonomy – because of a failure to transfer adequate financial resources from the centre and the failure of the cabinet to delegate 'powers, duties, and functions to the District Minister'.[43] While the delegation of these powers was made in September

[40] The anti-terror legislation (renewed every year since 1979) has proved relatively ineffective, dealing with the symptoms rather than the causes of Tamil separatism.
[41] A.J. Wilson (1988) ***The Break-Up of Sri Lanka*** (London: Hurst): p.359.
[42] de Silva (1986): pp.332–333.
[43] Ibid: p.317.

1982, as late as May 1983 there had been a failure to inform the District Councils of the manner in which delegated functions were to be carried out. The good intentions of the TULF were undone by the centralising logic of the state.

Outside parliament, Buddhist activists mobilised against the UNP regime. The free-market agenda pursued by the UNP provoked Labuduwe Siridhamma, an SLFP-aligned monk, to accuse Jayewardene of creating an *unrighteous society*, the opposite of what Jayewardene had set out to create. Buddhist activists were adept at turning Jayewardene's invocation of Buddhist tropes against him.[44] Moral decline came to be embodied in the 'emigration of Buddhist women as domestic servants to the Middle East'.[45] The discursive terrain of *unrighteousness* expanded when in 1982 Labuduwe Siridhamma called Jayewardene a 'traitor' to the Sinhalese Buddhist nation – a trope that would soon be adopted by the JVP against the UNP. In the Sinhalese Buddhist nationalist imaginary, Jayewardene increasingly was manifesting his disordering demonic potential – beneficent transformation was imminent in his violent encounter with the Tamils.[46]

Far from being a traitor, the UNP was consolidating a policy agenda initiated by S.W.R.D. Bandaranaike. In the Eastern Province, Sinhalese Buddhist nationalist phantasms were being acted on. Economic development was pursued with a view towards ethnically cleansing the Tamils and Muslims from Trincomalee District in particular.[47] The state's encroachment on to Tamil land and the marginalisation of Tamil labour in the state-owned corporations in the east were a prelude to the riots in Colombo that would soon follow.

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[44] Initially, this charge against Jayewardene's unrighteousness was framed in terms of a critique of the market reforms pursued by the Finance Minister.
[45] Abeysekara (2002): p.209.
[46] Jayewardene had irked Sinhalese nationalists when in 1979 he said that, in keeping with Buddhist principles, he did not 'differentiate between saying that this is a Sinhalese, this is a Tamil'. Abeysekara (2002): p.208.
[47] In 1993, of the 5000 acres appropriated by the Ports Authority, 700 were ceded by President Premadasa to 'government abetted encroachment by Sinhalese'. Hoole (2001): p.78.

The sacred was also a dominant trope that motivated the Sinhalese encirclement of the minorities in the east. Cyril Mathew, a government minister, had his secretary roam the environs of Trincomalee, 'figuring out ancient Buddhist sites and places to plant Sinhalese'.[48] In the Eastern Province, the discovery of sacred places played an 'expressive role in establishing the spiritual unity of the island while they simultaneously enabled its political unification'[49].[50] Such practices, which fetishised the sacred, were an ideological gesture that elided the past and the present, as old pre-colonial signifiers discovered novel import within the bureaucratic territorialisation of the colonial and post-colonial state. Usually, these sites conveyed a message of religious syncretism – Hindu and Mahāyāna Buddhist – but the ideological motivation of the state 'was that these ruins were proof of the region's Theravada–Sinhalese Buddhist past',[51] which necessitated the return of Sinhalese Buddhists to these areas. In restoring the Sinhalese to these regions, which possessed a sacred aura, the state reactivated the memory of Buddhist kingship and its symbiotic relationship with the restoration of *vihāras* and monuments to the Buddha, with the state actively engaging in a *karmic* economy.

By early 1983, the state was giving the appearance that it was preparing for the use of force against the Tamils – initially against Indian Tamils who had resettled in Trincomalee District.[52] The state set about violently evicting these Indian Tamils and relocating them back to the Hill Country – the disordering potential of the Indian Tamils re-encompassed within the hierarchical social order of the Kandyan highlands. These expulsions had the effect of further reordering the demography of Trincomalee, preparing the ground for the arrival of Sinhalese (usually landless) settlers. In Jaffna, the mood was equally tense. On 12th July 1983, in *The Island* newspaper, Vinoth Ramachandra wrote of the failure of the Sinhalese-owned press to cover the institutional violence directed against the Tamils. She wrote that if

[48] Hoole (2001): 79.
[49] Kemper (1991): p.137.
[50] When Tamils claimed recognition of Hindu sacred places in the East, they were met with contempt by Sinhalese archaeologists and epigraphers Hoole (2001): pp.75–78.
[51] Hoole (2001): p.78.
[52] Ibid: pp.79–81.

the readership in the Sinhalese south was motivated to inquire in to the cause of the separatist insurgency, 'they would soon discover that the primary cause of [separatist] terror lies in the presence of undisciplined security forces supported by repressive legislation. The arbitrary detention of young males … and the general vindictive spirit of a trigger happy military are quickly driving the public into sympathy for the Tigers.'[53]

In the eight months leading up to July 1983, the government fermented an 'atmosphere of repression and insanity'.[54] The extra-legal (neo-McCarthyite) assault on Tamil activists, politicians and people – particularly in the east – was couched in terms of a response to a Naxalite conspiracy orchestrated by the CPC, the Left activist Vijaya Kumaratunga and his partner, Chandrika Bandaranaike Kumaratunga. While the conspiracy was masterful UNP propaganda, it ensured that Jayewardene comfortably won the presidential election against Hector Kobbekaduwa of the SLFP in October 1982. His victory precipitated a further drift in the direction of a securitised state, with the amendment of the PTA giving the armed forces the power to dispose of bodies without an inquest – the state now given the capacity to operate in a manner that was beyond judicial scrutiny.[55]

These legislative changes provided cover for an assault on Tamil interests in general; in this task, they were assisted by the print media – independent as well as state.[56] Jayewardene went so far as to tell London's *Daily Telegraph* on 12th July 1983 that, '[n]ow we can't think of them [the Tamils]. Not about their lives.'[57] The pogrom of July 1983 was immediately preceded by the state-sponsored violence directed at Tamils in Trincomalee, which left over a dozen dead. Once again, the motive was the reorganisation of space in this ethnically contested region – a move that was aimed at diminishing the Tamil presence in preparation for the inevitable act of Sinhalisation.

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[53] Ibid: p.86.
[54] Ibid: p.90.
[55] Ibid: pp.98–101.
[56] Ibid: pp.83–84, 96–98.
[57] Ibid: pp.60–62, 84.

In Colombo, violence irrupted on 24th July. The spark that lit the fuse was the funeral of 13 Sinhalese (all Buddhist) soldiers who had been killed in an LTTE ambush in Jaffna – their bodies were brought to Colombo and were prepared for burial in a mortuary next to the cemetery.[58] In the emotionally charged atmosphere of the cemetery, as the gathered crowd awaited the burial ceremony, the monk Elle Gunawanse (who was closely associated with Gamini Dissanayake, the minister in charge of the Mahaveli hydroelectric scheme) and head of the Sinhala Mahajana Peramuna, incited the crowd to move against the Tamils.[59]

Violence initially broke out in the vicinity of the cemetery, the consequence of an 'overflow of heightened emotions on the part of the crowd gathered there – the schoolboys and friends and relatives of the dead, some of the security forces, plus some of the local populace in Borella [a suburb of Colombo]'.[60] It then spread to other inner-Colombo suburbs. Sporadic attacks directed at Tamil drivers, shop owners, pedestrians and so on soon turned into something 'more destructive and homicidal and showed firm evidence of planning and direction, of participation of politicians, government employees … and the use of government vehicles'.[61] The state did not seek to hide its complicity – Cyril Matthew, the Minister of Industries and confidante of Jayewardene was on 26th July identified directing a Sinhalese mob as they set about destroying large Tamil businesses.[62]

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[58] While the funeral may have been the spark that precipitated the riots, the state seemingly was planning to unleash violence against the Tamils irrespective of the death of the soldiers – one government minister boasted in early July 1983 that the Tamils would soon be 'taught a lesson'. Wilson (1994): p.104.

[59] Hoole (2001): pp.173–175. Gunawanse had allegedly drafted a list of Tamil establishments to be targeted. Wilson (1994): p.145. He would also 'became popular through the songs he wrote for the military'. I. Frydenlund (2005) ***The Sangha and its Relation to the Peace Process in Sri Lanka*** (Oslo: Norwegian Ministry of Foreign Affairs): p.24, extolling the Buddhist virtues of killing and dying for the motherland against the Tamils. R. Gombrich, '*Is the Sri Lankan War a Buddhist Fundamentalism?*' in M. Deegalle (Ed.) (2006) ***Buddhism, Conflict and Violence in Modern Sri Lanka*** (New York: Routledge): p.37.

[60] Hoole (2001): pp.105–108; see also S.J. Tambiah (1986) ***Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy*** (London: I.B. Tauris): pp.21–33.

[61] Tambiah (1986): p.72.

[62] Hoole (2001): pp.110–111; see also Wilson (1994): pp.125–143, 161–170.

The attacks on Tamils and Tamil-owned enterprises spread beyond Colombo to Kandy and the Hill Country.[63] Evidence of the planned nature of the violence was not concealed – those leading the attacks carried 'voter lists and addresses of Tamil owners and occupants of houses, shops, industries, and other property'[64].[65] By the end of the riots, the Tamil mercantile class lay in ruins, with Sri Lankan citizens reduced to refugee status.[66] Up to 2000 Tamils were killed because the agencies of order were under command (tacit rather than explicit) to observe a passive deportment while 'fresh violence irrupted'.[67]

The violence of July 1983 revealed the crisis in the institutional structures of Sri Lanka's post-colonial modernity. It was a thoroughly modern riot made possible by the institutions of a bureaucratic state.[68] Cyril Matthew's Ministry of Industries was at the core of its modernity – it possessed taxonomic knowledge about the location and ownership of Tamil businesses, the specific information required for the target lists to be composed and the ministry's employees – though the Jātika Sēvaka Sangamaya (National Workers Organisation) that Matthew controlled, also provided significant labour power for the pogrom[69].[70]

The riot succeeded in reordering the ethno-social composition of capital in Colombo. Post-1977 economic liberalisation had ruined the Sinhalese-dominated light industrial sector, while the Tamil

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[63] Hoole (2001): pp.102–104

[64] Tambiah (1986): p.73.

[65] In a candid moment in August 1983, Jayewardene conceded that the state had devised an elaborate scheme to attack the Tamils, but this concession was made in the name of trying to place the blame on another false Naxalite plot: Wilson (1994): pp.110, 144–145.

[66] ***India Today***, 31st August 1983.

[67] T. Dissanayake (1983) ***The Agony of Sri Lanka: An In-Depth Account of the Racial Riots of 1983*** (Colombo: Swastika): p.81.

[68] Z. Bauman (1991) ***Modernity and the Holocaust*** (Oxford: Blackwell). This seminal account of the Holocaust focuses on the causal relationship between an enumerated bureaucracy and extermination.

[69] Hoole (2001): pp.122–123; G. Obeyesekera, '*Political Violence and the Future of Democracy in Sri Lanka*' (1984) ***International Quarterly for Asian Studies*** 15: pp.39–60.

[70] Exemplifying the contradictions of Sinhalese Buddhist nationalism, Matthew's Low Country ancestry is traceable to the service castes (who have a South Indian genealogy).

and Muslim trading and service sectors benefited.[71] As the private sector expanded, job opportunities increased – particularly for the minority communities – thus circumventing the dominant patron–client networks to which Sinhalese entrepreneurs had access. Middle-level Sinhalese capitalists were disgruntled and openly vented their anger in the Sinhala language press. The import-substitution regime between 1956 and 1977 had benefited them, but an open economy forced them into competition with Tamil and Muslim entrepreneurs. Matthew's control of the Jātika Sēvaka Sangamaya was one aspect of 'networks of patronage, brokerage, and violence'[72] that expanded in the shadow of economic liberalisation.[73] The urban poor could be mobilised by these networks in the defence of their sense of the Buddhist social imaginary, as well as in defence of sections of the Sinhalese capitalist class.[74]

Tambiah has alluded to the 'theatricalization, and an accompanying ritualization and polarization, in the escalating contests of violence'[75] between the Sinhalese and Tamils. He has drawn an analogy between the euphoria that characterised Sinhalese on Tamil violence and the Sinhalese Buddhist efflorescence of 'devotion to ecstatic cults'.[76] Kapferer has captured the ontologically grounded nature of euphoria in the performative structure of violence in the 1983 pogrom.[77] The violence was, if anything, hierarchical in intent – that is, it sought to resubordinate the Tamil other who threatened the unity of the state at an ontological level.[78] Refracting the logic of a healing ritual, acting 'with the force of their own cosmic incorporation',[79]

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[71] N. Gunasinghe, '*The Open Economy and its Impact on Ethnic Relations in Sri Lanka*' in Committee for Rational Development (1984) ***Sri Lanka: The Ethnic Conflict – Myths, Realities and Perspectives*** (Colombo: CRD): pp.211–212.
[72] Tambiah (1986): p.51.
[73] Liberalisation merely created new patterns of dependent capitalism M. Moore (1985) ***The State and Peasant Politics in Sri Lanka*** (Cambridge: CUP); Tambiah (1986): pp.52–57.
[74] Gunasinghe (1984): p.213)
[75] Tambiah (1986): p.117.
[76] Ibid: p.59. Roberts (1994): pp.317-330, has commented on the ecstatic *enjoyment* etched on the Sinhalese as they rampaged against the Tamils.
[77] Kapferer (1998)
[78] The humiliation of the TULF freed up space for the LTTE to fill the vacuum.
[79] B. Kapferer (1998) ***Legends of People, Myths of State: Violence, Intolerance***

Sinhalese rioters fragmented 'their demonic victims as the Tamils threatened to fragment them, and by doing so resubordinate and reincorporate the Tamil demon in hierarchy'.[80] Such violence, by restoring the integrity of a fragmenting Sinhalese Buddhist social order, also restores the personal integrity of the Sinhalese individual cum collective as 'both the anguish of the person and the anguish of the nation are overcome in the power of hierarchy'.[81]

The violence of July 1983 was thoroughly ontological, for intrinsic to the emergence of Sinhalese Buddhist nationalism as an ideological practice was 'a particular ontology of the person and the state',[82] such that the 'condition of the person is synonymous with the condition of the state'.[83] The ontological *telos* of Sinhalese Buddhist historiography is replete with this relation, with the cosmological order structuring the performative logic of the relation between Buddhist kingship, the Sangha and the individual. However, in the course of the July 1983 riots, the fury of the violence directed at the Tamils was mediated through a bureaucratic order that positioned Tamils in a subordinate relation. Violence as a cultural practice is intensified once it happens to be motivated by an ontology of the everyday that finds itself in the service of a nationalist project. Challenging 'assumptions integral to the being of the nation also attacks the person' at an 'ontological depth, at the very source of being and existence in the world'.[84] Their passions fired, Tamils literally burned in their houses in order that the hierarchy of the Sinhalese Buddhist state could be restored, with the subject discovering 'his or her internal unity as an essential hierarchical condition which, in turn, is dependent on the hierarchical encompassing unity of the Buddhist state'.[85] Violence of this nature becomes a mechanism through which the Sinhalese Buddhist subject internalises the *unifying* force of the Sinhalese Buddhist state.

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and Political Culture in Sri Lanka and Australia (London: Smithsonian Institution Press): p.101.
[80] Ibid.
[81] Ibid: p.111.
[82] Ibid: p.102.
[83] Ibid: p.103.
[84] Ibid: p.83.
[85] Ibid: p.103.

Instead of engaging in self-reflection on the modernist Buddhism that has provided an authorising ground for such violence, leading monks called for a military campaign against the LTTE, even advocating that monks be prepared to disrobe and join the army.[86] Jayewardene's response was contradictory: having fostered the conditions that made July 1983 possible, he questioned the Buddhism of monks who advocated a military solution.[87] Their response was vehement: Hendigalle Pannatissa accused Jayewardene and the government of being traitors to the Sinhalese Buddhist nation.[88] Young monks who had been trained within the intellectual currents of modernist Buddhism – a cultural milieu that dominated the educational *pirivenas* – questioned the Buddhist nature of the state that Jayewardene was fashioning.[89] It was only through regenerative violence that the state could become more *righteous* and hence more Buddhist.

Failing to persuade the state to launch a total military campaign against Tamil separatists, many of these young monks would shortly gravitate towards the JVP, which provided the organisational resources for a sustained campaign of regenerative violence against the state – merely a prelude in their imaginary for a final assault against the LTTE. It would fall on the JVP to save the Sinhalese Buddhist nation from those who would betray it, and in this they too would draw on a violent aesthetic intrinsic to the Sinhalese Buddhist imaginary.

Rhetorically, the charge of *betraying* the nation was a powerful weapon that was used astutely against Jayewardene. In defence of

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[86] Abeysekara (2002): p.213. In June 1985, the chief monk of the Dutthagāmanī Vihāra near Galle raised the subject of monks disrobing in order to join the armed forces in the fight against Tamil separatist groups. One of the *sutras* chanted at this gathering was alleged to have been the one used by the Buddha to expel demons. Kapferer (1998): p.87.

[87] Abeysekara (2002): p.214. Gamini Dissanayake promised that in 14 minutes the Sinhalese could sacrifice the 'blood of every Tamil in the country' were they to continue to pressure for Indian intervention on their behalf <http://www.eastwestcenter.org/fileadmin/stored/pdfs/ps040.pdf> accessed 20th November 2011.

[88] Abeysekara (2002): pp.215–216. In January 1984, Walpola Rahula, Jayewardene's ally, called for the military to eradicate Tamil separatists.

[89] Abeysekara (2002): pp.218–219.

the UNP's Buddhist aura, in February 1985 Jayewardene spoke of the terror from *without* causing division *within*: 'The terrorists are attempting to shoot their way into the heart of Sri Lanka to the borders of what they call … Eelam. If we do not occupy the border, the border will come to us.'[90] Invoking the ontological ground occupied by Dutthagāmanī, and echoing the trope of Tamil *invasion* used by Gunasekera in the Constituent Assembly in the early 1970s, in March 1985 Prime Minister Premadasa, speaking in Tangalle near Magama – the birthplace of Dutthagāmanī – observed that:

> "Leaders had arisen in the south … to lead the battle against them [i.e. Tamil separatists]. Some people held the wrong belief that King Dutugemunu was a racial warrior. He was actually a rational leader, whose object was to preserve the freedom and integrity of the country. He was also a leader who realised from where the danger to the nation came from: the north and the east. That was why he went from [Magama] to Ānuradhapura to establish his kingdom."[91]

Premadasa emphasised the *unifying* and encompassing power of Dutthagāmanī in opposition to the LTTE, which had moved to a fragmenting position on the margin of the Sinhalese Buddhist state. Dutthagāmanī embodies 'ontologically the legitimate destructive, but reconstitutive violence of the state'.[92] In the ideological reading of the myth of kingship given by Premadasa, the violence directed against the Tamils by the modern state is – as with Dutthagāmanī's campaign against Elāra – wholly consistent with reason as it confronts the demonic forces of non-reason. Premadasa envisaged an encompassing 'rational violence ultimately leading to the re-establishment of the ordered [and hierarchical] state unified in reason'.[93]

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[90] Kapferer (1998): p.86.
[91] Ibid
[92] Ibid.
[93] Ibid. Even among Sinhalese who would describe themselves as ethical Buddhists, there was a tendency to blame the victims for creating the conditions that provoked Sinhalese Buddhist violence. Hoole (2001): pp.189–193.

The potency of this ontological ground was once again evident in early 1985 in an encounter between the newly appointed commander of the army and the Mahānayāka of the *Siyam Nikāya*.[94] The commander told the Mahāyānayakes that Sri Lanka faced its most critical encounter with fragmentation, 'threatened by terrorists who were being aided and abetted by foreign countries and organisations'.[95] The Mahānayāka of the Asgiriya chapter replied that 'not only the Government but also the people in general and the Maha Sangha in particular have built up hopes that [the Commander] would deal with all enemy forces in the country with the blessings of the Triple Gem and all the protective deities of Sri Lanka'.[96] The Sinhalese Buddhist state encompasses the Sinhalese Buddhist nation, which in turn encompasses the Sinhalese Buddhist people in a hierarchical relation. Only through an encompassing violence can the Sinhalese Buddhist nation be reordered, simultaneously restoring the hierarchy of the cosmic order.

Political actors thus speak the world which they and others are already within – the 'ontology of evil and of the state embedded in the myths … is strongly present in current realities'.[97] As the Thimpu peace talks approached in July 1985, Jayewardene found himself the butt of humour – which also, as an ideological gesture, was informed by the ontology of the cosmic state. The talks collapsed in August 1985 when the government delegation refused to recognise the Northern and Eastern Provinces as constitutive of the Tamil 'homelands', a principle conceded in the Indo-Sri Lanka Peace Accord of July 1987. In February 1986, Jayewardene was portrayed in a cartoon in *Divaina* (a Sinhala-language newspaper) as 'twisting and turning within'[98] the transformational and hierarchical process of a Sinhalese Buddhist exorcism ritual – the *Sanni Yakuma* rite, which is an intrinsic part of the *Suniyama*, but also an exorcism ritual in its own right. The cartoon presented Jayewardene 'as the supreme exorcist of state in a violent transformational struggle to restore the encompassing equanimity of an ordered hierarchy threatened by a demonic

[94] Gombrich (1988): pp.139–140.
[95] Kapferer (1998): p.87.
[96] Ibid.
[97] Ibid.
[98] Ibid: p.89.

possibility at its base'.[99] Jayewardene was portrayed as being in an internal struggle between Kola Sanniya, the destructive demon that inhabits the margins of the Buddhist cosmic order, and Deva Sanniya, a 'benign transformation of Kola Sanniya'.[100] Jayewardene was refracting the agony of the Sinhalese Buddhist nation, in which intra-Sinhalese Buddhist conflict echoed the transformative logic of an exorcism ritual, the demonic and the benign in a struggle over encompassment.

Thus Jayewardene increasingly was portrayed as a demonic protagonist fragmenting the Sinhalese Buddhist state/nation from within – he had been encompassed by his demonic potential. The cause of such a portrayal – he revealed an increasing willingness under Indian pressure to compromise with the non-separatist Tamil leadership. Ironically, his desire for compromise about the structure of the state had something in common with the pragmatics of the Asokan state, in contrast to its all-encompassing claims to *virtual* sovereignty.[101] However, it was a position that alienated him from Buddhist activists. As the fortieth anniversary of independence approached, one conclusion was certain: Sinhalese Buddhist notions of the demonic and legendary heroes of Sinhalese Buddhist historiography had 'broken free from their mythic and ritual containment'[102], generating a variety of Sinhalese Buddhist nationalist meanings, whose potential for destruction was now mediated through a taxonomic state. The destructive impact of this taxonomic state would intensify in the years ahead.

[99] Ibid: p.90.
[100] Ibid.
[101] S.J. Tambiah (1992) Buddhism Betrayed? Religion, Politics, and Violence in Sri Lanka (Chicago: Chicago UP): pp.78–79.
[102] Kapferer (1998): p.90.

15

The 'Line' Between Religion and Politics

Ananda Abeysekara

In the early 1980s, when President Jayewardene was arguing that the ideal monastic life entailed abandoning politics, his prime minister, Ranasinghe Premadasa, began to argue just the opposite. As early as 1983, Premadasa stated that the "success of the present or the future efforts of our government lies in the hands of the Maha Sangha," and he invited monks to play an active role in the affairs of the government:

> "It is the Maha Sangha who in the past had the key to the success of the nation and possesses it now and will also possess it in the future. It is the Maha Sangha who can exercise the most effective influence over the people to bring about peace, unity and discipline … No government can give this position of power and influence to the Maha Sangha nor can any government deprive the Maha Sangha of that position."[1]

In 1985 Premadasa pronounced that, "traditionally the Maha Sangha has given its guidance to the government and its people at all times. It is in need of that guidance as never before to lead the country through the present critical period."[2] Again, two years later, the prime minister asserted that the "responsibility of directing the rulers along the right path lies with the monks";[3] he said he spent much of his time with monks because they were his 'best friends' (*hodama mithrayō*).[4] Sometimes Premadasa sought to demonstrate the closeness of his friendship with the monkhood so far as to implicitly challenge the authority of President Jayewardene. In 1985, for example, despite reported warnings from his colleague-ministers, Premadasa attended the funeral of the Buddhist monk Labugama Siridhamma, who has once denounced Jayewardene as a 'traitor.'[5]

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[1] '*Success of Govt's Effort in Hands of MahaSangha*', ***Daily News***, 29th January 1983.
[2] '*PM Calls for Maha Sangha's Guidance*', ***Daily News***, 16th July 1985.
[3] '*Pālakayan Yahamaga Yävīme Vagakīma Sangharatnayatayi*' ('*The monks are responsible for guiding the rulers*'), ***Silumina***, 8th March 1987.
[4] '*Budu Dahama Jīvita Hädagasvana Jīvana Kramayak*' ('*Buddhism is a way of life that moulds human lives*'), 8th January 1987.
[5] Author's interview with monks at the Getambe temple, 7th August 1996.

Premadasa's position became even more visible during his presidency. In 1989 he remarked that, "kings and ministers sought the Buddha's advice. We have to seek the advice of the Maha Sangha to the solution of the [ethnic] crisis that we are facing today."[6] Premadasa took some prominent monks to the 'battlefield' in the north to inspect enemy bunkers and 'bless' Sinhala Buddhist soldiers fighting the war.[7]

This chapter examines how a particular kind of relations between Buddhism and the state (and by extension Buddhism and the nation) during Premadasa's prime ministry and presidency came to be authorised. Central to my inquiry is the examination of the dynamics of several significant 'Buddhist' projects – such as the construction of a so-called golden canopy for the Temple of the Tooth – that Premadasa undertook and completed. The significance of such practices is far from self-evident. For me, they make sense only when we look at how some authoritative Sinhala narratives made centrally visible a specific relation between Premadasa's 'Buddhist' identity and the 'Buddhist' nation of Sri Lanka. This relation, however, was subsequently contested by competing discourses that generated a very different kind of a relation between Buddhism and the nation, focusing on Premadasa himself.

My task here is not to provide an account of 'why' a decidedly complex political figure like Premadasa, unlike any other politician in the modern history of Sri Lanka (or South Asia for that matter) undertook so many costly state-sponsored 'religious' projects. The 'why' of his undertaking such unprecedented religious projects is precisely what governs the theoretical structure of Josine van der Horst's important book on Premadasa's religious rhetoric and performances.[8] Referring to the bloody political climate that characterised Premadasa's presidency (about this, more later), van der Horst argues that

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[6] ***Daily News***, 8th July 1989.

[7] '*Rata Rakina Sebalunta Āsiri: Malwatu Maha Nāhimiyō Uturē Yudha Bimata Vaditi*' ('*Blessings to the soldiers protecting the country: The Malwatu chief monk visits the battlefield in the north'*), ***Dinamina***, January 1992.

[8] J. Van der Horst (1995) ***Who Is He, What Is He Doing: Religious Rhetoric and Performances in Sri Lanka during R. Premadasa's Presidency, 1989-1993*** (Amsterdam: V.U. University Press): p.131.

Premadasa's "almost frantic engagement in religious observances and performances of meritorious deeds" was a result of his "anxiety concerning the balance of his merit ... over the excessive violence Premadasa [had] been in charge of."[9] This was van der Horst's own learned view: "I do not doubt that Premadasa was anxious over his merit status."[10]

It is clear that such a claim presupposes a direct relation between the modern present and the ancient past – that is, between Premadasa's religious practices and those of the famous third century B.C.E. Buddhist emperor Asoka, who supposedly turned to Buddhism after waging a bloody battle over Kalinga, that cost one hundred thousand lives. Van der Horst states that Asoka's "plans of action are discernible in Premadasa's performances."[11]

For van der Horst, then, Premadasa's observable 'religious' practices are self-evident; that is, they are available for identification and explanation in relation to a presumed given model (the emperor Asoka). As Nietzsche argues,

> "The question 'why?' is always a question after the *causa finalis*, after the 'what for?' ... Here Hume was right; habit ... makes us expect that a certain often-observed occurrence will follow another: Nothing more! That which gives extraordinary firmness to our belief in causality is not the great habit of seeing one occurrence following another but our inability to interpret events otherwise than as events caused by intentions. It [the question 'why?'] is a belief ... in will, in intention ... it is a belief that every event is a deed, that every deed presupposes a doer, it is belief in the 'subject'."[12]

I argue that Premadasa's practices are significant within particular debates in which they are battled out and defined as a Buddhism and difference. Here I examine some of those debates that authorised and contested a particular line between religion and

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[9] Ibid.
[10] Ibid:p.130.
[11] Ibid.
[12] F. Nietzsche (1968) ***The Will to Power*** (Trans. W. Kaufmman & R.J. Hollingdale) (New York: Vintage): p.295.

the nation-state during the Premadasa prime ministry to show how that line can be invested and divested of distinct meanings in differing conjunctures.

Authorising a Ruler, Religion, and Nation

The new constitution that made Jayewardene executive president in 1978 rendered the office of prime minister "lower in status than that of the prime minister of the fifth French Republic." Some scholars argue that under the new constitution, the prime minister (who in theory was also the "chief of government majority") "did not have the authority to direct, supervise or command his colleagues."[13] Premadasa himself exaggerated at one point that, as prime minister, he "did not have the powers even equal to [those] of a peon."[14] However no sooner did he become prime minister than a number of authoritative discourses began to construct a particular relation between Premadasa, his political office, Buddhism, and the nation.

In the late 1970s, the state newspapers recognised that the office of prime minister had "lost some of its power" after Jayewardene's introduction of the executive presidency; however, they went on to claim that the office had gained "enhanced importance" because the man who then held it, Premadasa.[15] For several weeks, explaining this supposed enhanced importance of the office, the newspapers carried a flood of articles that portrayed Premadasa as a "man of the people" who had "a deep understanding of the problems of the underdog which few Sri

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[13] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka*** (London: Macmillan): p.62 cited in K.M. de Silva & W.H. Wriggins (1988) ***J.R. Jayewardene of Sri Lanka*** (Honolulu: University of Hawaii Press): p.385.

[14] Quoted in '*Groups with vested Interests trying to Oust President*', ***The Island***, 21st September 1991.

[15] ***Ceylon Daily News***, 11th February 1978.

Lanka politicians can match";[16] he was, they said, an "asset to the nation."[17]

One writer observed that, "the mantle of this high office sits lightly on Premadasa, who is in a sense the real man of the people to achieve the distinction of becoming the country's first prime minister. Very much unlike prime ministers before him, from D.S. Senanayake to J.R. Jayewardene, Premadasa was not born into wealth and is proud of his humble origin."[18]

Newspapers carried reports of many influential Buddhist monastic voices speaking his praises. Madihe Paññasiha celebrated Premadasa as a "great leader who has always wished for the prosperity of the motherland and the Buddha Sasana [and who] strives to follow the [Buddha's] middle path." Paññasiha said Premadasa followed "in the footsteps of Anagarika Dharmapala, a great religious leader whose worthy example Premadasa is emulating.

A non-smoker and teetotaller, [Premadasa] observes the five precepts very devoutly."[19] Welagammedde Wimalajoti exalted the new prime minister as a "good Buddhist" and a "good Sinhalese patriot." "It is very rare", the monk said, "that a person who is religious, nationalistic, and patriotic is born to the world. It is a great blessing to the nation that such a person has been born. Prime Minister R. Premadasa is a person who possesses such rare qualities." [20] A day after Premadasa was sworn in as prime minister, the newspapers highlighted his Buddhist identity in front-page headlines: "The Prime Minister Attends Pooja [offering] at Temple as First Official Act."[21]

My point is that, even though the new Jayewardene constitution symbolically demoted the office of prime minister, diverse

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[16] Ibid.
[17] '*A Friend to All- an Asset to the Nation*', ***Ceylon Daily News***, 11th February 1978.
[18] '*The Prime Minister*', ***Ceylon Daily News***, 7th February 1978.
[19] '*His Happiest Moments Are Spent in the Service of the People*', ***Ceylon Daily News***, 24th February 1978.
[20] '*A Blessing to the Nation'*, ***Ceylon Daily News***, 7th February 1978.
[21] ***Ceylon Daily News***, 7th February 1978.

monastic and lay discourses conjoined to enhance the post by giving a particular 'Buddhist' identity to Premadasa, making him and it key to the future of the Buddhist nation. These depictions of Premadasa gained prominence a few years after he came to the premiership.

In 1982, at a Bōdhi Pūja ceremony at Kelaniya temple to invoke blessings on the prime minister, Walpola Rahula asserted that Premadasa was "devoted to Buddhism and the [Sinhalese] race" (*jātihitaishī āgamika bhaktiyen*). Rahula went on to claim that "if there are two or three people like Premadasa, everything in the country could be achieved, and that because of Premadasa, now ordinary Sri Lankans could have hopes unthinkable before."[22]

What interests me here is tracing the rise and fall of this relation between the prime minister, nation, and Buddhism (rather than the rise and fall of Premadasa himself). Let me first discuss some dimensions of the very publicised relation between Premadasa and one of the most popular Buddhist temples in Sri Lanka – the Temple of the Tooth. Of interest to my inquiry is a particular a set of practices that enabled that relation to come into public view: the construction of the golden canopy (*ran viyana*) over the Temple of the Tooth.[23]

What is in a Name? A Golden Canopy for the Tooth Temple

The Temple of the Tooth (*daladā māligāwa*), as its name suggests, is believed by many Sinhala Buddhists to house the Buddha's tooth relic.[24] I will not retell the entire long story of how Sri Lanka came

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[22] '*Avankakama Ätnam Ōnäma Usas Tatvayak Läbiya Haki Bava Agamätigen Oppuvenavä*' ('*The prime minister exemplifies that honestly can achieve any high status*'), ***Divamina***, 4th April 1982.

[23] Mark Jeurgensmeyer states wrongly that the canopy was constructed by J.R. Jayewardene; see M. Jeurgensmeyer, '*What the Bhikku said: Reflections on the Rise of Militant Religious Nationalism*' (1990) ***Religion*** 1: p.68.

[24] For an account of the significance of the tradition of relic veneration in Buddhism, see K. Trainor (1998) ***Relics, Rituals, and Representation in Buddhism: Rematerializing the Sri Lankan Theravāda Tradition***, Vol.10 (Cambridge: CUP).

to inherit one of the Buddha's teeth, except to note that, by about the twelfth century, the tooth relic, as the conventional narrative of it goes, "became the palladium of the Sinhalese kings."[25] Over the centuries, the relic, it is said, was shifted from place to place as kings changed the capitals of Sri Lanka.

In the sixteenth century, the tooth relic was moved to Kandy, where it was housed in the Temple of the Tooth that King Wimaladarmasuriya (1593-1603) constructed. Today the Temple of the Tooth is controlled by the two chief monks of the Malwatta and Asgiriya temples and by a lay Buddhist custodian (*diyavada nilame*). It is frequented daily by thousands of visitors, both local and foreign.

The history between the 'public' relation between Premadasa and the Temple of the Tooth, so far as I can gather, begins in the mid-1980s. In 1986, according to a newspaper report, the prime minister made an official visit to the temple to "pay homage to the Sacred Tooth Relic."[26] On that day, responding to a complaint by the chief monks of the temple about water leaking from the temple's roof, Premadasa pledged to cover the roof with "a bronze sheet."[27] Six months later, Premadasa announced his plans to build "a golden canopy" over the inner shrine room of the temple.

Initially, a number of people, including the then director of the Sri Lankan Archaeology Department, objected to the plan. They argued that a canopy over the roof would not only put the safety of the building at risk but also damage the very 'antiquity' of it since no additions to the building had been done since the last king of Kandy, King Kirti Sri Rajasimha.

The protest did not deter the prime minister from continuing the project: as a monk pointed out to me, "during that time Premadasa was extremely popular in Sri Lanka – even more so

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[25] K. Malalgoda (1976) ***Buddhism in Sinhalese Society, 1750-1900: A Study of Religious Rival and Change*** (London: University of California Press): p.14; also see H.L. Seneviratne (1978) ***Rituals of the Kandyan State*** (Cambridge: CUP): p.17.

[26] '*PM Promises Maligawa Repair, too, in Shelter Year*', ***Daily News***, 30th December 1986.

[27] Ibid.

than President Jayewardene himself. There was almost nothing that Premadasa could not do" (*karanda bäri deyak tibunnä*).[28] On December 31, 1987, (exactly a year before he would become president), the golden canopy, costing more than twenty million rupees, was ceremonially unveiled by Premadasa.

The occasion made possible a public space for the articulation and authorisation of a particular relation between Premadasa, Buddhism, and the nation that would later prove to be critical to his campaign for the office of president. The media portrayed the prime minister's offering of the canopy to the temple as an "historic event" that "provided shelter to the Tooth Temple, the highest lasting object of reverence [*sadā vandanīya mudun malkada*] of all Buddhists in the world."[29] The unveiling ceremony was nothing short of an extraordinary affair. The state newspaper carried front page reports of eyewitness accounts testifying that immediately after the canopy was unveiled by the prime minister, the "rays of the Buddha emanated from the Maligawa." It was described as a miracle (*prāthihāraya*); such an event, the reports claimed, occurs only when 'great people' do 'great' acts of merit."[30]

Days after the construction of the golden canopy, chief monks from various Buddhist fraternities used statements that made an explicit connection between Premadasa, the Buddha, the Sinhala nation, and its past Buddhist rulers. The head of the Asgiriya chapter, Palipana Chandananda, spoke of Premadasa as a "supreme individual" (*śreśta pudgalayek*) who always delivered his promises; others stated that by offering the canopy to the Maligawa, "like Ancient kings such as Bimbisara and Anata Pindika ... [Premadasa] donated shelter to the Buddha. Premadasa's act is memorable, and all Buddhists should honour it." [31] In letters to newspapers, Madihe Paññasiha praised

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[28] Interview with Warakawe Dhammaloka at the Nata Devale Temple (near the Tooth Temple), 8th-10th August 1996.

[29] '*Golden Canopy for a Historic Day*', ***Daily News***, 1st January 1998; '*Sādu Nāda Mädde Ranviyana Pidē*' ('*The golden canopy offered amid the cries of Sādu*'), ***Dinamina***, 1st January 1988.

[30] '*Daladā Mädurin Buduräs*' ('*Buddha's rays emanate from the Tooth Temple*'), ***Dinamina***, 1st January 1988.

[31] '*Daladā Vamsa Katāvata Ran Pituvak Ekkalā*' ('*[Premadasa] added a golden page to the history of the Daladā*'), ***Dinamina***, 1st January 1988.

Premadasa's leadership: he followed in the "footsteps of ancient kings"; "I have no doubt that it is the Buddha-influence which had motivated [Premadasa] to undertake this great task," wrote Paññasiha. Paññasiha went so far as to predict that the merit gained from this act would help Premadasa achieve "the highest things in life" such as the presidency of the country.[32] Lay Buddhists, too, commented on Premadasa's construction of the canopy and his "close association with monks as the sign of a noble leadership." (*udāra nāyakatvayaka lakshanyak*)[33] The lay custodian of the Tooth Temple, Neranjan Wijeratne, declared that, "Premadasa's name will be written in gold in the history of Sri Lanka."[34] As if acknowledging these representations, Premadasa, in a special message, linked the construction of the canopy to the "distant" past of the Sinhala Buddhist nation: he said he decided to build the canopy because "The Sacred Tooth Relic is held in Supreme veneration by the Buddhists all over the world. Our kings of old have valued and venerated the Sacred Tooth Relic of the Buddha and protected it with their very lives."[35]

Serving Temples, Saving the Nation

At the opening ceremony for the canopy, Premadasa made several important remarks about the 'Buddhist' identity of himself and the nation. Addressing a massive rally of monks and lay Buddhists, Premadasa spoke of his "good knowledge of Buddhism" and acknowledged his indebtedness to monks for helping him acquire it. He stated that he honoured and venerated the Buddha, the Dhamma, and the Sangha because of the "noble advice he received from monks."[36] He went on to discuss a highly

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[32] '*The Ceremonial Openning of Ran Viyana: More Messages*', ***The Island***, 29th December 1987.
[33] '*Daladā Vamsa Katāvata Tavat Alut Pituvak Ekkala*' ('*A new page to the history of the daladā worship*'), ***Dinamina***, 1st January 1988.
[34] '*Daladā Vamsa Katāvata Ran Pituvak Ekkalā*' ('*Golden page to the story of the tooth relic*'), ***Dinamina***, 1st January 1988.
[35] '*Golden Canopy- Fulfilment of a Pledge, Says PM*', ***Daily News***, 30th December 1987.
[36] '*Ran Viyana Pidīmata Hāki Vūyē Ahinsaka Janatāvage Ādāra Nisayi-Mahanuvara Mahapinkamedi Agamäti Tumā Pvasayi*' ('*I could offer the golden*

contentious national issue that had taken place six months earlier: the arrival in the island of the Indian Peace Keeping Force (IPKF).

In July 1987, as part of the Indo-Lanka Accord, signed by President Jayewardene and Indian Prime Minister Rajiv Gandhi, forty thousand Indian troops assigned to the IPKF landed in the north of Sri Lanka to end the escalating separatist war.[37] The signing of the Accord took place amid island-wide curfew because scores of young Buddhist monks and lay Buddhists, led by the Janatha Vimukthi Peramuna (JVP), rioted in Colombo against the arrival of a foreign army. The Accord did not help the diminishing popularity of Jayewardene. As a Sri Lankan commentator put it, "Jayewardene, in his last five years, had been spendthrift with the unprecedentedly massive charisma that he attained at the election in 1977 and had become the lodestar of dissidence and disaffection."[38] Immediately after the Accord was signed, many voices accused Jayewardene of "betraying the nation" to a foreign country; posters reading "Kill J.R." appeared overnight in several parts of the country.[39] Prime Minister Premadasa openly objected to the Accord and refused to appear at its signing, an event watched live on TV by many Sri Lankans.[40] Monks, too, spoke out, among them Walpola Rahula, who later stated that Sri Lanka "lost its freedom after thirty-eight years because of the Indo-Lanka Accord."[41] It is widely believed that Premadasa secretly masterminded damaging images of the Accord and of Jayewardene so as to produce a picture of a nation in desperate need of a new political leadership (presumably under

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canopy because of the donations of the poor people- prime minister says at the great ,meritorious ceremony in Great Kandy'), ***Duvayina***, 1st January 1988.

[37] The Liberation Tigers of Tamil Elam (LTTE), headed by V. Prabhakaran, were then fighting for a separate state in northern Sri Lanka.

[38] '*President's [Premedasa's] 'Horoscope': He Has Not Put a Foot Wrong So Far*', ***Daily News***, 16th February 1989.

[39] '*Observations in Colombo and Kandy 1987*', author's interview with Dewalegama Medhananda, 15th-16th November 1996.

[40] Another member of the government who did not support the peace accord was Lalith Athulathmudali; many believed that he, too (like Premadasa), was a sure contender for the presidency of Sri Lanka.

[41] '*Indu Sri Lanka Givisuma Nisā Apata Vasara 38 Kata Pasu Nidahasa Ahimi Unā*', ***Divayina***, 2nd July 1990.

Premadasa).[42] On the day the Accord was signed, one of Premadasa's allies, the monk Golaboda Ñanissara mobilised scores of youths to put up black flags throughout Colombo, symbolising the death of the country.[43] The black flags, made from polythene garbage bags, were said to have come from the Colombo Municipal Council, manned by Premadasa's friends.[44]

If his opposition to the Accord did not become centrally visible in July 1987, Premadasa made it glaringly public at the canopy ceremony. He pointed out that he was not afraid to say that the peace accord and having the Indian army in Sri Lanka was a mistake: the Indian troops failed to end the "chaos" (*arbudhaya*) in the country. "It was some people's view," he added, "that only force can solve the problems of the country, if so, why can't the present problems of the country be solved with an army of 40, 000 at the present. There are others who view that a political solution can be found. If so, why can't the problem be solved by the signing of the agreements [between Jayewardene and Rajiv Gandhi]."[45]

The point of all this is that Premadasa's rendering visible his opposition to the peace accord – which was an implicit form of support for the Sinhala nationalist forces who were by then seeking to remove the Jayewardene government – became possible in the context in which that particular relation between Premadasa's 'Buddhist' identity, Buddhism, and the Sinhala nation came to be authorised. Take, for example, the following key statement made on the day of the canopy unveiling by the chief monk of the Tooth Temple, Sirimalwatte Ananda. Praising Premadasa as a "pious, principled Buddhist," he asserted that, "as long as our great shrines such as the sacred Tooth Relic … exist on the soil of this Isle it will remain a Sinhala Buddhist country. The presence of non-Sinhala and non-Buddhist minorities will in no way make it a multinational or a multi-religious country."[46]

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[42]Interviews with Buddhist monks at Jayewardenapura University, 15th- 17th July 1995.

[43] Interview with Galaboda Ñanissara, 20th October 1996; '*Loku Väda Karana Podi Hämuduruwö*' ('*The title monk who does big things*'), ***Iridä Lankädïpa***, 12th December 1993.

[44]Interviews with monks in Colombo, July 1996 and October 1997.

[45] '*PM Offers Golden Canopy'*, ***Island***, 1st January 1988.

[46] '*Paying Homage with a Golden Canopy*', ***The Sun***, 31st December 1987.

Such assertions, which strategically challenged the authority of Jayewardene, who argued for the importance of a multi-ethnic Sri Lankan society, suggested that Premadasa's support of the Tooth Temple was a form of support of Sri Lanka as a Sinhala Buddhist country 'betrayed' by Jayewardene to a 'foreign' country. This was the context in which Premadasa came to construct the golden canopy for the Tooth Temple.

Exactly a year after the canopy was built, Premadasa became president, promising the immediate withdrawal of the IPKF from Sri Lanka, an idea that appealed to many Sinhala Buddhists at that time. In December 1988, a few days prior to Premadasa's inauguration, the media celebrated the anniversary of the canopy with a specific kind of rhetoric that sought to localise and nationalise the canopy: one newspaper article carried the title "The Golden Canopy Materialised by [Local] Scientific Knowledge." The text insisted that each year Sri Lanka celebrates the "miracle" of the canopy because it was created by "local [Sinhala Buddhist] engineers" (*dēśīya injinēru*) without assistance from "foreign engineers."[47] Thus the context of the canopy enabled the central visibility of Premadasa's Buddhist identity and its relation to the safeguarding of the 'embattled' Sinhala Buddhist nation, an identity that became a crucial part of Premadasa's bid for the presidency.

The election of Premadasa as president became a contentious topic in Sri Lanka. Rumours circulated, as S.B. Dissanayaka informs us, that Premadasa won his presidential nomination by strategically 'terrorising' the lives of Jayewardene and some of his ministers. Premadasa, according to Dissanayaka, maintained secret links with the members of the JVP and eventually assisted them in creating a period of 'terror' threatening the Jayewardene government.[48] Some Sri Lankans claim that although Jayewardene's first choice for the succession was Lalith Athulathmudali, one of the most popular cabinet ministers in the country, the president nominated Premadasa out of fear for his

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[47] '*Vidu Nuvanin Mävunu Ranviyana*' ('*The canopy materialized by the [local] scientific knowledge*'), ***Vidunäna***, 31st December 1988.
[48] S.B. Dissanayaka (1992) ***Mā Atsan Kala Dōshābhiyōgaya (The Impeachment I signed)*** (Colombo: Sirilaka): p.34.

life.[49] In fact, the whole election process was considered spurious because "Premadasa's people" controlled the ballot boxes.[50] It is in this controversial context that Premadasa's continuing relations with the Tooth Temple and its chief monks should be understood.

Just days after being elected executive president, Premadasa announced that he would take his oaths on the octagon (*pattirippuva*) of the Tooth Temple. This was a novel political practice: no leader of the country had ever been sworn in on the octagon. It is said that King Kirti Sri Rajasimha built the pattirippuva in 1783 and used it to address the nation.[51] Jayewardene had been sworn in Colombo and later went to the Tooth Temple to address the nation. Premadasa changed that convention. He not only officially became president on the octagon but also invited the temple's chief monks and others to witness the occasion.

As preparations got under way for the inauguration, scheduled for January 4, 1989, the media began to depict the history of Premadasa's relation to the Tooth Temple in a particular way. For several days, the state newspapers carried elaborate pictures of the Tooth Temple showing the glittering golden canopy. One picture had Premadasa holding a tray of flowers, against a background of the temple with the canopy in full view.[52] It introduced Premadasa as the "president of the common people" and invited every citizen of Sri Lanka to participate in his inauguration.[53]

The media representations of the relation between Premadasa and the Tooth Temple can be explained in terms of the Sinhala

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[49] Conversations with people in Colombo, Kandy, Dambulla and Sigiriya, 1994-1997. The relation between Jayewardene and Premadasa became so sour by the early 1990s that the former prohibited mention of the latter's name in his home. Conversation with Mrs. Hettige, the librarian of the Jayewardene Cultural Centre, Colombo, 6th October 1997.

[50] Dissanayaka (1992): p.34.

[51] '*Hela Raja Sirita Hā Pattirippuva*' ('*The Sinhala royal tradition and the octagon*'), ***Island***, 1st January 1989.

[52] The image of Premadasa holding a tray of flowers became so popular that he came to be nicknamed "prince of flowers" (*puśpakumāra*).

[53] ***Dinanmina***, 1st January 1989; also see ***Dinanmina***, 2nd January 1989, where another full page picture of Premadasa's whole family appeared against the background of Tooth Temple.

concept of *älluva*, a term that one of my main informant-monks used to characterise relations between the president and monks. The term means, among many other things, "seized" or "caught,"[54] but, as my informant used it – "*Premadasa älluvanē daladā māligawat*," meaning "Premadasa seized the Tooth Temple, too" – points to the strategic ways in which a particular narrative came to authorise, enable, and indeed oblige monks to "show," or "exhibit," (*pennanna*) a particularly privileged relation between the president and the temple, Buddhism and the (Premadasa) state.[55] When Premadasa was sworn in, for instance, his wife and two children appeared beside him on the *pattirippuva*. This well-known incident provoked vehement public criticism since no women had ever appeared on the octagon, and it was believed that the violation of that tradition would bring about harmful effects (*vas*). (Some Sri Lankans attribute Premadasa's premature death at the hands of as assassin to the ill effects of his wife's presence on the *pattirippuva*.) [56] The two chief monks of the Tooth Temple disregarded that tradition and 'permitted' Premadasa's entire family – his wife, daughter, son and son-in-law – on the *pattirippuva* because, as another informant noted, the relations between Premadasa and the chief monks had become such that "monks could not say no" (*nähä kiyanda bähä*) to him.[57]

What I want to emphasise, reminded of the final Foucauldian formulation of discourse/power, is that these kinds of relations between Buddhism, monks, and the nation cannot be conceptualised in terms of domination or coercion. Rather, they show how particular discourses enable and authorise particular forms of practices and persons to come into view as representing Buddhism and nation. These kinds of 'Buddhist' relations between Premadasa and monks became more prominent during the presidential inauguration ceremony. Delivering a speech to a

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[54] *Äluwa* is the past tense of *allanavā*, which means "catch", "touch", "seize", "arrest".
[55] Interview with Medhananda, 15th-16th November 1996.
[56] Interview with Dhammaloka and conversations with several people in Kandy in August 1996. After Premadasa's death, some monks publicly charged that he "desecrated the hallowed Pattiruppuva"; see '*Grandeur at Gam Udawas to Hide Own Atrocities*', ***Daily News***, 23rd August 1996.
[57] Interview with Dhammaloka, 8th August 1996.

"sea of people," as newspapers reported it,[58] Sirimalwatte Ananda said that Premadasa was "a real Buddhist" (*niyama bauddhayek*), a "heroic person" (*vīra puruśayek*), and a "noble individual" (*śrēstayeku*), who achieved a status of "nobility" as a "great ruler"[59]:

> "You are a good Buddhist. We know that prior to this occasion you have come to the Tooth Temple and enjoyed worshipping the Three Jewels, the Dhamma, and the Sangha. Not every politician can do that. We also know how you venerated the Three Jewels, prostrating on the floor [*pasaga phituvā*]. You are used to it. You have also donated a golden canopy for the beauty and the continuity of the Tooth Temple. Numerous are other Buddhist services you have done. A noble person [like you] will never have a bad rebirth."[60]

In a separate message, Sirimalwatte Ananda wished Premadasa "the strength to protect the Buddha Sasana and the country" and stated that, "our history records that it is natural that noble [*udāra*] people appear in times of chaos in the country"; he expressed confidence that the new president would fulfil that role.[61] Palipana Chandananda supported this view and said that, "monks have accepted that … [Premadasa is] a real Buddhist" and reminded the new president that the "time has come to safeguard the Buddha Sasana and the Buddhist sacred places.""[62]

These representations of Premadasa as a 'real Buddhist', born to rescue the nation from a time of 'chaos', are located in the context in which the golden canopy came into existence. It must be evident by now that, in making this argument, I am not

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[58] It is said that the government bussed thousands of people to Kandy for the ceremony. Each was given a few hundred rupees and a packet of rice. This practice continued annually.

[59] '*Senkadagala Yali Iyithāsika Vū Dā*' ('*The day Senkadagala [Kandy] became historic again*'), ***Divamina***, 3rd January 1993; '*Nava Janādhipati Usas Dēapālakayek*' ('*The new president is a great ruler*'), ***Davasa***, 2nd January 1989.

[60] ibid.

[61] '*Budusasunat Ratat Rākumata Śaktiya Läbēvā*' ('*May [Premadasa] have the strength to protect the Buddha Sasana and the country*'), ***Dinamina***, 4th January 1989.

[62] '*Obē Jayagrahanaya Nivāradi Tīnduvak*' ('*Your victory is a right decision [of the people]*'), ***Dinamina***, 4th January 1989.

suggesting in any way that the canopy should be taken as a monolithic, single 'event' in itself; rather, constructed during what was called a 'time of chaos' in Sri Lankan history, this 'Golden Canopy' is a different name for a particular conjuncture of narratives that made centrally visible a specific relation between Premadasa, Buddhism, and the nation. It was in the space of communicating this relation that more tangible gestures of monastic support for the president became possible.

For example, for three years the chief monks of the Tooth Temple permitted, and presided over, the annual celebrations of Premadasa's inauguration as president at the Tooth Temple, a practice that no previous government in Sri Lanka had cultivated.[63] Also each year, the chief monks, along with other monks, accompanied the president to his *gam udāva* festivals in various parts of Sri Lanka. They appeared on stages and spoke to masses of people about the benefits of the president's project to the country. The *gam udāva*, a project that Premadasa began as prime minister, proposed to 'awaken villages' by building houses for the needy. It became a controversial project: each year's 'awakening' of a village included extravagant festivities that cost millions of rupees. [64] Some Sri Lankans considered such celebrations an abuse of public money, and in August 1991 the issue formed an important aspect of the opposition's agenda to impeach Premadasa for 'violating' the constitution.[65] The monks continued to praise the project as a "cultural renaissance" (*sanskrutika navōdayak*) and argued that it showed Premadasa's diligence in the footsteps of Gandhi to "bring people happiness."[66]

The kind of authorised relation between Premadasa and monks, Buddhism and the nation, did not remain unchanged, and I now wish to examine the gradual emergence of a starkly different identity of the president in relation to Buddhism and the nation. In complex ways, competing and opposing narratives began to oust identity from its authorised domains, to turn the table on

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[63] See ***Dinamina***, 4th January 1990.
[64] Ibid., 25th June 1989-1993.
[65] See Dissanayaka (1992): p.5; for an English version of the charges presented to Parliament, also see van der Horst (1995): p.260.
[66] See, for example, '*Gam Udāvata Sangaruvanē Āsiri*' ('*Sangha's blessings to Gam Udāva*'), ***Dinamina***, 23rd June 1989.

identity, so to speak, and represent identity as difference, as the dangerous 'other' to be subdued and subverted.

Identity as Difference: From Real Buddhist to Killer

I alluded earlier to Premadasa's alliances with the popular monk Galaboda Ñanissara, of the Gangaramaya temple. In the late 1970s, these alliances had enabled Ñanissara to solicit financial support from the business community of Colombo and inaugurate the annual Buddhist procession Navam Perahära as well as several other 'social service' projects at the temple. Even during the Jayewardene presidency – Jayewardene himself was one of the chief patrons of Ñanissara's temple – Ñanissara made no bones about his exclusive support for Prime Minister Premadasa. After Premadasa came to power, Ñanissara made his support for the new president even more public. In the midst of that 'time of chaos' in July 1989, which coincided with President Premadasa's sixty-fifth birthday, Ñanissara wrote to the newspapers extolling Premadasa as a "national treasure [*jätika vastuvak*] of the Sinhala's and Buddhists." He disparaged other politicians (supposedly the former President Jayewardene and some of his ministers) and praised Premadasa as a "Sinhala Buddhist" leader who did not wear "[western] trousers at home and the [Sri Lanka] national dress in public."[67]

In the wake of the impeachment controversy in the early 1990s, Ñanissara extended the president his unstinting support. Once he addressed a meeting of five hundred Buddhist monks gathered at the public library in Colombo and attacked the impeachment attempt as the work of "a group of people who are trying to perpetuate a system that enables an elite class to enjoy wealth and comforts which the ordinary man is deprived of." He went on to call for the immediate withdrawal of the impeachment proposal and argued that the whole "country should be eternally grateful to

[67] '*Janapati R. Premadasa Mē Yugayata AvaŚya Vunē Āyi?*' ('*Why was President Premadasa needed for this era?*'), ***Divayina***, 23rd June 1989.

Premadasa" just for the fact that he got rid of IPKF, "an invasion of our country."[68]

The relation between the president and the monk became the target of much controversy. Many of my informants in Colombo characterised Ñanissara as an aggressive monk who spoke loudly and had a quick temper, not fearing even the demon.[69] Ñanissara is said to have engaged in physical confrontations with people and have struck even police officers who failed to follow his instructions during the Navam (Perahära) procession.[70] Some held that Ñanissara committed such acts with impunity because of Premadasa's influence.[71] It is widely rumoured that during the JVP insurrection Premadasa authorised Ñanissara to carry a handgun for self-defence. Some even gossiped that Premadasa and Ñanissara were in the business of printing money; one monk remarked that this was a "famous secret" (*prasiddha rahasak*). Such gossip became widespread because for three consecutive years Ñanissara held elaborate almsgiving ceremonies at his temple, offering, in addition to robes and other conventional gifts, "brand new thousand rupee bills" (*alutma dāhe kola*) to eleven thousand monks.[72] My aim here, it should be obvious by now, is not to determine the authenticity of these opposing claims or rumours, but rather to point to the context in which they began to emerge, displaying a different kind of relation between the president, Buddhism, and the nation.

Something of the significance of the emergence of such competing claims can be located by examining briefly the relation between Premadasa and one of the most prominent Buddhist monks, Kotikawatta Saddhatissa. Saddhatissa, unlike chief monks of the Tooth Temple, came from a temple of relative obscurity, in Kolonnawa, near Kaleniya. By the early 1980s, however, Saddhatissa had become one of the most popular Buddhist monks

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[68]' *Groups with Vested Interest Trying to Oust the President*', ***The Island***, 21st September 1991.
[69] '*Podihāmuduruwane Mokadda Oya Jaramare?*' ('*What is this rumble?*'), article in unidentified newspaper, n.d.
[70] '*Who Was Behind the Gangarama Clash?*', unidentified newspaper, n.d.
[71] Conversation with five people in Hunupitiya and several monks in Colombo, 1st-4th November 1997.
[72] See *Jinaratana Kārmika Vidyālaya*; interviews with monks who attended the *dāna* at the Gangarama temple, 4th October 1997.

in Sri Lanka. He earned his island wide reputation as an eloquent, mesmerising' (*vāsi karana*) preacher, and his Buddhist sermons (*bana*) were regularly broadcast over radio and on television. Saddhatissa, as one monk noted to me, was a popular UNP supporter, but there was a mass of people (*janagangāyak*) who disregarded the monk's political orientations and became devoted followers of his sermons. As the monk put it, "people had differentiated between his politics and his sermons" (*eyāge bana saha dēshapālanaya*). It is perhaps because of Saddhatissa's appeal to many Sinhalese Buddhists across political boundaries, my informant conjectured, that Premadasa allied himself with the monk.[73]

The history of the relationship between Saddhatissa and Premadasa, as far as I can determine, goes back to the early 1980s. In 1982, when Premadasa suffered from a minor illness, for ten days Saddhatissa conducted a massive bōdhi puja ceremony at his temple and rallied monks island-wide to do so in order to 'invoke blessings' on the prime minister. At such events Saddhatissa, like other monks of his time, began to represent Premadasa as a "superior person" (*śresta pudgalayā*) who "won people's hearts."[74] Saddhatissa went so far as to hyperbolise that "the whole country has accepted Premadasa as a man of merit who has reaped a noble harvest through his own effort."[75]

In the early 1980s, Premadasa invited Saddhatissa to deliver the annual Vesak sermon at his official residence, Temple Trees.[76] Telecast nationwide, the sermon provided the occasion for the public depiction of Premadasa and his family as devout Buddhists listening to the words of the Buddha. This practice, which no other politician had cultivated at the official residence in modern history, continued every year for more than a decade.[77] In 1989, after he became the president, Premadasa made the practice

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[73] Interviews with Medhananda, 16th November 1996.
[74] '*Janatāva Set Pätuvē Agamäti Janahada Dinū Nisayi*' ('*People invoked blessings [on Premadasa] because he won people's heart*'), ***Lankāpīpa***, 5th January 1982.
[75] '*Agamäti Utsahayen Śresta Pala Belgat Putāglayek*' ('*The prime minister is a person who has reaped noble results*'), ***Davasa***, 30th June 1980.
[76] Vesak, a public holiday, falls in the month of May; it celebrates three major events in the life of the Buddha: birth, enlightenment, and passing away.
[77] ***Dinamina***, 22nd May 1989.

more frequent, inviting Saddhatissa to preach a sermon every Sunday at President's House. These sermons, some of my informants noted, were nothing more than forms of elaborate praise (*gunavarnanāva*) of the president's virtues. By the late 1980s, Saddhatissa's relations with the Premadasa government had become so well known that he came to be called "the monk who preaches at the royal palace" (*rajagedara bana kiyana hāmuduruwō*).[78]

Other practices emerged that brought into public view this close 'Buddhist' relation between the president and the monk. In 1984, with the help of Muslim friends and businessmen, Premadasa constructed a massive preaching hall (Saddhatissa Dharma Mandiraya) at Saddhatissa's temple to mark the monk's forty-fourth birthday.[79] The preaching hall proved quite useful to a specific kind of practice that the newspapers called *pinkama* (religious ceremony), held annually at the temple. The pinkama, organised every year by the Premadasa's Sucharita movement, was a massive meeting of monks transported to Saddhatissa's temple from different parts of the country. A newspaper report described the nature of the pinkama one year: "Over 1,500 Bhikkhus from several parts of the country along with thousands of devotees participated in the Pinkama … [They] offered pirikara [gifts] to the monks… [The monks] walked in a colourful procession from the Kolonnawa junction to the [temple] and the Prime Minister Premadasa and Mrs Hema Premadasa … also took part in the procession."[80] Notable features of this pinkama were the speeches that Premadasa and some of his close colleague-ministers delivered at the temple. Nobody quite knew the purpose of the annual meeting, but "every year [for seven years] they talked about the problem of 'terror' and 'terrorism' in the country."[81]

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[78] Author's interview with monks at the Mahabodhi Society, 6th-8th October 1997; Author's conversations with monks and lay people in Kolonnawa, 9th-10th October 1997.

[79] '*Taruna Bhikśun Vahansēlā Bana Kīmata Peramuna Gatayutuyi*' ('*The young monks must learn how to preach baba*'), ***Davasa***, 23rd July 1984.

[80] '*Terrorists Fight Not to Win Ethnic Rights*', ***Island***, May 1987.

[81] Author's interview with Kolonnawe Dhammika, 10th October 1997. Dhammika used the words *terrorism* and *terror* interchangeably to characterise the political context in 1984; 'terror' as a conceptual category, however, was constructed and deployed within a particular political context in 1989.

By then (the late 1980s), the country had already witnessed the emergence of the LTTE as a formidable guerrilla force beginning to battle for a separate state in the northeast. During this time, at Saddhatissa's temple Premadasa produced a particular narrative about this condition in the country. As it was reported in *The Island*, addressing a meeting of one thousand monks, Premadasa stated:

> "The country was facing a grave threat due to the inhuman and vicious acts of a small group of people. They have restored to the most beastly methods of killing innocent civilians and even infants and children. This showed how sick minds could disrupt the majority peace loving people … it was indeed a great injustice done to Sri Lanka … These terrorists with assistance from outside were bent on destroying civilisation and civilised ways of living."[82]

The picture painted by these words is clear: Sri Lanka, "facing a grave threat," is on the brink of losing its "civilisation" (one may compare these words to the speech Premadasa gave at the canopy opening in 1987). My point here is that the possibility of voicing these warnings about the danger of terrorism to the "civilisation" of Sri Lanka in front of thousands of monks, "the sentinels of the nation," was generated by the relations between Premadasa and monks like Saddhatissa. The cant about "terrorism" run amok enabled the implicit representation of himself as next president, who, if elected, could eliminate the threat.

Monks like Saddhatissa supported Premadasa because, as Saddhatissa's own student-monk put it, they "liked to be in the spotlight" (*āsayi rūpa rāmuvata*), to "appear visible" (*penī indīmata*). Saddhatissa's popularity –boosted by the president's "alliance" (*sambandatāvaya*) with the temple – attracted many Buddhist "donors" to the temple. Through the monk's influence and intervention, the donors themselves "got things done" (*väda karagattā*) by the government.[83] It was because of Saddhatissa's

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[82] '*Terrorists Fight Not to Win Ethnic Rights*', ***Island***, May 1987.

[83] Interview with Dhammika, 10th October 1997. Dhammika now berates those who, after benefitting from his teacher, abandoned the temple following his death.

continuing quest for popularity, my informant continued, that the monk lost his life at the hands of an assassin. What is important about Saddhatissa's assassination is that it marked the emergence of a space that contested the formerly authorised relation between Premadasa, Buddhism, and the nation, authorised in part by monks like Saddhatissa. The context of Saddhatissa's assassination shows how competing and opposing narratives sought, on the one hand, to produce Premadasa's 'Buddhist' identity as difference and, on the other, to subvert it.

As early as June 1989, Premadasa was lobbying to send the IPKF back to India, a promise he made as part of his campaign for president.[84] Here it is crucial to bear in mind some aspects of the political climate of the country. The JVP, which had begun its own 'war' to overthrow the Premadasa government, also demanded the removal of the IPKF. Since January 1989, the JVP had killed, according to the government's estimate, more than seventeen hundred "police officers, politicians, and ordinary citizens" who had failed to comply with its (the JVP's) own law. For several months, this unwritten JVP law brought the country to a virtual standstill, demanding the closure of shops, business establishments, schools, and universities, and the stoppage of work and transport.[85] In June 1989, the government imposed island-wide curfew, claiming to quell such "violent activities" (*pracanda väda*).[86]

It is in the wake of what he himself called "chaos" (*arbudaya*) that Premadasa, as president, spoke of sending back the Indian army as a "common" challenge shared by his government and the JVP opponents. [87] This he claimed was the duty of "patriotic"

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[84] '*Text of Premadasa-Gandhi Letters Tabled in House: No Mandatory Role for Indian Army in Lanka*', ***Daily News***, 8th July 1989.
[85] '*Hadisi Nītiya Yalit Pänevve Akamätten Uvat Karanna Siduvelā, Ranjan*' ('*The curfew was imposed again because of necessity*'), ***Dinamina***, 21st June 1989; also see C.A. Chandraprema (1991) ***Sri Lanka: The Years of Terror" The JVP Insurrection, 1987-1989*** (Colombo: Lake House): pp.265-286.
[86] Ibid.;'*Pracanda Kriyā Väda Varjana Ādiyen Ārtikayatat Jana Jivītayatat Bādā*' ('*The violent activities and strikes are barriers to the economy and the lives of the people*'), ***Dinamina***, 21st June 1989.
[87] '*Väda Bēda Tikakata Amataka Kara Sāma Hāmudāva Yavana Abhiyōgayata Ekānmen Muhuna Demu*' ('*Let us forget debates and confrontations and face the challenge of sending back the IPKF as one'*), ***Divamina***, 17th June 1989.

(*deshaprēmi*) Sri Lankans, which, of course, was the favoured term that the JVP used to define its own identity. A few weeks later, Premadasa asserted a direct correlation between this "patriotic duty" – sending back the Indian army – and Buddhism. In a public address about India's refusal to pull out its army, Premadasa warned Indian Prime Minister Rajiv Ghandi: "Keeping armed forces in a country without its consent [is] a violation of Panchasila [five precepts of Buddhism]."[88] It is at the juncture of constructing such a strategic link between Buddhism, patriotism, and the nation that Premadasa invited Saddhatissa to support the government's cause by making a statement on television.

Issuing statements favourable to the government was seen as a dangerous practice at the time because the JVP considered any support for the government a 'crime' punishable by death. Despite these visible dangers, on July 29, 1989, the anniversary of signing the Indo-Lanka Accord – and this seems far from a coincidence – Saddhatissa appeared on television and commended the president's labour to send back the Indian army and invited all Sri Lankans to join in the cause. A day after his statement, Saddhatissa received a hail of anonymous calls threatening his life. The calls continued until August 3, 1989. That night, according to some reports, two 'unknown' men arrived at the temple. They informed the elderly temple attendant that they had come to invite Saddhatissa to an almsgiving ceremony. As they entered Saddhatissa's reading room, one of the men greeted the monk by offering a tray of betel and worshiping him. Then the other man pulled out the gun and fired two shots, killing the monk on the spot.[89]

The case of Saddhatissa's assassination is still unsolved. It might be called a mystery. No one – neither the resident monks at the temple nor the Buddhist neighbours – is said to have seen the perpetrators of the killing. There are people who might have seen

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[88] '*Keeping Armed Forces in a Country without Its Consent: Violation of Panchasila, President*', ***Sunday Observer***, 23rd July 1989.
[89] Interview with Dhammika, 10th October 1997; '*Rūpavāhinī Prakaśāyen Pasuva Nādunana Aya Durakatanayen Nāhimita Bäna Vädunā*' ('*After statement on TV unknown people telephoned and scolded monk*'), ***Viriväsa***, 6th August 1989.

the killers, suspected to be the members of the JVP, and who now recall sketchy details of what happened, but at the time no one would dare identify them. Even President Premadasa, who spoke at Saddhatissa's elaborate state funeral, did not refer to the killing of Saddhatissa as an assassination but simply as a "sudden death" (*hadisi apavatvīmak*) and "a loss to the entire world."[90] Later the government conducted an investigation: it lasted only a few days, and no arrests have ever been made. Even today, some maintain that given the conditions at that time in Sri Lanka, they could spread rumours linked the president to the monk's assassination, maintaining that the government ordered it as part of a strategy to blame it on the JVP (*jvp eka udin yanna*). Killing monks, as some hold, authorised the government to launch an island wide counteroffensive on the JVP, portraying them as killers of "pious monks."[91]

Questions about the identity of the assassin are not, of course, of interest to this study. But the assassination, marking the conjuncture discussed above, made possible a series of competing narratives that tried to authorise a very different kind of identity of Premadasa and his relation to Buddhism and the nation. This new identity of Premadasa is one of a "killer" (*mini maruvā*) who unleashed a period of "terror" that he himself claimed to have eliminated by restoring peace in Sri Lanka.[92] Subsequently, the government of Chandrika Bandaranaike Kumaratunga officially endorsed this identity of Premadasa as a "killer" – of not only monks but various political figures as well. It announced that special presidential commissions had uncovered "hard evidence" that pointed to Premadasa's complicity in the assassination of his

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[90] '*Saddhatissa Nāhimiyange Viyōva Mulu Lovatama Imahat Pāduvak*' ('*Saddhatissa's passing away a great loss to the entire world*'), ***Dinamina***, 11th August 1989.

[91] I heard these rumours many times from a number of monks and lay Buddhists in Kolonnawa, Kelaniya, Colombo, Kadawata, Kandy, Andiambalama, and Dambulla during my research in Sri Lanka, 1994 to 1997.

[92] At the beginning of every year after 1989, the government newspapers devoted pages listing various "achievements" of the Premadasa government. In 1993, two whole pages in the *Daily News* and *Divamina* credited Premadasa with, among other things, the following noteworthy accomplishments: '*Four Years Record of 'New Vision-New Ideal' for Mother Lanka*', ***Divamina*&*Daily News***, 2nd January 1993. These were described as "immortal services", ***Divamina***, 4th May 1989.

former UNP ministerial colleague and rival Lalith Athulathmudali, and a senior Sri Lankan soldier, Lieutenant-General Denzil Kobbekaduwa. [93] These kinds of counter-narratives not only contested the formerly authorised identity of Premdasa as "a real Buddhist" but also cast doubt on the 'Buddhist' identities of those (monks) who helped to produce it. The counter narratives about the president became so pervasive that a few days prior to his death in 1993, Premadasa himself implored people: "Kill me by any means ... but do not kill my pure character (*pirisidu charitaya*)."[94]

It is in the context of the voicing of these kinds of rival narratives that I wish to locate one of President Premadasa's final 'Buddhist' projects, the construction of a massive Buddha statue at a temple popularly known as the Bahirawakanda. But I must point out that Premadasa undertook and completed various other 'Buddhist' projects prior to his death in 1993. Among them were the creation of a separate Ministry for Buddhist Affairs (Buddha Sasana Ministry) in 1989 and a Buddha Sasana Fund in 1990;[95] the establishment in 1990 of a Supreme Sangha Council, which would "advice the government on the measures needed to be taken to foster and develop the Buddha Sasana;"[96] and the much contested plan in 1992 to ordain 2,300 Buddhist monks as part of celebrating the 2,300th anniversary of the introduction of Buddhism to the island.[97]

The plan to ordain monks, proposed a few months after the impeachment attempt, unlike other Premadasa projects created a hail of criticism from many members of the Sangha. One monk

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[93] '*Premadasa Involved: Assassination of Lalith and Kobbekaduwa Commissions Point Finger at Ex-President*', ***Midweek Mirror***, 8th October 1997; '*Premadasa Targeted Kobbekaduwa*', ***Daily News***, 9th October 1997.
[94] '*Mā Marā Dämuvāta Kamak Nä; Mage Charitaya Ghātanaya Karanna Epā*' ('*Kill me; but do not kill my character*'), ***Dinamina***, 3rd May 1993.
[95] '*Buddha Sāsana Aramudala Ärabhū Vagayi*' ('*The Buddha Sasana fund created*'), ***Dinamina***, 6th December 1990.
[96] '*Supreme Advisory Council on the Buddha Sasana Formed*', ***Observer***, 30th September 1990. For more of these events, see Van der Horst (1995): pp.135-145. There is more on the Ministry of the Buddha Sasana in C.R. de Silva, '*State Support for Religious in Contemporary Sri Lanka: Some Ideological and Policy Issues*' (1997) (Unpublished paper delivered at the Sixth Sri Lanka Conference: Peradeniya, Sri Lanka): pp. 6-7.
[97] ***Divaiyina***, 28th February 1992.

described it as "one of the places where Premadasa failed [to win the approval of monks]" (*ekatänakin Premadasa päradunā*).[98] A few monks did express support for the proposal, but many popular monks who had endorsed earlier Premadasa projects raised severe objection to the ordination plan.[99] Walpola Rahula, a vocal advocate of Premadasa's gam udāva movement and his effort to withdraw the IPKF,[100] had praised Premadasa as the most "genuine, qualified person for the leadership of uniting all Theravada Buddhist countries";[101] but he proposed the president's plans to ordain the twenty-three hundred monks. He surprisingly stated that it was not an effort to "develop Buddhism" but a political strategy to "win votes at the next election. It is a disgrace [*nindāvak*]."[102] In the wake of the objections, the big ordination ceremony came to an abrupt halt: only a few hundred monks were ordained.[103]

These narratives about Premadasa, it is important to note, began to emerge in late 1991, when powerful anti-government forces (for example, the impeachment attempt) charged the president with a variety of constitutional and ethical violations. By early 1992, a number of monks began to view Premadasa's projects (for example, the village reawakening celebrations and annual festivals at the Tooth Temple) as "insane activities" (*pissuväda*),[104] even though they had been authorised by monks themselves. This criticism became conspicuous in regard to a particular feature of the awakenings. At each gam udāva, Premadasa built a *cēliya*, or pagoda, and named it after a king, a prime minister, or a political

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[98] Author's interview with Medhananda, 16th November 1997; Dhammaloka, 8th August 1996; and conversations with monks in Kandy and Colombo, 5th-8th August 1996 and 5th-9th October 1997.

[99] See the debate in the newspaper. For example '*Kula daruvan Mahana Karaīma*' ('*Ordination of young boys*'), ***Silumina***, 8th May 1992.

[100] See ***Dinamina***, 21st April 1989; ***Dinamina***, 6th June 1989.

[101] '*Theravādi Bauddha Ratavala Sandhanayaka Nāyakatvayata Niyama Sudssā Apē Janapatiyi*', ***Dinamina***, 4th July 1991.

[102] '*Rahaya 2300k Mahana Karanna Yannē Labana Pārat Balaya Labana Aramunin*' ('*The government plans to ordain two thousand three hundred boys with the intention of obtaining power next year'*), ***Divanyina***, 2nd February 1992.

[103] Conversation with monks in Colombo and with the staff at the Ministry of Buddha Sasana, 5th October 1997.

[104] Author's interviews with Madhananda, 16th November 1996; Dhammaloka, 8th August 1996; Dhammika, 10th of August 1997; and several other student monks at Peradeniya University, 9th August 1996.

leader considered to be a "great patriot."[105] It was novel practice since, as one monk pointed out, in the entire history of Buddhism in Sri Lanka not a single cētiya had been constructed in honour of a layman. Usually found at Buddhist temples, cētiyas enshrine relics of the Buddha and the arhats and are objects of Buddhist veneration; thus, many monks considered Premadasa's random erection of pagodas for lay people a "great shame" (*maha läjjāvak*) and "dishonour" (*avanambuvak tuttudekē väda*) to Buddhism, and the nation.[106]

The point should be obvious: a few years after he became president, a number of varying rival discourses emerged, competing to contest the formerly authorised relation between Premadasa, Buddhism, and the nation. This contestation, it is well to note, coincided with the impeachment attempt, which, among other things, depicted the president as suffering from "mental illness" (*mānasika ledak*).[107] It was under the heading of mental illness that the impeachment, led by Lalith Athulathmudali and others, portrayed Premadasa's construction of temples and pagodas as acts of "blind devotion" (*anda visvāsayak*) that conspired to "deceive the public."[108] One cannot overlook these competing narratives: the impeachment attempt became the site of debate on public platforms and in the media. [109] The power and persuasiveness of these new narratives about Premadasa grew in the context of Athulathmudali's assassination, which was widely suspected to have been ordered by Premadasa. The assassination had groups of Buddhists stoning temples and setting them on fire, among them those of monks considered to be the president's close

[105] Premadasa, for example, named cetiyas in 1990 and 1991 after Devanam Piyatissa (*devana pätis mahāsäya*) and Weera Keppetipola, respectively; See ***Dinamina***, 17th June 1990; ***Daily Mirror***, 19th and 22nd June1992. Premadasa is said to have begun this tradition by naming the first pagoda at a gam udāva after King Dutugämunum the archetypal hero-defender of Buddhism in the *Mahāvamsa*, the greatest chronicle of Sri Lanka.

[106] Author's interview with Medhananada, 15th November 1996.

[107] The copy of the impeachment motion in Dissanayaka (1992): p.113.

[108] Ibid: p.115.

[109] On the details of the fierce impeachment campaign led by Lalith Athlathmudali and Gamini Dissanayake, two of the most prominent cabinet ministers in the Jayewardene government, see Dissanayaka (1992).

allies.[110] It is in the context of these shifting discourses, which produced an identity of Premadasa as a killer and a danger to Buddhism and the nation, that I want to discuss his involvement in the construction of the Bahirawakanda Buddha statue at the Sri Mahabhodi Temple in Kandy.

The Sri Mahabhodi Temple, or Bahirawankanda temple, is located on a hilltop, Bahirawankanda ("the hill of the Bahirawa demon"), that overlooks the entire city of Kandy.[111] Of relatively recent origin, the temple was built on land donated in the early 1970s to Ampitiye Dhammarama, a monk from the Amarapura Nikāya, by the minister of land in the SLFP government. Initially, the monk resided in a makeshift residence on the hill, soliciting funds for the construction of a temple. The head monks of the Temple of the Tooth, however, protested the plan, claiming that given its strategic location on a hill facing the Tooth Temple, a new temple from a different Buddhist fraternity would overshadow the "centre" (*mulastānaya*) of the Siyam Nikāya. In the early 1980s, the monks wrote to President Jayewardene and demanded the removal of Dhammarama from Bahirawankanda, claiming that he was not a "proper monk" (*koheda yana unnānsē kenek*). The ownership of the land remained contested until, in the mid- 1980s, a chief monk of the Amarapura Nikāya, Hinatiyana Dhammaloka, compelled Premadasa to intervene and legally grant the land to Dharmmarama. The sole intervention remained Premadasa's only support for Dhammarama's temple until early 1990.

During the early phases of building the temple with the support of only a handful of businessmen from Kandy, Dhammarama extended several invitations to Premadasa to visit Bahirawankanda. Premadasa turned down such invitations, so it is said, because he did not want to be seen patronising a temple with which the powerful monks of the Tooth Temple had sour

[110] I have in mind here the case of Elle Gunawansa, one of President Premadasa's close confidant monks. During the funeral procession of Athulathmudali, people stoned Gunawansa's temple, forcing him to flee and live in exile for several months: author's interview with Elle Gunawansa and other monks in Colombo, July 1995.

[111] The following information about the temple's history comes from two interviews conducted with the monks at the Bahirawakanda temple, 17th-18th July 1996.

disputes. [112] Later, all that changed. In the late 1980s, Dhammarama began to build a Buddha statue that would stand more than eighty feet in height – a tall task that many thought would be impossible for a single monk unless he had substantial financial backing. In January 1992, a few weeks after Athulathmudali had held one of the largest impeachment rallies against the president in Kandy, the newspapers flashed front page headlines announcing Premadasa's sudden visit to the Bahirawankanda temple "to investigate the construction work on the Buddha image" in Kandy. The newspapers portrayed Premadasa as the sole architect of the project, when in fact much work, worth almost two million rupees, had already been done on the statue.[113] During his visit, Premadasa donated a half- million rupees from the President's Fund to the project: he also planned to unveil the statue ceremonially a year later, when he would be celebrating the fourth anniversary of his presidency. In January 1993, the government newspapers ran poetic front-page headlines about Premadasa's unveiling of the Buddha statue[114] - an occasion that "brings peace to the entire island of Sri Lanka." The Buddha statue at Bahirawankanda, one paper said, "brightens not only the Buddhists in Kandy but the entire Buddhist world"; it "adds a new chapter to the ... history of Buddhism in Sri Lanka ... it will become an object of veneration in the Buddhist world."[115]

Significantly, this event did not seem to attract the support of many monks. Despite the government's (and also Dhammarama's) attempt to portray the construction of the statue as an "historical event," there were hardly any articles about it in the newspapers, no words of praise by his former friends in the monkhood about his involvement in the project. The statue's unveiling marked that particular context in which Premadasa's image as a real Buddhist had come to be questioned by both monks and lay Buddhists. The chief monks of the Tooth Temple

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[112] Author's interviews, Bahirawakanda temple, 17th-18th July 1996.
[113] '*Bahirawakande Idivana Budu Pilimayē Väda Piriksīmata Janapati Yayi*' ('*The president goes to investigate the construction works on the Buddha statue at Bahirawakanda*'), ***Dinamina***, 2nd January 1992.
[114] One headline read, '*Sambudu Piliruva Bahirawakande- Tunhelayata Sisilasayi Nibande*' ('*Buddha statue at Bahirawakanda, always a blessing to the whole country*'), ***Dinamina***, 2nd January 1991.
[115] ***Dinamina***, 1st January 1991.

and many other Buddhist monks and lay people in Kandy considered that a new statue, painted gold, [116] situated on a hill facing the Tooth Temple, posed a "challenge" (*abhiyōghayak*) to the Tooth Temple. It was seen as a disgrace. This intimated also that Premadasa was an accomplice to, if not the architect of, that disgrace. [117] So the 'Buddhist' project of constructing the Bahirawankanda Buddha statue produced the ironic effect of contesting the 'Buddhist' identity of the president.

It is interesting, however, that three days following the unveiling of the Bahirawankanda statue, despite implicit objections of the chief monks who had supported the president earlier, Premadasa returned to the Tooth Temple to celebrate the anniversary of his presidency and address the nation from the octagon with his family and the monks of the Tooth Temple at his side. Once again the state newspapers carried announcements with pictures of Premadasa standing with a tray of flowers against the background of the Tooth Temple. One announcement read: "May the sacred tooth relic bless his excellency the president, who ushered in a new era to our motherland, bringing solace to the poorest of the poor, dispelling the darkness in their lives."[118] This I see as an example of the ways in which the Tooth Temple had been made a particular 'Buddhist' site that enabled the Premadasa government to make centrally visible an authoritative public discourse – one that sought to attenuate the force of rival contesting narratives about the president's 'true' Buddhist identity and the nation.

Conclusion

In providing this account of the shifting fortunes of Premadasa's 'religious' identity, its rise and fall, I have wanted to argue that the configurations of questions about who and what kinds of practice do and do not define what kind of relations between religion, the state, and the nation are located in specific conjunctures of debates. The identity of Premadasa as a real Buddhist leader born

[116] After Premadasa's death, the statue was painted white.
[117] Author's interview with Dhammaloka, 10th August 1996.
[118] '*A tribute to Our Leader*', ***Daily News***, 2nd January 1993.

to liberate the Buddhist nation came to be authorised in a particular context. Significant to making centrally visible these relations between Premadasa, Buddhism, and the nation were practices like the construction of the golden canopy for the Tooth Temple. These relations, however, were contested in a different conjuncture: competing discourses began to portray Premadasa as a man whose practices disgraced Buddhism and who had forfeited the right to rule the 'Buddhist' nation. The agents of these kinds of rival narratives were the same monks who had been his former intimate allies. Premadasa himself responded to this challenge, as we see in his completion of the Bahirawankanda statue and his official return to the Tooth Temple to celebrate his presidency. But such responses themselves produced ironic effects: they came to be seen as efforts of a beleaguered president, in the face of an ocean of controversy and contestation, desperately seeking to assert and keep in public view his formerly authorised 'Buddhist' identity. The emergence and submergence of this identity is a crucial instance of how identity, as Foucault has noted, is both an instrument and effect of discourse / power. A conjuncture of discourses not only produces identity but "undermines and exposes it, renders it fragile, makes it possible to thwart [contest] it."[119]

In concluding, I want to make clear that, in using terms like 'Buddhism' and 'nation' frequently throughout this chapter, I have not sought to pursue an argument that informs some contemporary disciplinary studies on 'religion' and 'nationalism' in South Asia. Put broadly, that argument wants to show how "religion" – or 'religious movements', be they Hindu, Sikh, Muslim, or Buddhist – plays an instrumental part in the processes of establishing and defining the identity of the 'nation'. It is this argument that comes to us in terms of 'religious nationalism.'[120]

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[119] M. Foucault (1978) ***History of Sexuality***, Vol. I (Editions Gallimard): p.101.

[120] Here I am particularly thinking of P. van der Veer (1994) ***Religious Nationalism: Hindus and Muslims in India*** (London: University of California Press). For others who are interested in understanding religious nationalism in terms of "religious symbols in the political field," see T.B. Hansen (1999) ***The Saffron Wave: Democracy and Hindu Nationalism in Modern India*** (Princeton: Princeton University Press): pp. 148-150. In the context of Sri Lanka, see R.L. Stirrat, '*Catholic Identity and Global Forces in Sinhala Sri Lanka*' in T.J. Bartholomeusz & C.R. de Silva (Eds.) (1998) ***Buddhist Fundamentalism*** (Albany: State University of New York Press): p.153. Stirrat,

Now this concept, religious nationalism, it seems to me is another disciplinary category to capture the supposed fusion of religion and politics, seeking to avoid confining nationalism to a public domain of purely 'secular' modern politics. This is because, as some argue, the distinction between the secular and the sacred, religion and politics – a distinction that sees such ideas as belonging to separate spheres – "is an ideological element in the Western discourse of modernity" [located in the Enlightenment and colonialism].[121] As two recent scholars, van der Veer and Lehmann, argue, this dichotomy has enabled the West to understand both its own self/identity as secular hence nonreligious, and non- West as embodying "a history of dangerous politicization of religious difference"[122]

Understandably, what this kind of dichotomy that privileges the West with an exclusive identity of rationality that the 'backward' non-West supposedly lacks, van der Veer and Lehmann wants to contend that religious and nationalism are interrelated in complicated ways, not only in the East but in the West as well.

While I sympathise with this argument about the Western discourse of modernity, I am sceptical of the analytical soundness of disciplinary concepts, like that of religious nationalism, that labour to illuminate the interconnection between religion and the nation. I suspect that such labours do not yield any new insight into the discursive formations of the altering meanings of categories like "religion" and "nation" and that, instead, they participate in a set of presumptive questions about what constitute the identity of nationalism. To suggest, in other words, that nationalism should be seen as something conditioned or influenced by "religion" is to assume that religion embodies some

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building upon van der Veer, argues, "Certainly religion has become one of the key features in the definition of the nation and national identity in Sri Lanka." Similarly, speaking of the global emergence of two kinds of nationalism, ethnic and ideological, Mark Juergensmeyer writes that "if the ethnic approach to religious nationalism, *politicizes* religion by employing religious identities for political ends, and ideological approach to religious nationalism does the opposite: it *religionizes* politics": see M. Juergensmeyer, '*The Worldwide Rise of Religious Nationalism*' (1996) ***Journal of International Affairs*** 50: p.5.

[121] P. van der Veer & H. Lehman (Eds.) (1999) ***Nation and Religion: Perspectives on Europe and Asia*** (Princeton: Princeton University Press): p.3.

[122] Ibid, see also van der Veer (1994): Ch.1.

independent autonomous "religious" identity. Here I am in agreement with Talal Asad, who has raised some serious misgivings about the supposed interrelation between religion and nationalism:

> "To insist that nationalism should be seen as a religious, or even as having been shaped by religion is, in my view, to miss the nature and consequence of the revolution brought about by the Enlightenment doctrine of secularism in the structure of modern collective representations and practices. Of course modern nationalism draws on pre-existing languages and practices- including those that we call, anachronistically, "religious." How could it be otherwise? Yet it does not follow that religion forms nationalism."[123]

In making this argument, what Asad wants to point out is, of course, not that nationalism should be taken as a secular matter. Rather Asad wants to point out that categories like "religion" and "secular" are not things but efforts to identify and define elusive and opaque sets of "particular ideas, sentiments, practices, institutions, and traditions- as well as followers who instantiate, maintain, or alter them."[124]

It is the instantiation, maintenance, and alteration of the relation between religion, identity, and the politics that have preoccupied me. I have sought to demonstrate the ways in which differing persons, practices, and narratives come to authorize what should and should not belong to the identity of religion, nation, and politics. Thus one would not hurry to identify what religion and politics are, what nationalism is, whether it is religious or secular; or whether it is an "imagined community."[125] Rather one must *look* for the discourses embedded in relations of power that authorize particular persons and institutions that seek to define such categories. Since the relation between religion and politics is

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[123]See T. Asad, '*Religion, Nation-state, Secularism,*' in van der Veer & Lehman: p.187. Note that, surprisingly, this article is in van der Veer & Lehman's edited volume.
[124]ibid.
[125]B. Anderson (1983[1992]) ***Imagined Communities: Reflections on the Origin and Spread of Nationalism*** (London: Verso).

located in particular discourses, then the questions about whether it is religious nationalism, or whether religion influences nationalism, are theoretically faulty.

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Jathika Chinthanaya and the Executive Presidency

Kalana Senaratne[1]

[1] I thank Mr Jagath Liyana Arachchi, Attorney-at-Law (CPA), for the invaluable assistance he gave by gaining access to a number of Sinhala publications (cited in this chapter) which are out-of-print and making them available to me on very short notice.

Introduction

The *Jathika Chinthanaya* movement[2], ever since its emergence in the 1980s[3], has been a prominent voice dedicated to articulating and promoting Sinhala-Buddhist nationalist thought in Sri Lanka. Over the years, its 'ideological children' have formed different political parties and movements representing Sinhala-Buddhist nationalism in the country. But ever since the 1980s, the principal and unfailing proponents of the *Jathika Chinthanaya* have been Dr. Gunadasa Amarasekera and Professor Nalin de Silva.[4]

The purpose of this chapter is to examine how the concept of political leadership and the issue of Executive Presidency in particular, have been discussed, promoted and critiqued in the political writings [5] of the *Jathika Chinthanaya* proponents. This involves an examination of how these proponents construct a narrative concerning the State and political leadership which can be considered to be reflective of, and at the same time appealing to, the political sensitivities of the majority Sinhala-Buddhist population in the country; thereby making a project such as the abolition of the Executive Presidency an arduous one.

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[2] 'Movement' here is only meant to be a convenient reference to the writers and proponents of the *Jathika Chinthanaya*.

[3] The rise of which has been acknowledged by international commentators; see Samuel P. Huntington (1996) ***The Clash of Civilizations and the Remaking of World Order*** (New York: Simon & Schuster): p.94.

[4] Dr Gunadasa Amarasekera, a dental surgeon by profession, is a leading novelist, poet and critic. He is also the President of the Patriotic National Movement (PNM). Professor Nalin de Silva, an academic (who was attached to the Universities of Colombo and Kelaniya), is a prominent writer and columnist. One of his important early works (first published in 1986) is the exposition of the concept of *Nirmanathmaka Sapekshathavadaya* (Constructive Relativism); see N. de Silva (1999) ***Mage Lokaya*** (3rd Ed.) (Maharagama: Chinthana Parshadaya) [Sinhala]. This chapter is almost exclusively an examination of their political writings.

[5] Much of the publications referred to in this chapter are in Sinhala. Writers such as Amarasekera and Nalin de Silva, though bilingual, have published most of their major publications in Sinhala.

Jathika Chinthanaya, the State and Political Leadership: An Introduction

What is meant by *Jathika Chinthanaya*? What forms of political structure and leadership get promoted under this concept? This section attempts to address these questions, very briefly. This would provide the broader conceptual backdrop within which an assessment of the *Jathika Chinthanaya* movement's political approach towards the Executive Presidency can be undertaken.

What is Jathika Chinthanaya?[6]

Very often, the phrase '*Jathika Chinthanaya*' gets translated as 'national thought'. This was perhaps the early meaning attached to the phrase, when explained by Gunadasa Amarasekera in 1986.[7] Therefore, 'national thought', 'national thinking' and 'national ideology' are some of the popular ways in which the phrase gets referred to in English commentaries.

Jathika Chinthanaya refers to the thread that binds and unites the different aspects of a culture together[8]; it is the thread that runs through and holds together the literature, arts, customs, ethics,

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[6] This section is not meant to be a detailed examination of the *Jathika Chinthanaya* concept; rather it attempts to provide an introduction to the basic and defining features of the concept.

[7] This was in an article published in ***Irida Divaina***, 17th August 1986; see the essay titled '*Marxwadi Chinthanaya Saha Jathika Chinthanaya*' in G. Amarasekera (2000) ***Deshapalana Samaja Vichara I (1986-1993)***(Colombo: S. Godage) [Sinhala]: p.1-8. It is evident that the use of the phrase by Amarasekera seems to be heavily influenced by A. Walicki (1979) ***A History of Russian Thought From Enlightenment to Marxism***(Trans. H. Andrews-Rusiecka) (Stanford: Stanford University Press). Here, the words "Russian thought" were interpreted by Amarasekera as "Rusiyanu [Russian] chinthanaya." However, this attempt has been recently critiqued by Nalin de Silva; see N. de Silva, '*Chinthanaya Saha Jathika Chinthanaya*', ***Kalaya***<http://www1.kalaya.org/2013/05/blog-post_3.html> accessed 15th July 2013 [Sinhala].

[8] G. Amarasekera (2006) ***Ganadura Mediyama Dakinemi Arunalu*** (4th Ed.) (Boralesgamuwa: Visidunu) [Sinhala]: p.61.

political and social norms of the people.[9] More specifically, as Nalin de Silva points out, what is referred to here is the '*chinthanaya*' of a nation, which, originally, was a reference to the '*chinthanaya*' of the Sinhalas.[10] '*Chinthanaya*', in broad terms, is "a thread that binds all those things that have been created by the human being in a particular culture", such as science, arts, dancing, music, even aspects such as cooking or the mode of dress – it is a "thread that binds all these things together."[11]

The 'thread' is largely that version of Theravada Buddhism as practiced by a majority in Sri Lanka; i.e. Sinhala-Buddhism. Amarasekera once stated succinctly, that a most convenient and simple way in which the question 'what is *Jathika Chinthanaya*?' can be answered is to say that it is Sinhala-Buddhist thought ("*sinhala bauddha chinthanaya*").[12] In that sense, Sinhala-Buddhism or the Sinhala-Buddhist cultural identity[13] plays a defining role in much of what gets promoted as, or within, the *Jathika Chinthanaya*.[14] Sinhala-Buddhism takes on the role of an overarching and all-

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[9] Ibid.: p.39.

[10] N. de Silva, '*Chinthanaya and Modernity*' ***The Island***<http://www.island.lk/2004/09/01/midweek4.html> accessed 15th July 2013. 'Sinhalas' – a term which has been popularised by advocates of the *Jathika Chinthanaya* (and especially, Nalin de Silva) – is considered to be slowly replacing the reference made to 'Sinhalese', a shift which appears to be "directed by a measure of purism"; M. Roberts (2004) ***Sinhala Consciousness in the Kandyan Period 1590s to 1815*** (Colombo: Vijitha Yapa Publications): p.xvi.

[11] As briefly explained by N. de Silva, '*Buddhism, science and development: a synthesis – Prof. Nalin De Silva*' ***YouTube***<http://www.youtube.com/watch?v=gZ0fAllF9ZY> accessed 15th July 2013, especially at 4.05-4.50 minutes.

[12] Amarasekera (2006): p.31.

[13] The Sinhala-Buddhist identity is not a fixed one; it is subject to change, with the Sinhala Buddhist community being susceptible to be named differently over the course of time: N. de Silva, '*Intellectual Invertebratism: The Stillborn Artificial Sri Lankan Identity – V*',***Kalaya***<http://www.kalaya.org/i080806.html> accessed 15th July 2013.

[14] It is also a concept that "recognises the importance of culture, economics and politics in the making of social forces and as an eastern system of knowledge is also aware of the fact that they are interrelated and not mutually exclusive": N. de Silva, '*The Bare Doctrine of Blair the Bear*', ***Kalaya*** <http://www.kalaya.org/i990427.html> accessed 15th July 2013.

encompassing culture, since it is regarded as being applicable to the vast majority; so it is said that over the past two-thousand years or more, the different peoples of Sri Lanka have lived under the shade of the *Jathika Chinthanaya* of the Sinhala-Buddhist majority.[15] In claiming so, the *Jathika Chinthanaya* concept enables the promotion of a myth necessary for political unity and cohesiveness: the myth of a single, overarching, culture under which all peoples have historically co-existed, and therefore should continue to in the future.

And to be sure, this narrative does not leave out the different other numerically smaller minority groups aside. Rather, the cultural identities and distinctiveness of the Tamil and Muslim people get recognised. There is a celebration and promotion of their cultural distinctiveness. Nalin de Silva, for example, has emphasised the importance of Sri Lankan Tamils developing a "truly Sri Lankan Thamil culture" which is not influenced by South India (Tamil Nadu).[16] Reviving the Sinhala people and placing emphasis on the importance of the *Jathika Chinthanaya* is considered to be an exercise which is essential to prevent the destruction, not only of the Sinhala people, but of the Tamil people as well.[17] And, *Jathika Chinthanaya* is not to be regarded as a nationalist ideology per se; rather "a nationalist ideology has to be worked out in a Jathika Chinthanaya."[18] More importantly, there is also a taking into consideration of the particular sensitivities of the minority communities regarding the phrase 'Sinhala-Buddhism'. So for example, Amarasekera once wrote that if the use of the term 'Sinhala-Buddhist' (*"sinhala bauddha"*) to define the essence of this overarching culture is felt to be unpleasant, then it is necessary to use a different term.[19]

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[15] Amarasekera (2006): p.45.

[16] N. de Silva, '*Statements and Western Statesmen*', ***Kalaya***<http://www.kalaya.org/i060621.html> accessed 15th July 2013.

[17] Amarasekera (2000): p.26.

[18] N. de Silva, '*Beyond the Numbers Game*', ***Kalaya***<http://www.kalaya.org/i010905.html> accessed 15th July 2013. Therefore '*chinthanaya*' is viewed as a concept which should not be easily translated as 'thought' or 'ideology'.

[19] Amarasekera (2006): p.45-46.

Yet, Sri Lanka is required to be viewed as a country in which the Sinhala, Tamil and Muslim people inherit a single overarching culture, under the shade of which the respective different cultures have space to develop and flourish. In other words, the cultural identities of the Tamil and Muslim people are categories or different varieties of the broader cultural identity of the Sinhala people.[20]

This is also because the Sinhala people are regarded as the original inhabitors of the country. The Sinhalas (or *Hela*) people – whose historical roots are popularly traced back to the arrival of Prince Vijaya from Northern India, as per the *Mahavamsa* chronicle[21] - have originated in Sri Lanka[22], and are not migrants. They are the proud inheritors of Buddhism, which has been the religion of a vast majority of the people of the country ever since the arrival of Arahant Mihindu, the son of Emperor Ashoka of India, during the period of King Devanampiya Tissa.[23] In that sense, *Jathika Chinthanaya* is also a unifying thread, that runs through these different peoples and cultures within the country, which binds them together, transforming Sri Lanka into a single, largely cohesive, nation; a Sinhala-Buddhist nation.

What is interesting about this narrative is that it promotes the distinctive cultural identities of the different minority groups within a broader assimilationist project. While all come together to make a single cohesive unit, there is always the Sinhala-Buddhist

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[20] Ibid.: p.45.

[21] W. Geiger (2007) ***The Mahavamsa or the Great Chronicle of Ceylon*** (Trans.) (Dehiwela: Buddhist Cultural Centre).

[22] N. de Silva, '*Of Sinhalas and Tamils*', ***Kalaya***<http://www.kalaya.org/i030305.html> accessed 15th July 2013. Therefore it is important to note that writers such as Nalin de Silva do not consider the Mahavamsa to be the final word on the historical roots of the Sinhalas. The use of the Mahavamsa is a more political and strategic exercise to him: in other words, the Mahavamsa text is defended largely at times when it is sought to be attacked by critics of Sinhala-Buddhist nationalism.

[23] This does not mean, however, that the people were unaware of the Buddha's teaching before the arrival of Arahant Mihindu. What happened with the arrival of Arahant Mihindu is the establishment of the *Buddha Sasana*, argues Amarasekera (2006), at p.34.

community dominating the picture. That the Sinhalas were the original inhabitants of the country is also a claim to (benevolent) ownership of the Sri Lankan territory and State, under whose protection the others would come to live. Under such a context, the framework of the State is that which accords to the wishes of the majority. Different cultures co-existing under an overarching culture is different is not the same as different cultures co-existing respecting each other's culture and autonomy. The latter understanding promotes greater equality, while the former creates a hierarchy wherein everything appears to be fine until a different cultural entity raises a claim for equality which upsets the silent supremacy of the majority community.

Apart from the above, one of cardinal ideas behind the *Jathika Chinthanaya* is the need to look at the problems confronting the people of Sri Lanka through the prism of their own *chinthanaya*. This is because the Sinhala people and the other ethnic communities, according to Amarasekera, have lived in the country in a civilised manner for centuries, having developed a distinct and splendid culture, providing them with the ability to address their problems without imitating the West.[24]

Colonialism rattled this situation, upsetting the further flourishing of the *Jathika Chinthanaya*; and the impact of Western-inspired colonialism, in all its forms and manifestations, has had a debilitating impact on the country and its people. This partly explains why the critique of the West – especially Western systems of knowledge, including Western-science[25] - remains a constant and recurring theme in the writings of the *Jathika Chinthanaya* movement. In that sense, there is a strong assertion of the need for true independence, both from Western-rule and Western-

[24] G. Amarasekera (1991) ***Arunaluseren Arunodayata*** (Maharagama: Chinthana Parshadaya): p.156-157.

[25] This is not surprising given that the advocates of the *Jathika Chinthanaya* are extremely critical of Western systems of knowledge (and the 'Judaic Christian chinthanaya' which guides the construction of such knowledge), and have vehemently critiqued Western-science in particular. See: N. de Silva (2006) ***Ape Pravada*** (Boralesgamuwa: Visidunu Prakashakayo); N. de Silva (2008) ***Ape Pravada – 2*** (Boralesgamuwa: Visidunu Prakashakayo); N. de Silva (2010) ***Ape Pravada – 3*** (Boralesgamuwa: Visidunu Prakashakayo).

dominated knowledge and thought systems.

The Sinhala-Buddhist State

As stated before, Sri Lanka is considered to have been originally inhabited by the Sinhalas and one which has a long and unique history of preserving the teachings of the Buddha; a history which is without parallel in the world.[26] What emerges now is the Sinhala-Buddhist State of Sri Lanka. According to Nalin de Silva[27], the Sinhala-Buddhist State was established by King Dutu Gemunu, the first king who united the country.[28] Ever since then, the people of the country were Sinhala-Buddhists. Their culture was Sinhala-Buddhist. The State was Sinhala-Buddhist. A distinct phrase or label (i.e. 'Sinhala-Buddhist') was unnecessary to explain the character of the State and its people. Sinhala-Buddhism was natural.[29]

The central pillars of governance were threefold: the King; the *Sangha* (the Order of Buddhist Monks or *Bhikkus*); and the people (who were predominantly Sinhala-Buddhists). This structure, originally established by Emperor Ashoka of India, is considered to have been inherited, further developed and established in Sri Lanka[30]; a political structure which is regarded to have been continuously maintained in Sri Lanka for over two thousand years,

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[26] For a recent articulation of this position by a representative of the Sinhala-Buddhist nationalist party, the Jathika Hela Urumaya (JHU), see: '*The Constitutional Form of the First Republic: The Sinhala-Buddhist Perspective: An Interview with Udaya Gammanpila*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: CPA): p.899-932. As Gammanpila states: "We have been practicing Buddhism as the majority religion for the last two thousand four hundred years. There is no other country in the world which has practiced one religion as the majority religion for such a long period of time"- p.908.

[27] See generally, N. de Silva (1998) ***Nidahase Pahan Temba: Sinhala Bauddha Rajya Pilibanda Hendinweemak***(Maharagama: Chinthana Parshadaya).

[28] Ibid.: p.5-6.

[29] Ibid.: p.2.

[30] G. Amarasekera (2011) ***Amathakawu Urumaya: Kavandayata Hisak*** (Boralesgamuwa: Visidunu): p.62; De Silva (1998): p.9.

disturbed significantly (though not totally destroyed) due to colonial invasion.[31]

Also importantly, Sri Lanka has always been a 'unitary' State. The famous battle between the Sinhala King, Dutu Gemunu, and the Tamil King, Elara, was a battle undertaken by the former to unify the country, leading to the establishment of the Sinhala-Buddhist State. What King Dutu Gemunu did was unify (*eksesath*) the country; the term '*eksesath*' meant '*ekiya*' (unitary). [32] In contemporary parlance, then, King Dutu Gemunu established the unitary Sinhala-Buddhist State, with a single legislative body (a *raja sabhawa* or King's Council), and a system of administrative decentralisation (not devolution).[33] This is a narrative which asserts that the Tamil people never had a territorial entity (or State) akin to the *eksesath rajya* developed by King Dutu Gemunu. [34] It vehemently rejects the 'traditional homeland' concept promoted by the Tamil nationalists. Therefore, writers such as Nalin de Silva have forcefully asserted that the current Tamil problem in the country is nothing but a Tamil racist problem created by the colonial powers and the Tamil nationalists.[35]

Unsurprisingly, the importance of devolution of powers does not figure in the idea of State-reformation advocated by the *Jathika Chinthanaya* movement. Rather, Amarasekera argues that the principal aim is to see how a humanist, socialist, society based on the principle of equality can be constructed[36]; which cannot be

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[31] Amarasekera (2011): p.57.

[32] de Silva (1998): p.7.

[33] Ibid: p.10.

[34] Ibid: p.8.

[35] See generally, N. de Silva (2000) ***Prabhakaran: Ohuge Seeyala, Baappala Saha Massinala*** (3rd Ed.) (Maharagama: Chinthana Parshadaya) [Sinhala] <http://www.kalaya.org/files/Prabhakaran_Ohuge_Seeyala_Bappala_ha_Massinala.pdf> accessed 15th July 2013; N. de Silva (1997) ***An Introduction to Tamil Racism in Sri Lanka*** (Maharagama: Chinthana Parshadaya); N. de Silva (2009) ***Demala Jathivadayata Erehiwa*** (Maharagama: Chinthana Parshadaya) [Sinhala]; also see, N. de Silva (2013) ***Dekma-I*** (Colombo: S. Godage) [Sinhala].

[36] Amarasekera (2011): p.80 ("*manawa hithawadi, samanathmathawa mul karagath samajawadi samajayak*").

achieved either through Capitalism or Marxism.[37] Rather, what can lead to such a society is a form of Dharmic Socialism (*Dharmika Samajawadaya*)[38], or Buddhist socialism.

The above provides a broad outline of the nature of the Sinhala-Buddhist State that gets promoted through the *Jathika Chinthanaya*. Some of its central features and purposes are clear: the preservation and maintenance of the unitary character of the State, the protection of Buddhism, as well as the Sinhala language and culture (of the majority community). Protecting Buddhism is regarded only as a protective measure taken by the Sinhala-Buddhists, since they believe that it is their duty to provide protection to the religion. It is meant to be a purely defensive concept, which aims to protect one's culture, religion and nationality from foreign intervention.[39]

Also, emphasis has come to be placed on the notion termed "*Sinhalathva*": which refers to the prominence of the "Sinhala Nation, Sinhala language, Sinhala history, Sinhala culture and finally the Sinhala life style."[40] What seems to be asserted here is that the prominence of Sinhala-Buddhism – which is considered natural and clear to anyone given the ethnic composition of the country – has to be recognised; the kind of prominence which is thought to be ignored or dismissed by those attempting to view Sri Lanka as a multi-ethnic and multi-cultural country. As de Silva states:

> "Sri Lanka is a Sinhala Buddhist country and is not multi-national or multi-religious. However, the identification of Sri Lanka as a Sinhala Buddhist

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[37] Ibid. Note here, that Marxism did play a significantly influential role for writers such as Amarasekera, who attempted to give a nationalist flavour to Marxism in his early writings on the *Jathika Chinthanaya*. Nalin de Silva, on the other hand, was originally a member of the leftist Nawa Sama Samaja Party (NSSP) and passionately advocated the right to self-determination for the Tamil people. However, Marxism later came to be thoroughly critiqued by these writers, especially by de Silva.

[38] Amarasekera (2011): p.81-87.

[39] de Silva (1998): p.15.

[40] N. de Silva, '*Bishops, Generals and Ambassadors*', ***Kalaya*** <http://www.kalaya.org/i030108.html> accessed 15th July 2013.

> country does not imply that non-Sinhala Buddhists are in any way second class citizens. All are equal before the law. The Sinhala Buddhist identity is a reflection of the country's history and the present social composition. It also implies that the main component of the common culture of the country is Sinhala Buddhist."[41]

The logical conclusion of Sinhala-Buddhism being the thread that binds all the people is precisely this. At every moment, that identity rises to the surface, submerging the ability to give equal prominence to other religions and cultures. The claim that Sinhala-Buddhists are the overwhelming majority is obvious enough; and to that extent, the *Jathika Chinthanaya* concept seems unproblematic. But it is in the fierce rejection of the multi-cultural or multi-ethnic labels, in the vigorous assertion of the need to recognise Sinhala-Buddhism as the dominant identity, that the dangers lie. The inability on the part of the Tamil community and leadership to recognise this predominance makes them Tamil 'racists' in the minds of the *Jathika Chinthanaya* advocates.

Political Leadership in a Sinhala-Buddhist State

Within this political and governance structure of the Sinhala-Buddhist State, the King comes to play a dominant role.

Traditionally, it has been noted that: "In the view of Sinhalese Buddhists, the duty of the king is to protect his people, making their life safe, happy and comfortable. He intended to achieve this goal in two ways: first, by providing all that is needed for their material advancement and second, by providing all that is needed for their spiritual advancement." [42] This conception of kingship placed importance on righteous rule and meritocracy, as famously promoted through the tenfold duties (or perfections) of the king

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[41] de Silva (1997): p.4.

[42] J.B. Disanayaka (2007) ***Lanka: The Land of Kings*** (Sumitha Publishers): p.32.

(*dasa raja dhamma*, or *dasa paramita*)[43] and other Buddhist sources, including conceptions such as the Chakkavatti Monarchy.[44] There was tremendous veneration and respect, for the King was also regarded to be a *bodhisattva*, one who was aspiring to be a future Buddha.[45]

This form of leadership was sought to be ensured within the Sinhala-Buddhist State, through the three pillars represented by the King, the *Sangha* community (the *bhikkus*) and the people. In this triangular structure, the *Sangha* community played the important role of advisors and guardians, stepping forward to ensure, when necessary, that the king did not use his powers to the detriment of the governed.[46] The *bhikkus* therefore were involved in 'politics' in an advisory capacity, involved even in the creation and nurturing of future kings, but not in active politics.[47]

The King, on the other hand, was the ruler of the country and of all the people, and was supposed to rule according to the Dhamma, treating all the people with equality. In this way, a harmonious balance was sought to be established, resulting in the formation and maintenance of an ethical society.[48] This, it is often stated, was the classic form of political community organised under the rulership of Emperor Ashoka, who was the model of ideal or righteous kingship.

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[43] These were *dana* (generosity, munificence); *sila* (morality); *pariccaga* (self-sacrifice and liberality); *ajjava* (honesty); *maddava* (gentleness); *tapo* (self-restraint, patience); *akkodha* (without malice); *avihimsa* (non-violance); *khanti* (forbearance); and *avirodana* (agreeability, non-obstruction): ibid.: p.35.

[44] See generally, N. Ratnapala (1997)***Buddhist Democratic Political Theory and Practice*** (Colombo: Sarvodaya); L. de Silva (2003) ***Cakkavatti Monarchy of the Pali Canon as a Democratic Meritocracy*** (Dehiwela: Buddhist Cultural Centre).

[45] Disanayaka (2007): p.34.

[46] For a classical discussion on the role of monks in Sri Lankan politics, see W. Rahula (1974) ***The Heritage of the Bhikkhu*** (Colombo: S. Godage & Brothers, 2003 Second Impression).

[47] In this regard, writers such as Nalin de Silva have been very critical of Buddhist monks being engaged in active *electoral* politics; see, for example, N. de Silva (2004) ***Mathiwaranaya Saha Haamuduruwo*** (Maharagama: Chinthana Parshadaya) [Sinhala].

[48] Amarasekera (2011): p.62.

In Sinhala-Buddhist nationalist writings, a form of ideal or commendable kingship gets represented by the likes of Kings Devanampiya Tissa, Dutu Gemunu and Maha Parakrama Bahu. They are often lauded for having protected the religion of the majority (Buddhism) as well as the territorial integrity of the country. Not all kings have been successful in this task, and maintaining the Sinhala-Buddhist State and its unitary character has not been easy. However, even during the most calamitous times, the broader framework of the Sinhala-Buddhist State was sought to be protected. Such was the case until the most serious threat to this framework was exerted by colonial invasion by the European powers; especially in 1815, when the British captured the Kandyan Kingdom.

Interestingly, it has also been asserted that the king did not always have to be Sinhala-Buddhist in origin. What was required, in principle, was his commitment to the protection and promotion of Buddhism, as well as righteous rule. It is argued, therefore, that this was the reason why the Sinhala people were even ready to accept Tamil Kings of Indian origin – such as those belonging to the Nayakkar dynasty[49] in general, and kings like Sri Vijaya Raja Sinha in particular – as their own leaders. Here, the ethnic or religious identity of the leader in question did not matter, and they came to be regarded as "Sinhala kings."[50] Therefore, this meant that even a Tamil can become the president of Sri Lanka, as long as he accepts that the main culture in Sri Lanka is the Sinhala-Buddhist culture (just as the kings of the Nayakkara dynasty did during the 18th and 19th centuries).[51] Here again, it is not simply a Tamil who can become a king; rather, it is a Tamil who is committed to accepting the dominance or significance of Sinhala-Buddhism that can become the ruler..

But calamity struck in 1815, which was a significant blow to the

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[49] The Nayakkar dynasty had four main kings: Vijaya Raja Sinha (1739-1747); Kirti Sri Raja Sinha (1747-1782); Rajadhi Raja Sinha (1782-1798); and Sri Vikrama Raja Sinha (1798-1815). Hindus by faith, these kings extended patronage to Buddhism by building royal temples and Buddhist shrines, while also promoting the welfare of the *Sangha*. See Disanayaka (2007): p.50-51.

[50] Amarasekera (2006): p.36. See also, Amarasekera (2011): p.66.

[51] de Silva (2009): p.147 & 216.

continuation of king's rule in the country with the fall of the Kandyan kingdom. And a few decades later, in 1848, the great rebellion led by leaders such as Puran Appu and Gongalegoda Banda was crushed. It has been the strong contention that ever since then, the British had deliberately prevented the emergence of truly Sinhala-Buddhist leaders in the country. The Sinhalas, therefore, lacked a proper, indigenous, leader of their own since the early 19th century. Nalin de Silva writes:

> "It is unfortunate that since 1848 the Sinhalas have had no leadership of their own, except for a short period during the [heyday] of Anagarika Dharmapala who was defeated by the British and their appointed leaders. After the independence struggle of 1817-18 the British massacred brutally the Sinhala leadership and installed their own agents as the leaders of the Sinhalas. Ordinary people like Puran Appu and Gongalegoda Banda who were not leaders in the eyes of the Sinhalas were forced to take up the leadership at the second independence struggle of 1848. Since then the anglicised, culturally as well as religion wise, set of people who were endowed with land, position and other privileges have been appointed as leaders of the Sinhalas by the British."[52]

It is within this context that Anagarika Dharmapala[53], who pioneered Sinhala-Buddhist nationalist revivalism (especially in the early 20th century), becomes the epitome of truly authentic, indigenous, Sinhala-Buddhist leadership. He is a figure who comes to be revered by the *Jathika Chinthanaya* movement (and perhaps Sinhala-Buddhists in general) as the most admirable Sinhala-Buddhist nationalist figure to have emerged in the country since 1848.

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[52] N. de Silva, '*Changing Leaders*', ***Kalaya***<http://www.kalaya.org/i020807.html> accessed 15th July 2013.

[53] For a useful collection of his writings, see A. Guruge (Ed.) (1991) ***Return to Righteousness: A Collection of Speeches, Essays and Letters of the Anagarika Dharmapala*** (Sri Lanka: Ministry of Cultural Affairs & Information). See also for a biographical account, B. Sangharakshita (1964) ***Anagarika Dharmapala: A Biographical Sketch*** (3rd Ed.) (Kandy: Buddhist Publication Society); G. Amarasekera (1980) ***Anagarika Dharmpala Marxwadida?***(Kalutara: Sampath Prakashana Samagama) [Sinhala].

Jathika Chinthanaya and Post-Independence Political Leadership

The above examination provides a basic introduction to how the *Jathika Chinthanaya* movement understands and promotes the notion of political leadership and the Sinhala-Buddhist State. The symbiotic relationship between the two is clear; the kind of political leader that gets promoted as well as his/her functions are founded on the nature of the political community or State within which that leader needs to function, and vice-versa. In that sense, the leader of Sri Lanka is often regarded as having to protect, preserve, promote and give prominence to the unitary character of the State, Buddhism, and the Sinhala-Buddhist culture (which is said to have been the case, even when the kings were not Sinhala-Buddhist in origin). And the successful maintenance of the Sinhala-Buddhist political structure, in turn, depends on the nature of the leader in power.

What this section attempts to do is to briefly examine how the *Jathika Chinthanaya* proponents have approached the issue of supporting or critiquing post-independence political leaders of Sri Lanka (albeit without discussing the merits of the arguments made). The impact of this broader political approach of the *Jathika Chinthanaya* movement on the debate concerning the Executive Presidency will be discussed in the final section of the chapter.

Bandaranaike and the 'Revolution' of 1956

Perhaps the first post-independence political leader who comes to be most discussed and appreciated by the *Jathika Chinthanaya* movement is Prime Minister S.W.R.D. Bandaranaike, elected in 1956, a pivotal year in the political story of Sinhala-Buddhist nationalism. This was a 'revolutionary' moment in the country's history, not because of the election of Mr. Bandaranaike, but because it was a result of the galvanisation of the five great forces (*panca maha balawegaya*) of the country: the Buddhist monks (*sangha*), indigenous doctors (*weda*), teachers (*guru*), farmers (*govi*) and the labour force (*kamkaru*). This social mobilisation enabled Mr. Bandaranaike attain power, ably facilitated by the Sri Lanka Freedom Party (SLFP) which had been, at its inception in 1951,

liberal in outlook.[54]

This '1956 revolution'[55] was the culmination of the Buddhist revivalism that was initiated by Anagarika Dharmapala.[56] The path was now paved to initiate a period of rule which put the *Jathika Chinthanaya* to good use. Mr. Bandaranaike's task was to give leadership to the social forces – the popular nationalist wave – which elected him, and govern the country with the *Jathika Chinthanaya* in mind. In a broader sense, "the programme of fifty six", as de Silva states, represented "nothing but the freedom struggle from western Christian cultural political and economic colonialism."[57] The 'Sinhala-Only' policy, which defines the Bandaranaike-era, addressed a grievance of the Sinhala people, and rectified an injustice perpetrated by colonial rule.

But the *Jathika Chinthanaya* movement's appreciation of this era is not wholly celebratory in tone. It is critical, when pointing out that Mr. Bandaranaike was unable to provide the much needed national leadership to the nationalist forces that elected him. On the one hand, it had to be remembered that the popular nationalist wave of this era was not Mr. Bandaranaike's creation alone; he even lacked a certain degree of Sinhala-Buddhist authenticity to be regarded as a true Sinhalese leader.[58] But even more critically, Mr. Bandaranaike was determined to hold on to power. Amarasekera argues that Mr. Bandaranaike could be regarded as the creator of the deplorable, power-hungry political culture that bedevils the

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[54] Amarasekera (2006): p.178.

[55] The importance attached to 1956 is also reflected in the phrase "Children of Fifty Six" ("*Panas Haye Daruwo*"), coined by Nalin de Silva in his Bandaranaike Memorial Lecture delivered in 1989. See, for instance, N.de Silva, '*Panas Haye Daruwo*', ***Kalaya***<http://www.kalaya.org/files/d040125.pdf>; '*Panas Haye Daruwo (Dewana Kotasa)*', ***Kalaya*** <http://www.kalaya.org/files/d040208.pdf> accessed 15th July 2013 [Sinhala].

[56] Amarasekera (2006): p.178.

[57] N. de Silva, '*The SLFP-JVP Alliance*', ***Kalaya***<http://www.kalaya.org/files/i040121.pdf> accessed 15TH July 2013.

[58] Since Mr Bandaranaike was born into an anglicised family and had to change his religion, "he could not become a cultural Sinhala Buddhist"; N. de Silva, '*Changing Leaders*', ***Kalaya***<http://www.kalaya.org/files/i020807.pdf> accessed 15th July 2013.

country today.[59] This is not to suggest that he was a crass opportunist; and yet, his main shortcoming was his inability to provide that all important intellectual leadership to the popular social mobilisation of 1956.[60] It is considered a lost opportunity for the Sinhala-Buddhist masses.

Mrs. Sirimavo Bandaranaike's arrival in the political scene is regarded to have been viewed by the Sinhala-Buddhists as a continuation of the journey that began in 1956.[61] Moreover, the leadership she provided during the 1970-77 era has been broadly considered to be a praiseworthy one, given her anti-imperialist stance, and the attempt made to resuscitate the humane, socialist, Sinhala-Buddhist heritage. The argument goes that had she been able to desist from engaging in certain unnecessary practices during that period, much progress could have been made, especially to proceed in the direction that was expected by a vast majority of the people.[62] This may partly explain why the introduction of the first republican constitution of Sri Lanka in 1972 – with its commitment to the unitary character of the State and the prominence afforded to Buddhism – has been welcomed by Sinhala-Buddhist nationalist forces.

J.R. Jayewardene, the Executive Presidency and the Authoritarian Era

Mr. J.R. Jayewardene first mooted the need for a strong executive

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[59] Amarasekera (2006): p.179. So, while his 'Sinhala-Only' policy of 1956 receives applause, the 1957 Bandaranaike-Chelvanayakam Pact is seen as evidence of Mr. Bandaranaike's intention to remain in power, especially by appeasing the Tamil nationalists.

[60] Amarasekera (2006): p.179. Amarasekera argues that Mr. Bandaranaike, who was undoubtedly confronted with numerous political challenges, was capitulating and moving closer to the capitalist camp, and it was the unfortunate shooting by Somarama which, ironically, saved Mr. Bandaranaike from disgrace; Amarasekera (2011): p.16.

[61] Amarasekera (2011): p.16.

[62] Ibid. Much of the criticism here seems to be directed at the Marxist/Leftist members of the then regime, with its policy of taking over land being regarded as an inhumane policy that was guided by hatred and jealousy, lacking the support and blessings of a majority of the people; ibid.: p.17.

in 1966, arguing that a "strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature; not afraid to take correct but unpopular decisions because of censure from its parliamentary party" was necessary "in a developing country faced with grave problems."[63] He won the elections in 1977, having promised to usher in a *dharmishta samajaya* (righteous society). He attempted to portray himself as the ideal leader, the righteous king; and even proceeded to enunciate ten pledges he would take as the Executive President.[64]

The proponents of the *Jathika Chinthanaya* have been critical of President Jayewardene's policies. The introduction of the Executive Presidential system gets hardly appreciated in their early writings. In broad terms, President Jayewardene emerges as a hypocritical ruler, who made opportunistic use of the concept of a *dharmishta* society for electoral purposes, knowing very well the concept was popular among the Sinhala-Buddhist masses. Amarasekera asserts that President Jayewardene was never honest about ensuring such a righteous and humane society.[65]

Widely criticised in this regard is President Jayewardene's open-economic policy, which is said to have facilitated the creation of an unjust, unequal, society. This was a policy which was pro-US and neo-imperialist in character, a policy which ran contrary to the humane and ethical economic policies of a righteous society, and one which was responsible for tensions that erupted in 1988-89.[66]

Furthermore, the Jayewardene regime's policies on the Tamil question have attracted much critical commentary. On the one hand, it is said that the violence committed in 1983 against the

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[63] J.R. Jayewardene (1979) ***Selected Speeches and Writings, 1944-1978*** (Colombo: H.W. Cave & Company Ltd.): p.86; see '*Science and Politics*', Speech at the opening of the Twenty Second Annual Sessions of the Ceylon Association for the Advancement of Science, Colombo (14th December 1966).

[64] Ibid: p.175-185; see '*Democratic Socialism through Development*', Speech made at the Convocation Ceremony of the University of Sri Lanka (31st May 1978).

[65] Amarasekera has claimed that the plan to make use of the *dharmishta* concept could have been promoted by the American CIA; Amarasekera (2011): p.18.

[66] Ibid.: p.72.

Tamil people was evidence of the inability of that regime to ensure law, order and accountability. It was carried out by the Jayewardene-government, in particular by a certain minister and his goons; a deliberately orchestrated inhumane attack, with the intention of teaching the Tamil people a lesson.[67]

But on the other hand, equally problematic was the Indo-Lanka Accord of 1987, which paved the way for the provincial council system via the Thirteenth Amendment to the Constitution.[68] According to Nalin de Silva, President Jayewardene thereby "admitted that the north and the east were the Tamil traditional homelands, introduced the Thirteenth Amendment to the constitution and set up provincial councils, and made Tamil an official language by going further along the same course of action under the Indian government's pressure and influence."[69] Also, President Jayewardene introduced the Thirteenth Amendment to mask the shame and ignominy that befell him as a consequence of having to sign the Indo-Lanka Accord.[70] His reluctant admission that certain injustices had been committed against the Tamil people was one of his ploys to gain Tamil votes, for he knew that Tamil votes were necessary for practical political purposes as the Sinhala votes often got divided between the two main parties, the UNP and the SLFP.[71]

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[67] Amarasekera (1991): p.106. Amarasekera proceeds to question how one expects people to have any confidence in law, justice and fairness when killing was sought to be institutionalised by the government.

[68] However, note that writers such as Amarasekera were initially more sober in their critique of India's role in Sri Lankan affairs during this period. Writing the preface to the first edition of *Ganadura Mediyama Dakinemi Arunalu* in 1988, Amarasekera argued that India was never regarded as one of Sri Lanka's enemies but rather as a powerful neighbour and relative who wished for Sri Lanka's welfare. If we were prompted to act with this attitude, argues Amarasekera, we would even be able to set aside the adverse or harmful elements ("*ahithakara kotas*") of the Indo-Lanka Accord. Amarasekera goes on to state that acting as if India is an enemy, without adopting such a careful approach, would spell disaster, further threatening Sri Lanka's sovereignty. See Amarasekera (2006): p.12-13.

[69] de Silva (1997): p.69-70.

[70] G. Amarasekera (2003) ***Deshapalana-Samaja Vichara II (1994-2000)*** (2nd Ed.) (Colombo: S. Godage): p.35.

[71] de Silva (1997): p.72.

In the final analysis, the Jayewardene-era had given rise to nepotism, and has come to be recognised as one wherein acts of electoral violence and malpractice, attacks on the judiciary, and the violation of peoples' freedoms in general were rampant. Amarasekera argues that it was the Executive Presidential system and the manner in which the system was used that need to be held responsible for much of this nepotism and undemocratic rule witnessed during the Jayewardene era. [72]A lso, President Jayewardene had created an all-powerful presidential system, through strong centralisation of powers, in order to preserve his capitalist, open-economic system.[73]

As regards President Ranasinghe Premadasa, the approach of the *Jathika Chinthanaya* movement has also been a mixed one.

Much admired has been President Premadasa's perceived stance towards the West. He is regarded as one of the unique leaders, not overly influenced by the West, and therefore, not bound to please the West. [74] So, his decision to declare the then British High Commissioner in Sri Lanka, David Gladstone, *persona non grata* has been widely appreciated.[75]

However, President Premadasa's economic policies have not received much admiration and support.[76] He is perceived as having attempted to perpetuate President Jayewardene's policies, by

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[72] Amarasekera (2006): p.174.

[73] Amarasekera (2003): p.38.

[74] N. de Silva, '*The Leadership of the Sinhalas*', ***Kalaya***<http://www.kalaya.org/i030115.html> accessed 18th Mar 2013. This was also the case with President D.B. Wijetunga, who succeeded President Premadasa for a brief period after the latter's assassination.

[75] Ibid. This episode has often been reminded to succeeding Presidents whenever foreign diplomats were considered to be meddling unnecessarily in the affairs of the country; see for example, N. de Silva, '*Norwegian Humbug*', ***Kalaya***<http://www.kalaya.org/i010516.html> accessed 15th July 2013.

[76] See G. Amarasekera (1993) ***Jathika Chinthanaya Saha Jathika Arthikaya*** (Maharagama: Chinthana Parshadaya), written in response to the challenge posed by President Premadasa, when the latter challenged his critics to come up with an alternative to the economic policy implemented at that time.

further opening up the economy to the detriment of the country and its industries. Amarasekera, in critiquing this policy – adopting a pro-Third World approach, critical of the policies carried out by certain International Financial Institutions (IFIs) – demanded the revival of a more humane and ethical economic system, one which was structured around the village-based agricultural economy.[77]

Similarly, the Premadasa-era had not inspired much hope regarding the possibility of defeating the LTTE. As is well known, Sinhala-Buddhist nationalist groups have been extremely critical of President Premadasa's handover of arms to the LTTE (to fight the IPKF). That the political leadership of this era was not convincing enough in its ability of defeating the LTTE is reflected in the writings of this era, some of which strongly called for the need to have an able, strong and dedicated political leadership to defeat the LTTE, without antagonising India.[78]

Kumaratunga, Wickremasinghe and the LTTE Problem

After the assassination of President Premadasa, President D.B. Wijetunga was in power for a brief period (1993-1994). During this period, President Wijetunga was reported to have made a number of statements claiming that the Tamil problem in the country was only a terrorist-problem, and not an ethnic one.[79] This approach was widely welcomed and praised by writers such as

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[77] Ibid., p. 21-27. However, the *Jathika Chinthanaya* movement's understanding and policy prescriptions regarding economic development have been critiqued by modern Sinhala-Buddhist nationalist politicians such as Patali Champika Ranawaka. See, P.C. Ranawaka (2001) ***Sihala Abhiyoghaya*** (Colombo: Dayawansa Jayakody & Co.), especially p. 157-164.

[78] N. de Silva (1999) ***Jathika Urumaya*** (Rajagiriya: Sanskruthika Urumayan Rekagenime Sanwidanaya): p.1-6. (being an article published in the *Irida Divaina* newspaper, dated 24.05.1992).

[79] A number of these statements have been referred to in N. Satyendran, '*Ethnic Problem? What Ethnic Problem!*',***Tamil Nation***<http://tamilnation.co/saty/9310ethnic.htm> accessed 15th July 2013.

Amarasekera [80], who hoped that this perspective had to be implemented on the ground (i.e. defeating the LTTE), with the assistance of India as well.[81] This, however, was not to be, as Chandrika Bandaranaike Kumaratunga came to power in 1994.

In broad terms, proponents of the *Jathika Chinthanaya* hold that in 1994, the SLFP-led government headed by President Kumaratunga was elected to get rid of (the Jayewardene-dominated) 17-years rule of the UNP, which had damaged Sinhala-Buddhist civilisation.[82] But having attained power, it did not take long for the SLFP to expose its political nakedness, for it too was perceived as having made opportunistic use of popular nationalist sentiment to attain power and forget the people thereafter.[83] It seemed almost like an extension of the erstwhile UNP-era. This perception was largely a consequence of President Kumaratunga's policies concerning the Tamil-problem (and the LTTE); policies which ranged from holding peace-talks with the LTTE to the drafting of pro-devolutionary constitutional proposals. Such policies were considered to have been promoted by 'non-national' forces (especially by NGOs), and it was believed that President Kumaratunga was ideologically committed to granting a federal solution. As Nalin de Silva stated: "Chandrika Kumaratunga is ideologically committed for a federal solution. Unlike JR Jayawardene she ideologically accepts that the Tamil people have been subjected to injustices. The non-national forces promoted her as the presidential candidate in 1994 because of this view […] She is the first national leader to be in the camp of Tamil racism ideologically."[84]

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[80] See generally, Amarasekera (2000): p.156-161.

[81] Ibid.: p.161.

[82] Amarasekera (2006): p.8.

[83] Ibid. At the 1994 parliamentary elections, Amarasekera expressed his support for the Mahajana Eksath Peramuna (MEP), not the SLFP. This was largely as a consequence of the MEP's claim that there was no ethnic problem in the country: Amarasekera (2003): p.28. Also, the SLFP had metamorphosed into a Sinhala Buddhist party especially in the eyes of its supporters and sympathisers, but the leadership did not seem to have undergone the same change; N. de Silva, '*No to Federalism*', ***Kalaya*** <http://www.kalaya.org/i030122.html> accessed 15th July 2013.

[84] de Silva (1997): p.81.

Such pro-devolutionary policies ran counter to the perceived mission of President Kumaratunga. The "people" had "voted her to power not to grant federalism" even though "she became the presidential candidate on the strength of the non national forces."[85] Given that the problem was a Tamil racist problem, conducting peace-negotiations with the LTTE, or granting greater devolution, was not the solution. Rather, Tamil racism had to be defeated both militarily (by defeating the LTTE) and politically.[86]

Therefore, negotiations with the LTTE as well as the draft constitutional proposals – such as the 1995 and 2000 proposals of the UPFA Government – attracted a lot of criticism; and, any attempt at holding a referendum to change the Constitution was considered unconstitutional.[87] On many matters concerning the Tamil problem (including the role of the Norwegian government which acted as peace-facilitator), President Kumaratunga was seen to be following a cowardly tradition which was a result of the colonial legacy; one which was contrary to the tradition of Anagarika Dharmapala. Alas, the great misfortune of the Sinhalese was the absence of their own leaders.[88]

But here again, one could see that the attack directed at President Kumaratunga was tempered with some realism, largely because of the emergence of Mr. Ranil Wickremasinghe as the Prime Minister in 2001 and due to the decision he took to enter into a Ceasefire Agreement (CFA) in 2002 with the LTTE; a decision widely regarded by the Sinhala majority as amounting to an appeasement of the LTTE, thereby threatening the sovereignty and territorial integrity of the country.

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[85] Ibid: p.83.

[86] N. de Silva, '*Fatchett Arrives*', ***Kalaya***<http://www.kalaya.org/i981104.html> accessed 15th July 2013.

[87] N. de Silva, '*The Referendum of the President*', ***Kalaya***<http://www.kalaya.org/i010808.html> accessed 15th July 2013. For a critique of political proposals which were publicised during this period, see de Silva (1999); Amarasekera (2003): p.29-38 & 48-52.

[88] N. de Silva, '*Chandrika Kumaratunga Ha Sinhala Nayakathwaya*', ***Kalaya***<http://www.kalaya.org/files/d030119.pdf> accessed 15th July 2013 [Sinhala].

What this meant was not only that the CFA and the Wickremasinghe-government had to be critiqued. It was also necessary for the Sinhala nationalist forces to give critical support to President Kumaratunga to avert the dangers posed by the CFA.[89] It is within this political context that one finds President Kumaratunga being requested to de-merge the North and the East[90], and being urged to use her Executive Presidential powers to avert any damage that could be done to the sovereignty of the country, not only by the Wickremasinghe-regime and its pacts with the LTTE, but also due to the actions of the Norwegian government and its envoys in the country. [91] President Kumaratunga had to be strengthened, politically.[92]

And once again, when the second term of President Kumaratunga was reaching its end, she came to be criticised as it was felt that she was trying to extend her term by abolishing the Executive Presidency (due to the two-term limit imposed by the constitution), and introducing a Prime Ministerial system with an 'Executive Cabinet'. This was perceived as evidence of President Kumaratunga's desire to establish a federal state.[93]

This alleged political motive did not materialise. Prime Minister Mahinda Rajapaksa was now set to contest the Presidential election of 2005.

Mahinda Rajapaksa and the Defeat of the LTTE

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[89] N. de Silva, '*Eelam by Another Name*', ***Kalaya***<http://www.kalaya.org/i020313.html> accessed 15th July 2013.

[90] N. de Silva, '*Demerger of North and East – Need of the Hour*', ***Kalaya***<http://www.kalaya.org/i020828.html> accessed 15th July 2013. This was in 2002. The de-merger took place only in 2006, upon a decision of the Supreme Court.

[91] N. de Silva, '*Ali Koti Valassu Nari*', ***Kalaya***<http://www.kalaya.org/i030101.html> accessed 15th July 2013.

[92] N. de Silva, '*Ali Koti Valassu Ha Nari*', ***Kalaya***<http://www.kalaya.org/files/d021229.pdf> accessed 15th July 2013.

[93] N. de Silva, '*The PA-JVP Alliance, Constitution and Some Questions*', ***Kalaya***<http://www.kalaya.org/i040324.html>accessed 15th July 2013.

It might be of some interest to note that the *Jathika Chinthanaya* movement has not been entirely uncritical of Mahinda Rajapaksa. For example, writers such as Nalin de Silva have been somewhat skeptical about Rajapaksa's nationalist credentials; especially when it was realised that Mahinda Rajapaksa (as the then Prime Minister) was maintaining a studious silence on the Post-Tsunami Operational Management Structure (P-TOMS) which was sought to be introduced by the then government. Sinhala-Buddhist nationalist groups came to view the P-TOMS as a threat to the sovereignty and territorial integrity of the country. Therefore, it was questioned whether Prime Minister Rajapaksa was either ignorant or was attempting to be non-committal in order to obtain the support of both nationalist groups as well as the NGOs.[94]

But as the Presidential election of 2005 approached and his candidature announced, Mahinda Rajapaksa became the inevitable option for Sinhala nationalist groups. He came to be seen as a political survivor, loyal to the SLFP, a 'child of 1956.'[95] The Presidential contest was one between the nationalist forces and the non-nationalist forces: the former being represented by Mahinda Rajapaksa, the latter being represented by the opposing Presidential candidate, Ranil Wickremasinghe.[96] The policy plan of Mahinda Rajapaksa – the *Mahinda Chinthanaya* – contained the commitment, inter alia, to preserve the unitary character of the State.[97] There was also the promise that once elected, he would abide by the advice given to King Devanampiya Tissa by Arahat Mahinda Thero about the responsibilities of the king; which was a promise that the *Jathika Chinthanaya* movement had hoped

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[94] N. de Silva, '*The SLFP Will Decide*', ***Kalaya***<http://www.kalaya.org/i050608.html> accessed 15th July 2013.

[95] N.de Silva, '*Coming Presidential Elections*', ***Kalaya***<http://www.kalaya.org/i050803.html> accessed 15th July 2013.

[96] N. de Silva, '*Non National Forces and Bandaranaike Puthra*', ***Kalaya***<http://www.kalaya.org/i050914.html> accessed 15th July 2013; See also, N. de Silva, '*Theeranaya*', ***Kalaya***<http://www.kalaya.org/files/d051113.pdf>accessed 15th July 2013 [Sinhala].

[97] N. de Silva, '*Mahinda Chinthanaya*', ***Kalaya*** <http://www.kalaya.org/i051019.html> accessed 15th July 2013.

Rajapaksa would keep.[98]

Like President Premadasa, Rajapaksa was considered a rare leader who was not a creation of the West. With the victory at the 2005 Presidential election, he came to be regarded as the only true Sinhala leader to have emerged after Anagarika Dharmapala; his victory now being hailed as a significant victory, inter alia, for the unitary conception of the Sri Lankan State.[99]

Thereafter, President Rajapaksa was able to attract the steady support of the nationalist forces. This was largely due to his anti-LTTE policy and the attempt he was seen to be making to defeat the LTTE militarily; a policy which had been advocated for a long time by numerous Sinhala-nationalist forces, especially by the advocates of the *Jathika Chinthanaya*. Ever since the emergence of the LTTE as a unit which threatened the Armed Forces, they had consistently maintained that the LTTE should, and can, be militarily defeated with the proper kind of political leadership and commitment.

Finally, they came to see in President Rajapaksa such a leader who was determined to defeat the LTTE, and who could, in the process, withstand external (Western) pressure. The defeat of the LTTE in May 2009 was therefore a remarkable achievement, thanks mainly to the political leadership of President Rajapaksa. Amarasekera points out that it was unsurprising then that the people had come to regard Mahinda Rajapaksa as the leader who, after King Parakrama Bahu VI, saved and united the country.[100]

In this political context, the stance adopted by the *Jathika Chinthanaya* movement during the Presidential election of 2010 was unsurprising. The challenge posed by the former Army Commander and Presidential-candidate, Sarath Fonseka, was to be opposed. While Sarath Fonseka had been admired and praised as a military leader before, his decision to challenge President

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[98] Ibid.

[99] N. de Silva, '*Ekiya Rajya Sankalpaya Jayagani*', ***Kalaya***<http://www.kalaya.org/files/d051120.pdf> accessed 15th July 2013 [Sinhala].

[100] Amarasekera (2011): p.19.

Rajapaksa – with the backing of the Wickremasinghe-led UNP and other parties, such as the Tamil National Alliance (TNA), which was always regarded as a proxy of the LTTE – made the task of the *Jathika Chinthanaya* movement and other Sinhala nationalist forces that much easier.

The picture, then, was quite clear: President Rajapaksa was (like in 2005) the representative of the nationalist forces, while Sarath Fonseka represented the non-nationalist forces.[101] The 2010 Presidential-election was now the most crucial battle in the fight against non-nationalist forces, which were perceived to be having the support of Western powers as well.

In particular, the electoral promise made by Sarath Fonseka to the effect that he would abolish the Executive Presidential system once elected, was not taken seriously by the *Jathika Chinthanaya* movement. Writers such as Nalin de Silva were confident that such claims were not believable. In other words, Fonseka will not abolish the Executive Presidency[102], as the promise to abolish the Executive Presidency was always a political condition attached to the manifesto of politicians which never got implemented.[103]

Such political promises did not materialise, given the resounding victory achieved by President Rajapaksa. The nationalist forces had won. And at the time of writing this chapter (July 2013), their long march continues.

Jathika Chinthanaya and the Politics of Presidentialism: An Assessment

In assessing the politics of the *Jathika Chinthanaya* movement, a

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[101] N. de Silva, '*The West and the Jathikathva*', ***Kalaya***<http://www.kalaya.org/files2/i091216.pdf> accessed 15th July 2013.

[102] N. de Silva, '*The Uncommon Candidate*', ***Kalaya***<http://www.kalaya.org/files2/i091118.pdf> accessed 15th July 2013.

[103] N. de Silva, '*Swan Song*', ***Kalaya***<http://www.kalaya.org/files2/i091202.pdf> accessed 15th July 2013: abolishing the Executive Presidency "has been a condition that has been included in the agreements signed between political parties when they did not have anything else to agree on", and therefore, nobody "is fooled by these agreements on abolishing the Presidency and the General [Fonseka] if elected would be the last person to abolish it."

number of factors come to light.

i. Jathika Chinthanaya: Between Flexibility and Dogmatism

The *Jathika Chinthanaya* concept is, like all other concepts, a constructed one. It is flexible in character, and can be articulated to promote different projects.

Predominantly, its promotion has been such that it has appeared to be a concept which is dogmatic, tribalistic (in its negative sense) and assimilationist in approach, promoting the predominance and superiority of Sinhala-Buddhism (and the inevitable inferiority of different ethnic and religious communities), asserting a rigid conception of the 'unitary' State, while also degenerating into an anti-Western screed. Within such a conception then, the role of the political leader (or the Executive President) can get easily reduced to the function of: giving prominence to Buddhism and Sinhala-Buddhist culture, and the rigid defence of the unitary character of the State. It is this version of Sinhala-Buddhist nationalism that is more popular, and one which recently formed Sinhala-Buddhist nationalist groups and advocates tend to be promoting so vigorously today.[104]

Its attraction perhaps lies, partly in this dogmatic and militant character (thereby satisfying some of man's natural impulses and urges in the midst of surrounding uncertainty), but partly also in its seeming humane character and the embrace of the other. As observed earlier in this chapter (section 2.1), the concept is seemingly flexible and tends to promote a narrative which appears to stand for some form of unity and togetherness; one which is at times mindful of the sensitivities of different communities; one which seeks to embrace distinct and different cultures (while only pointing to what, for a lot of people, will be the obviousness of

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[104] Such support for the Executive Presidency has been more recently extended by ultra-Sinhala-Buddhist nationalist groups such as the Bodu Bala Sena (BBS). As its General Secretary is reported to have stated: "As long as President Rajapaksa maintains the unitary state we will support him and protect him. It doesn't matter to us how long he will govern as long as Sri Lanka is a unitary nation"; see J. Padmasiri & K. Pathiraja, '*Indo-Lanka Accord remains invalid – Champika*', ***InfoLanka***<http://www.infolanka.com/news/IL/dm874.htm> accessed 15th July 2013.

prominence of Sinhala-Buddhists and Sinhala-Buddhism); a narrative which invokes a sense of pride in the people (at least, the majority community and their language and religion); a narrative which is critical of the West but is accommodative and understanding when necessary; and as a concept which promotes democratic politics and the idea of a humane socialist society (centred around, and inspired by, Buddhism).

In the absence of this mix, the *Jathika Chinthanaya*, or the broader Sinhala-Buddhist nationalist political project it gives expression to, cannot have succeeded in the country. It is this mix which gives the concept a certain pragmatic and realist flavour, so necessary for a dominant political ideology. In this sense, it is perhaps like any other form of ethnic nationalism. It is also due to this flexibility that one comes across the staunch and unflinching defence of the Executive Presidency in some writings, while critique of the same (especially of the Executive Presidency during the Jayewardene-era) in some others. And as long as such different readings are possible, as long as you retain enough to both support and critique the Presidency where necessary, the Sinhala-Buddhist masses would not be convinced that the broader politics of the kind promoted by a concept such as the *Jathika Chinthanaya* is entirely anti-democratic and deplorable.

ii. Kings as Presidents and the Cultural Challenge

There is a historical and cultural dimension which plays a prominent role in the *Jathika Chinthanaya* movement's discourse on political leadership (and the Executive Presidency). Fundamentally, it is a discourse inspired by the history and culture of Sri Lanka, especially the ancient model of kingship. Constant reference is therefore made to ancient kings, and the need to return to a state which resembles an ancient and glorious past. Reverting to a political system akin to that maintained by King Dutu Gemunu, for example, has been the desire of certain writers.[105]

But the reason why this political discourse connects with the masses is also because it is not based on abstract theorising. And the

[105] de Silva (1998): p.16.

apparent glorification of the ancient kings and the lost past does not necessarily mean that what is advocated is a total return to an old form of kingship. Amarasekera, for example, states that thinking of such a return is even naïve and impractical: therefore, the task today is to construct a system of governance and a political philosophy that enables the work of such a 'king' or ruler.[106]

For this, the Executive Presidency – the monarchical presidential system – appears to be a perfect match. This is especially so, now that the President can, at least in theory, remain in power indefinitely (as a consequence of the 18th Amendment to the Constitution), as was possible for ancient kings. That there was no great public outcry over the introduction of the 18th Amendment suggests that deep within the cultural consciousness of the Sinhala-Buddhist masses in particular, there was if not an explicit endorsement, a tendency to silently accept, a leadership model which is both powerful, even long lasting, as long as the ability to change the leader is guaranteed. While the popular criticism is that President Rajapaksa has transformed himself into the "self-appointed king of Sri Lanka"[107], the far more critical question for the critics is why the masses did not have a problem with a constitutional structure that created such a 'king'.

Proponents of the *Jathika Chinthanaya* have a firm understanding of this cultural dimension that underlies the debate on the Executive Presidency. As Amarasekera points out, it was because of this dimension that the introduction of the 18th Amendment went unopposed by the people. Is this not, Amarasekera asks, a manifestation of the people's need to revive the idea of kingship, by having an Executive President with powers similar to a King, sans a fixed term limit? [108] In a political environment and culture wherein a President is called '*Maha Rajano*' ('Great King'),[109] and

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[106] Amarasekera (2006): p.49.

[107] M. Samaraweera, '*Mahendra Percival Rajapaksa is now the King of Sri Lanka*', ***Transcurrents*** <http://transcurrents.com/tc/2010/09/mahendra_percival_rajapaksa_is.html> accessed 15th July 2013.

[108] Amarasekera (2011): p.100.

[109] Ibid.: p.101.

gets portrayed in the press as "the epitome of sovereign power" akin to an old Sinhalese King or as a "manorial lord of the past"[110], Amarasekera's query cannot be lightly dismissed.

Amarasekera believes that the reason why such developments were embraced by the people had much to do with the ancient cultural recollection as well as due to the manner in which President Rajapaksa conducted the war against the LTTE. The people thereby came to acknowledge that without such power, Prabhakaran's terrorism could not have been effectively defeated.[111]

This explains why abolishing the Executive Presidency would not just be a simple political act but one which, in the present post-war context, will come to represent a significant democratic and ideological revolution; especially if the abolition of the Presidency is to take place in reaction to, and as a way of opposing, the current Rajapaksa-dominated rule.

iii. Political 'Realism'

The *Jathika Chinthanaya* movement has also shown a sufficient amount of realism and pragmatism in its support for the Executive Presidency. Over the past few decades, the movement has been willing to support the Executive Presidency even on a conditional basis (which was largely evident during President Kumaratunga's era), which makes its support and critique of the system contradictory to some, but pragmatic and realistic to others (especially, to the masses).

But also, there are a number of factors – a confluence of political and geopolitical factors – which make the contemporary position adopted by the movement on the Executive Presidency seem far

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[110] M. Roberts, '*Mahinda Rajapaksa as a Modern Mahavasala and Font of Clemency? The Roots of Populist Authoritarianism in Sri Lanka*', ***Groundviews Journalism for Citizens***<http://groundviews.org/2012/01/25/mahinda-rajapaksa-as-a-modern-mahavasala-and-font-of-clemency-the-roots-of-populist-authoritarianism-in-sri-lanka/?doing_wp_cron=1374034470.3772990703582763671875> accessed 15th July 2013.

[111] Amarasekera (2011): p.101.

more realistic and convincing to a majority community. These factors make the task of the anti-Executive Presidency camp extremely challenging.

Firstly, the present demand for abolishing the Executive Presidency takes place under a context wherein another polarising debate on the Thirteenth Amendment has taken place; and what is to be noted here is that the more popular view within the country (even according to certain opinion polls) seems to be that the Thirteenth Amendment needs to be abolished, largely because the full implementation of the Thirteenth Amendment (especially in the North) will pose a threat to the sovereignty of the country. And one of the principal motives of the *Jathika Chinthanaya* movement has been to ensure the repeal of the Thirteenth Amendment, [112] wherein the role of the President is clear: "The President was bestowed absolute power, not once but twice. It was not meant for indulging in political cunning but to take the necessary measures, such as holding a referendum with a view to getting rid of this disgraceful amendment. That should have been the first act."[113]

Within a context wherein the Executive President with such powers is considered to be the main guarantor of the country's sovereignty, any movement which attempts to abolish the Executive Presidency will be perceived by the majority community as one which is far removed from political realities. Also, the popular sense that the full implementation of the Thirteenth Amendment could seriously threaten the sovereignty of the country would make the groups proposing the abolition of the Executive Presidency silent about issues such as political devolution. Within such a context, what could be expected at best is some form of reformation of the Executive Presidency, not total abolition.

Secondly, the debate on abolishing the Executive Presidency comes just a few years after the end of a three-decades long armed conflict,

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[112] G. Amarasekera, '*Why the 13th Amendment should be repealed*', ***The Nation***<http://www.nation.lk/2011/06/05/newsfe6.htm> accessed 15th July 2013.

[113] Ibid. In this regard, great importance has come to be placed on the statements against the implementation of the 13th Amendment made by the Secretary of the Ministry of Defence, Gotabaya Rajapaksa. See, G. Amarasekera, '*Gotabaya Rajapaksa's Statement*', ***The Island***<http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=76075> accessed 15th July 2013.

wherein the popular perception in the country is that it was principally political leadership given by the Executive President that enabled the defeat of the LTTE. The popular perception, in other words, is that without a strong political leader (Executive President), such success would not have been possible. This has been the dominant view of the *Jathika Chinthanaya* movement, as well as other Sinhala-Buddhist nationalist groups. This was why the anti-Executive Presidency slogan became meaningless, especially during the 2010 Presidential election, just months after the victory against the LTTE.[114]

In this context, the task before the anti-Executive Presidency groups is a difficult one; the masses need to be convinced that defeating the LTTE was the only positive outcome of the Executive Presidency. But in addition, the masses would also need to be convinced that the perceived threats posed by different elements – ranging from political groups in Tamil Nadu to 'Tamil diaspora' groups elsewhere – could be adequately met by the new system that is proposed in place of the Executive Presidency. In strange ways, promising that the alternative would be as strong as the Executive Presidency in protecting the country's sovereignty would raise the question within the nationalist masses as to why, if then, the current system needs to be abolished entirely (without introducing suitable amendments, if necessary).

Both the above factors strengthen the view that abolishing the Executive Presidency is an immensely challenging and contentious task, as it has "an integral connection with the concept of sovereignty."[115] And also, as long as the majority polity is seen to be unwilling or unable to think more broadly about sovereignty, the 'unitary' concept, and devolution, anti-Executive Presidency formations will have an extremely tough task confronting the more 'realistic' politics of Sinhala-Buddhist nationalism, as promoted by the *Jathika Chinthanaya* movement. Also, to attempt to abolish the Executive Presidency under the above mentioned circumstances

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[114] N. de Silva, '*Janadipathiwaranaya*', ***Kalaya***<http://www.kalaya.org/files2/d091122.pdf> accessed 15th July 2013 [Sinhala].

[115] H.L. de Silva (2008) ***Sri Lanka: A Nation in Conflict*** (Boralesgamuwa: Visidunu Prakashakayo): p.432.

could lead to policy confusion, as is seen in the recent positions adopted by the UNP on the Executive Presidency.[116] And also, abolishing the Executive Presidency under such circumstances would even result in a return of the same system, now under a different garb and a different title.

iv. The Inadequacy of Abolishing the Executive Presidency

What is also clear from the politics of the the *Jathika Chinthanaya* movement is that the mere abolition of the Executive Presidency would not be enough. This is especially the case, when noticing the critical admiration that these advocates have had for Prime Ministers S.W.R.D. Bandaranaike and Sirimavo Bandaranaike. In other words, it is to be remembered that one of the most appreciated leaders of the *Jathika Chinthanaya* movement is a Prime Minister (Mr. Bandaranaike). It is a stark reminder that the kind of leadership per se (Prime Ministerial or Presidential) does not affect the political positions adopted by Sinhala-Buddhist nationalism. To think that it does would amount to a simplistic understanding of Sinhala-Buddhist nationalism.

But more critically, it is to be further noted that even the proponents of the *Jathika Chinthanaya* tend to be ideologically against the current Executive Presidential system. For example, Nalin de Silva while arguing that it is necessary to have a legislative body which has the sole monopoly over law-making at the centre, which should be the sole repository of legislative power"[117], points out that "[s]uch a structure has no place for the executive presidential system."[118] It has also been the view that under the

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[116] See, '*UNP draft proposal for a new constitution*', ***The Island***<http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=80114> accessed 15th July 2013. In addition, the UNP's views on the Executive Presidency were confusing given earlier reports that the UNP had ruled out the possibility of abolishing the system; see, '*UNP says no abolishing of Executive Presidency*',***Daily Mirror***<http://www.dailymirror.lk/news/29546-new-constitution.html> accessed 15th July 2013. Such confusion may also reflect the impact Sinhala-Buddhist nationalist sentiment, which is not entirely opposed to the Executive Presidency.

[117] de Silva (1997): p.98.

[118] Ibid.

party-political system that exists today, neither the Presidential system nor a Prime-Ministerial system makes any significant difference since both systems, by giving prominence to the political party which undertakes governance, results in promoting a powerful party-leader.[119] It has also been argued that there is a need to have a system which promotes a national politics rather than party politics, a governance structure with minimum state-intervention with a decentralised system of strong village and town councils, and one which re-introduces the king-*sangha*-people triangular framework by replacing the king with a *manthrana sabhawa*.[120] An entirely different governance structure is thereby advocated.

What this means then is that the challenge confronting any movement which stands for the abolition of the Executive Presidency is to ensure not simply the change of the system, but whether this change comes about as a result of a change in the principles and attitudes that people hold concerning the notion of political leadership, about the character of the State, about issues concerning pluralism, etc.[121] But such a change, in the abstract, would be what the proponents of the *Jathika Chinthanaya* demand too. Therefore going further, the even greater challenge for the anti-Executive Presidency camp is to see whether or not their proposed change would result in a system promoted by *Jathika Chinthanaya* movement.

Perhaps it is also to be noted that the reason for the absence of any serious and detailed evaluation of the Executive Presidential system (and the importance of re-introducing the Prime Ministerial system, for example) by writers such as Amarasekera and Nalin de Silva, is because from an ideological perspective, such evaluation is meaningless; especially because the *Jathika Chinthanaya* movement does not place too much importance on whether what is existing is a Presidential or a Prime-Ministerial system. This could well be a

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[119] de Silva (1998): p.14.

[120] Ibid.

[121] This aspect has been briefly but usefully discussed, for instance, in C.R. de Silva, '*The Overmighty Executive? A Liberal Viewpoint*' in C. Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform***(Colombo: Council for Liberal Democracy): p.313-325.

position that is closer to the understanding of the Sinhala-Buddhist masses who may be guided by the observation that in principle, no political system is wholly good or bad; inspiration for holding such a view (which is accurate in principle) may be derived from the Buddha's lack of preference for any single form of political system! Therefore under normal circumstances, to give the impression that anything is better than the existing Executive Presidential system may not be entirely convincing for the masses of the country.

v. Immediate Prospects: Abolition, Reform or Retention?

As discussed above, proponents of the *Jathika Chinthanaya* would ideologically stand for a system which is not a Presidential system. And in their earlier writings examined in this chapter, there was a critique of the Presidential system and the kind of nepotism it gave rise to (especially in relation to the Jayewardene-era). The Buddhist (and at times, 'socialist') strands in the writings of the *Jathika Chinthanaya* movement tend to promote a strong critique of the authoritarianism and dictatorial system that the Executive Presidency has come to represent (even though such a critique has not been forthcoming in recent times).

All this provides space for the promotion of significant reformation of the Executive Presidential system, if required. Also to be noted here is that reformation has been considered necessary by certain Sinhala nationalist groups and individuals, in recent times. For instance, it has been pointed out by the JHU that the Constitution is flawed given that there are certain powers entrusted on the President which are unnecessary.[122] Sinhala nationalist advocates have, more recently, called for the repeal of provisions such as Article 35 of the Constitution; which confers upon the President immunity from suit, barring the possibility of instituting proceedings against the President in a court or tribunal "in respect of anything done or omitted to be done by him either in his official or private capacity."[123] Therefore, some form of reformation is

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[122] '*The Constitution is flawed says Gammanpila*', ***Ceylon Today***<http://www.ceylontoday.lk/51-32229-news-detail-the-constitution-is-flawed-says-gammanpila.html> accessed 15th July 2013.

[123] S.L. Gunasekara, '*Eliminating the Scourge of Thuggery*', ***Daily***

indeed advocated by Sinhala nationalist groups today.

Yet, in practical terms, it is extremely questionable whether reformation would be a prominent theme in the political agenda of the *Jathika Chinthanaya* advocates, anytime in the near future. What needs to be remembered is that in recent times, many of them: have supported the repeal of the 17th Amendment to the Constitution and the introduction of the 18th Amendment; believe that the massive majority received in parliament to adopt the 18th Amendment, making the present government one of the strongest in Asia, was a good omen for the country[124]; and, have defended the Presidential (and constitutional) powers enabling the swift removal of the former Chief Justice.[125] This is in addition to other Sinhala-Buddhist nationalist groups defending the Executive Presidency more explicitly.[126] These factors tend to foreclose any realistic prospects for a considerable and meaningful reformation of the Executive Presidential system anytime soon.

The only inference one can reach is that reformation, or even abolition, of the Executive Presidency under the Rajapaksa-regime will take place *only* as a tactical or strategic ploy to evade strong 'international' pressure. Only a drastic situation would lead to drastic measures being taken in respect of the Executive Presidency. But importantly, this kind of reformation would have the support of the *Jathika Chinthanaya* movement, as long as the incumbent regime and its main opposition (or perceived alternative) are labelled respectively as 'nationalist' and 'non-

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Mirror<http://www.dailymirror.lk/opinion/172-opinion/28726-eliminating-the-scourge-of-thuggery-.html> accessed 15th July 2013.

[124] N. de Silva, '*Vyavastha Sanshodanaya*', ***Kalaya***<http://www.kalaya.org/files2/d100912.pdf> accessed 15th July 2013 [Sinhala].

[125] Writers such as Nalin de Silva were in the forefront of defending the move to impeach the former Chief Justice. See, for example, N. de Silva, '*More on Attempt to Impeach the CJ*', ***The Island***<http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=65959> accessed 15th July 2013; N. de Silva, '*Judging the Judges*', ***The Island***, <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=69447>accessed 15th July 2013.

[126] See for instance, U. Gammanpila, '*In Defence of the Executive Presidency*', ***Ceylon Today***<http://www.ceylontoday.lk/76-29770-news-detail-in-defence-of-the-executive-presidency.html> accessed 15th July 2013.

nationalist' in character; as was the case during the 2010 Presidential election.

Conclusion

Abolishing, or significantly reforming, the Executive Presidential system is an important and serious political task. However it is an exercise which inevitably demands the support of the Sinhala-Buddhist majority, which is sympathetic to the political ideology represented by groups such as the *Jathika Chinthanaya* movement. And as always, the question is about how the Executive Presidency is reformed or replaced, under what context, and by whom.

17

Mahinda Rajapaksa as a Modern Mahāvāsala and Font of Clemency? The Roots of Populist Authoritarianism

Michael Roberts[1]

[1] **Editor's Note**: This chapter is a reproduction of an article published by the author in 2012, at the height of the Rajapaksa regime. It is republished here without amendment except for minor formatting changes. In the light of the electoral defeat of the Rajapaksa regime in the presidential election of January 2015, the discussion shows a remarkable prescience about the nature of the Rajapaksa regime and the way it might fall, demonstrating the value of deeper understandings of history and culture in the analysis of contemporary politics and constitutional practice.

On 4th December 2011 the *Sunday Island* carried a headline, 'Mahinda ready to meet General Fonseka's family over pardon' – with a picture alongside showing President Mahinda Rajapaksa seated in an armchair perusing an official document – a document in royal red and marked by a recognisable state seal. It is the juxtaposition of the headline and image that drew my interest. In my reading as an analyst attentive to indigenous cultural threads, this combination suggested several interrelated motifs, namely, that:

A. President Rajapaksa is the epitome of sovereign power, vested with the rights of clemency on high, just like Sinhalese kings of the past who could be supplicated by condemned subjects who crawled on their knees to the palace gates (*mahāvāsala*) and begged for pardon for their evil-doings or crimes;[2]
B. President Rajapaksa is akin to a manorial lord of the past, a patrimonial figure who is readily accessible on his veranda to subordinate officials, tenants, and other people seeking favours from this font of *noblesse oblige*;
C. President Rajapaksa is a son of the soil, native to core. After all, what can be more native than a *hansi putuva* (armchair)? He is, therefore, as personable as approachable.

In sum, what one sees here in this interpretation is native kingly power on high within a hierarchical situation, marking a flow of authority from an apical fountainhead to persons and 'satellites' below. The imagery on this front page suggests motifs that I have incorporated within my theoretical construct, the 'Asokan Persona.'[3] But within today's modernist setting the imagery also conveys themes that I would describe as 'populist.' The essay will clarify each of these concepts in turn.

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[2] See R. Pieris (1956) ***Sinhalese Social Organisation*** (Colombo: University of Ceylon Press); L. Dewaraja (1972) ***The Kandyan Kingdom of Ceylon, 1707-1760*** (Colombo: Lake House); M. Roberts (2004) ***Sinhala Consciousness in the Kandyan Period, 1590s to 1815*** (Colombo: Vijitha Yapa); R. Knox (1911) ***An Historical Relation of the Island of Ceylon*** (Ed. J. Ryan) (Glasgow: Maclehose & Sons) for background and other relevant details.

[3] M. Roberts, '*The Asokan Persona as a Cultural Disposition*' in M. Roberts (1994) ***Exploring Confrontation*** (Chur: Harwood Academic Publishers): pp.58-72.

The Asokan Persona as Analytical Model

The Asokan Persona is a distilled picture of the conceptions of authority and symbols of status and power embodied in a *cakravarti* figure in Sinhala society over the past centuries. It assumes varying contexts of hierarchy and focuses upon the relationship between a superior and a subordinate. It seeks to delineate the images of authority and status that inform such interpersonal exchanges. It argues that such conceptions of authority and status are both embodied in, and reproduced within, the mechanisms of social distancing and the verbal and kinesic symbols of status.

It is not simply an issue of a superior being imposing his power on subordinates. The whole point of the paradigm is to mark the manner in which the everyday practices of subordinates – some of which are taken for granted – incorporate and reproduce the status and power of the superior person and/or position. In this manner the Asokan Persona takes one into the realm of hegemonic practices in the sense in which the concept 'hegemony' is used by Antonio Gramsci, whereby those subordinate and inferior participate in their own subordination.[4]

One illustration of the meaningful practices which embody the Asokan Persona and perpetuate its reproduction over time is the Sinhala word *pirivarāgena* as it is understood in several contexts. This term describes the entourages around powerful personages. Such a term not only arises in political contexts as well the adulation around film stars, cricketing greats, and other people of prominence, but also comes into play in reading the artistic and sculptural imagery in Buddhist temples because the figure of the Buddha is often surrounded by deities or devoted disciples in positions *pirivarāgena*.

Note, too, that the numerous deities of the Hindu dispensation who have been absorbed into the Sinhala Buddhist practices of supplication derive their authority from the receipt of the Buddha's *varam* or *varan. Varan* means 'delegated authority' and

[4] Ibid: pp.57-58, 70-71.

implies hierarchy. It encodes encompassment or incorporation within hierarchy, even if one is a powerful being like a deity who in turn receives supplication from lesser beings (humans). Thus, the deities are encompassed by the Buddha Dhamma.[5]

Equally significant in these illustrations is the fact that such meaningful terminology crosses the domains of politics and religion. This is what one would anticipate for an Asian context where the two have always been intimately intertwined and where the separation of 'State' and 'Church,' politics and religion, has not proceeded in the manner that eventuated in modern Europe in the early modern era and after the French Revolution of 1789.

Populism and Fascism in Comparative Perspective

Populism describes a political current which places the masses (the *volk*) within a nation-state on a pedestal and claims to work for their greater good.[6] In world practice in recent centuries it refers to a cult of the masses which vests the figure espousing and embodying the popular cause with an enormous concentration of power. Populism was especially pronounced in several Eastern European countries between the two World Wars. In this period, the populist 'cult of the masses' overlapped often with what has been called 'peasant essentialism.'[7] Eastern Europe in this period saw the emergence of several peasant parties, some drawing inspiration from 'the historical messianism' associated with the

[5] G. Obeyesekere, '*The Buddhist Pantheon and its Extensions*' in M. Nash (Ed.) (1966) ***Anthropological Studies in Theravada Buddhism*** (New Haven: Yale University Southeast Asian Series); M. Roberts, '*The Asokan Persona and its Reproduction in Modern Times*' and M. Roberts, '*Four Twentieth Century Texts and the Asokan Persona*' in Roberts (1994): pp.73-88 and pp.57-72.
[6] P. Worsley, '*The Concept of Populism*'; P. Wiles, '*A Syndrome not a Doctrine: Some Elementary Theses on Populism*'; A. Stewart, '*The Social Roots*' in G. Ionescu & E. Gellner (Eds.) (1969) ***Populism: Its Meanings and National Characteristics*** (London: Weidenfeld & Nicolson): pp.212-250; pp.166-709; pp.180-196.
[7] T. Brass, '*Peasant Essentialism and the Agrarian Question in the Colombian Andes*' (1990) ***Journal of Peasant Studies*** 17(3): pp.44-56.

Russian *narodnik* movements.[8] Romania presents a significant illustration that offers qualified comparative insights for those familiar with Sri Lankan history in the last seventy years. Here, the Left intellectual Constantin Stere (1865-1936) moved away from orthodox socialism and drafted an essay in 1908 entitled 'Poporanism or Social Democracy?' Addressing Romania's agricultural context, Stere did not see any future for industrialisation programmes or a proletarian emphasis in politics, and argued instead for a 'peasant state' where small agricultural plots would serve as the basis for economic development.

From this moment Stere and Dobrogeanu Gherea spearheaded the campaign to gain voting rights for the Romanian peasantry through the slogan *poporism.* Though Stere has been described as a 'constitutionalist populist,'[9] the influence of *narodnik* currents of thought also implanted messianic threads conducive to a cultic dependence on a leader figure. Leader figures were particularly prominent in the organisation known as the Legion of the Archangel Michael, which was set up in 1927 by a religious mystic, Cornelia Zelea Codreanu. The Legion's ideology was ultra-nationalist, anti-communist, anti-Semitic, and fascist; but, unlike other contemporary fascist movements in Europe, it presented an overt religiosity centred upon the Romanian Orthodox Church. Its fascist character was sharpened in 1930 when Codreanu formed the 'Iron Guard' as a paramilitary branch of the Legion.[10] This core group assumed such importance that its name became synonymous with the Legion. Then, in 1935 its leaders adopted a new name: 'the Totul pentru Ţară' party, literally 'Everything for the Country', but commonly translated as 'Everything for the Fatherland', or occasionally, 'Everything for the Motherland.'[11]

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[8] A. Walicki, '*Russia*' in Ionescu & Gellner (1969): pp. 62-90; Wiles in Ionescu & Gellner (1969): pp. 171-176; G. Ionescu, '*Eastern Europe*' in Ionescu & Gellner (1969): pp.104-109.
[9] Ionescu in Ionescu & Gellner (1969): p.102.
[10] Wiles in Ionescu & Gellner (1969).
[11] For background see ibid; M. Bucur, '*Carol II of Rumania'* in B. Fischer (Ed.) (2007) ***Balkan Strongmen*** (West Lafayette, Indiana: Purdue University Press).

The Iron Guard's support base seems to have been strongest among students and peasants. However, it garnered only 15.5 per cent of the vote at the elections in December 1937, coming third behind the National Liberal Party (35.9%) and the Peasants' Party (20.4%). At this point in 1938 the factionalised and fractured state of democratic politics and the widespread resort to violence from many sides, especially the Iron Guard, encouraged the constitutional monarch, King Carol, to intervene with a *coup d'état*, which rendered him dictator. Carol is described as having played "a very similar populist card as Cordeanu during a period of political and social instability [in order] to rally support for his personal authority."[12] In the event, his dictatorship did not last long because the onset of World War II in 1940 and foreign pressures altered the political scales in Romania in ways that are too complex and/or irrelevant for our comparative reflections.

The Romanian tale between the two World Wars can be supplemented by the events that unfolded in Italy and Germany between 1918 and the early 1930s. The rise of Mussolini and Hitler, as we know, was facilitated by the parliamentary process of elections in their respective countries. The vote and a parliamentary base provided their respective parties with the platform to seize power. While there must surely have been differences in the factors aiding the advances towards dictatorship in both countries, the critical point here is that the democratic process enabled both these fascist parties to muster popular support and thereafter legitimise their authoritarian regimes with a plebiscitarian hue that was not wholly dissimilar to the world's first 'popular dictatorship,' namely, that established by Napoleon Buonaparte.

Sri Lanka: 1956-2012

The establishment of universal suffrage in 1931 as Sri Lanka moved towards political independence encouraged political activists to cultivate popular appeal through vote banks, patronage, and rhetoric. After independence was secured by D.S. Senanayake and his aides in 1948 through a pragmatic course

[12] Bucur in Fischer (2007): pp.100-101.

that utilised the geo-political context, the United National Party (UNP) grouping which he had founded as an elite-led cross-ethnic coalition was challenged in the mid-1950s by the Mahajana Eksat Peramuna (MEP), another coalition fostering two major political currents: (a) the force of cultural nationalism centred upon the Sinhala language, indigenous imagery, and Buddhism; and (b) the grievances and demands of the underprivileged directed against the privileged classes.[13]

The demands of the have-nots were bolstered by powerful socialist and Left currents of thought that had their roots in the Marxist parties that had taken shape in the island from the 1930s. Their vociferous attacks blended neatly with the nativist disparagement of the privileged as a Westernised and de-nationalised body of people. The MEP slogan of 'Sinhala Only' therefore distilled both currents of thinking and promised avenues of advancement to both the Sinhala-speaking have-nots and those aligned with the coalition. In the event the MEP led by an elitist Oxford educated aristocrat, S.W.R.D. Bandaranaike, swept to power through a momentous triumph at the general elections of 1956, completely out-muscling the right-wing UNP in a landslide victory. For this reason one can speak of the '1956 revolution' and the '1956 ideology.' A central dimension in this movement was the rhetorical emphasis on the *duppath podhu janathā*, namely, 'the poor [suffering] people': a slogan that reverberated throughout politics in subsequent decades and also promoted the emergence of the Janatā Eksat Peramuna (JVP, see below).

A sub-theme in the political rhetoric of the 1940s and 1950s was the attack on the 'kachchery system' and the administrative order established by the British with the Ceylon Civil Service at its apex. The campaign depicted the system as 'feudal' and 'colonial.' The Leftist and nativist/nationalist hues sustaining this drive should not obscure the fact that this pressure was a power-grab. The political spokesmen were targeting the separation of powers

[13] The review of political developments in this section is based J. Jupp (1978) ***Sri Lanka: Third World Democracy*** (London: Frank Cass); M. Roberts, '*Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: Barriers to Accommodation*' (1978) ***Modern Asian Studies*** 12: pp.353-376; K.M. de Silva (1996) ***Reaping the Whirlwind*** (Delhi: Penguin); Roberts (1994): pp.57-72.

installed by the British in what was in effect a major political shift. What one sees from 1956 is a gradual process by which the administrative services were taken over and subordinated by the parliamentarians and politicians (paving the way eventually for encroachments on the judiciary in more recent decades).

Marxist dogma was a central force in this process. When I interviewed Colvin R. de Silva in the late 1960s,[14] he insisted (with typical lucid vigour) that the United Left Front (ULF) required executive heads of departments who were in sympathy with their socialist programmes. In brief, democratic centralism must prevail in the firmament. So it came to pass: this process was set in train when the ULF came to power in 1970. This turn in politics was then taken further with a twist of its own when J.R. Jayewardene established the Gaullist constitutional order of 1978 with some assistance from scholars like A.J. Wilson.

The '1956 revolution' was a triumph for the SLFP led by the Bandaranaikes and the forces of linguistic nationalism in ways that have been deeply etched into the subsequent politics of confrontation. The alienation of the Tamil peoples which it encouraged was further entrenched (1) because the principal other contender for parliamentary power, the UNP, also adopted the linguistic and cultural slogans of 1956; and (2) because the Trotskyist parties abandoned their principled demand for parity of status for both languages and joined the SLFP in the coalition known as the United Left Front (ULF) in 1964. So, the ingredients were in place for the Tamil political activists of most shades to become disenchanted with the idea of federalism and to move towards a demand for a separate state. The republican constitution installed by the ULF in 1972 was the final nail in this trend. The principal Tamil party, the Tamil United National Front (TULF), adopted secession as their goal through the Vaddukoddai Resolution in May 1976.

[14] See Roberts Oral History Project (ROHP) in Barr Smith Library, University of Adelaide, interviews dated 23rd June 1967, 20th September 1967, and 4th January 1968.

There was a parallel development in the 1960s to 1980s that has had a significant influence on today's politics. This was the emergence of the Janatā Vimukti Peramuna (JVP) in the Sinhala-speaking regions. The insurrectionary JVP of the period 1967-71 was mostly composed of youth in the age bracket 15-30. In this first phase the JVP was a fusion of two ideological legacies: they were both the children of the Old Left and the children of 1956. Directed by the limited avenues of economic advancement for those educated only in Sinhala within a decrepit economy, they absorbed Naxalite, Maoist, and Latin American revolutionary theories as a path to a seizure of power. The abject failure of their 'boy's own' adventure in revolutionary action in 1971 did not deter their hard-core members. After 1971 those that survived their failed takeover honed their discipline in jail. When fortuitous circumstances led to their release in 1977, some elements regrouped. Further political transformations, notably the emergence of Tamil separatism under the Liberation Tigers of Tamil Eelam (LTTE), and the intervention of India through its imposition of the Indian Peace Keeping Force (IPKF) in mid-1987, provided the reformed JVP with the opportunity to mount a campaign in defence of national sovereignty. Their second insurrection of 1987-90 was in effect a civil war in the south, involving unbridled ferocity on both sides.

Though socialist ideas informed JVP motivations within this second phase, the 1956 ideology of linguistic nationalism and indigenist currents of thought, gilded with xenophobia, dominated this campaign in the late 1980s. Note, too, that the last quarter of the twentieth century was featured by an intellectual current identified as Jātika Chintanaya. Articulated by such advocates as Gunadasa Amarasekera and Nalin de Silva, the Jātika Chintanaya sentiments were suffused by a form of indigenist populism.[15] Subsequently, after the second JVP insurrection was had been crushed by brute force in 1989-90, a revamped JVP emerged in the late 1990s and 2000s as a parliamentary party. The new JVP was not that different from the Jātika Chintanaya. In the 2000s, however, the SLFP itself was re-invented in the mantle of 1956 once the Rajapaksa clan displaced Chandrika

[15] See chapter by Kalana Senaratne in this book.

Kumaratunga (nee Bandaranaike) at its masthead. The stance adopted by Mahinda Rajapaksa was directed towards the rural folk and was explicitly anti-elitist in rhetoric (as distinct from practice). In dressing itself under the banner of 'Mahinda Chintanaya,' it effectively stole the sarong and vest from the JVP even as the two allied together in the 2005 parliamentary elections in order to trump the rejuvenated UNP. Having secured this 'democratic' victory, the Rajapaksa regime split the JVP by its offer of spoils to some leading lights within that party. It also embraced the small party known as the Jātika Hela Urumaya (JHU), which is widely regarded as an ultra-nationalist organisation directed by Sinhala Buddhist chauvinism. In effect, the new SLFP of the Rajapaksas became the dominant expression of Sinhala heritage and power in Sri Lanka's political firmament, a force that is often depicted by radical and moderate commentators as 'Sinhala supremacist.'[16]

The Rajapaksa brothers were a key element in the combination of forces that engineered the comprehensive defeat of the LTTE as a military force in the island by May 2009. This momentous change has been a major benefit to most people in the land and therefore contributed immensely to the prestige and authority of Mahinda Rajapaksa. His roots in the southeast encouraged local people, including sycophants, to see him as modern day Dutugemunu and to clothe him with the honorifics bestowed on famous Sinhala kings in the past. Moreover, political rhetoric under the Rajapaksa regime was regularly threaded by a reiteration of extreme Sinhala nationalist positions, spiced with the occasional strain of xenophobia and the bashing of some Western state(s) and/or NGO's. Mahinda Rajapaksa's emergence to supreme power in the recent past was accompanied by a considered distancing from the elites of Colombo. His appeal has been to the rural bourgeoisie and underprivileged. The successful expansion of the Rajapaksa-led SLFP's clout by patronage and electoral process was confirmed in his clear victory over Sarath Fonseka at the presidential election of January 2010, and then consolidated at the parliamentary elections of April 2010. Note that it is a

[16] For instance see the articles published by Tisaranee Gunasekera and 'Shanie' (Lankanesan Nesiah) in the local English-media newspapers, and some of the essays in the websites like *Groundviews* and *Transcurrents*.

standard practice within Sri Lanka's political dispensation for a ruling party to call the presidential elections before those for parliament. The presidential executive can tilt the parliamentary process.

Returning recently to his village Happawana-Harumalgoda after a life in exile, the radical Dayapala Thiranagama noted its transformations since he was child in the 1960s: "it no longer bears the hallmark of destitution and abject poverty" and it "will continue to change at increasing speed." But this is a footnote to his verdict that "President Rajapaksa enjoys a solid political support among the Sinhalese rural masses, which hitherto no other political leader has been able to command."[17] Coming from a Left radical whose article also conveys reservations about the anti-democratic trends in contemporary politics, this is a significant pointer to the character of 'the Rajapaksa regime' (a considered phrase that I have deployed elsewhere as well[18]).

What, then, one sees in Sri Lanka is the development of 'populist authoritarianism' built upon Sinhalese nationalism and a rural-cum-urban vote within a context where the Sinhalese have constituted some 69-80 per cent of the population over the last fifty years. Since virtually every political party in Sri Lanka has been oligarchic in its internal structures and favours a top-down mode of operation, sometimes augmented by dynastic threads and the Marxist concept of 'democratic centralism,' the overall tendency in Sri Lanka's politics has been towards the periodic creation of 'populist authoritarianism.' The authoritarian character of the present Sri Lankan state is also supported by the 1978 Constitution, as consolidated by subsequent amendments,

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[17] D. Thiranagama, '*Ending the Exile and Back to Roots: Fears, Challenges and Hopes*', ***Groundviews***, 2nd January 2012: http://groundviews.org/2012/01/02/ending-the-exile-and-back-to-roots-fears-challenges-and-hopes/ (accessed 30th December 2014).

[18] M. Roberts, '*The Rajapaksa Regime and the Fourth Estate*', ***Groundviews***, 9th December 2009: http://www.groundviews.org/2009/12/08/the-rajapakse-regime-and-the-fourth-estate/ (accessed 30th December 2014).

and the subservience of both the judiciary and the leading administrators. Those aspects of political behaviour and those symbolic images that I have called the 'Asokan Persona' contribute to this process. They point not only to the overconcentration of power, but also raise the spectre of a further shift towards a dictatorship.

Recall my opening comparisons: populist authoritarianism is sometimes described as a form of 'plebiscitarian dictatorship' because of its Bonapartist motifs and its mass appeal, and mass support that is sometimes confirmed by referendums. So, the issue arises: are we in danger of sliding in this direction under the impulses of the Rakjapaksas and the forces they have assembled? This danger is not only accentuated by the 1978 constitutional structure and its subsequent amendments, but also by the censorship and intimidation of the press that occurred during Eelam War IV in 2006-09. This period saw regular disappearances and assaults on several press personnel, a few killings (notably that of Lasantha Wickrematunga), and pressures which forced others to leave the country.[19] The overarching fears are captured in the metaphor the 'white van' phenomenon. This force encouraged some measures of self-censorship and caution in the reportage of the independent media. Though disappearances have abated in some measure since mid-2009, the overarching fears and constraints, and acts of censorship, continued throughout the Rajapaksa regime. Middle class personnel have even advised me to be cautious in my journeys and writings in Sri Lanka. It is not remiss to talk of 'threads of fear and caution.'

So, what are the prospects of a Rajapaksa dictatorship eventuating and what restraints remain? Apart from Sri Lanka's

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[19] Journalists for Democracy (2009) ***Sri Lanka: Thirty-four journalists & media workers killed during present government rule*** <http://www.jdslanka.org/2009/08/sri-lanka-thirty-four-journalists-media.html>; U. Kurukulasuriya, ' *I finally boarded the plane*', 2nd April 2010< http://www.fojo.se/international/freedom-of-expression-around-the-world/uvindu-from-sri-lanka>.

geo-political situation in the Indian Ocean space dominated by Big Brother India and the overarching moral pressure of the cumulus clouds we call 'the West,' what are the internal restraints? As hypothetical surmise, I mark three major factors that would restrain such a development. The first is the character of populism in Sri Lanka as it has taken root in the Rajapaksa *walauwa* and its corridors. President Rajapaksa believes in his popularity and the popularity of the Rajapaksa dynasty. He desires to sustain it and pass it down the lineage as a legacy. This means that it has to be periodically affirmed through general elections. Therefore familial subjectivity and family interests will influence the future. In this future such a subjective inclination will mesh with the inclinations of the Sri Lankan people. In contrast with the neophyte democracy of Romania in the 1930s, Sri Lanka has 'enjoyed' universal suffrage and elections for 80 years. General elections are an institution and deeply entrenched as an expectation among the generality of people. Any breach of this practice will jeopardise the perpetuation of the populist/popular character of the Rajapaksa lineage.

General elections and Sri Lanka's version of democracy have also institutionalised a multi-party system. However weak the opposition parties, and however oligarchic/dictatorial their internal organisation, they exist as entities. Their presence provides a source of resistance to any dictatorial takeover. True, the Rajapaksas have successfully incorporated many former opponents into their regime through patronage, spoils, and largesse in ways that have created a sprawling government establishment. But there are limits to populist authoritarianism through such patronage. In helping A to get a coveted post, one can alienate B who anticipated that very post. Dissatisfied clients gravitate to the opposition parties; or they await the opportunity to do so. The vast patronage system can leak like a sieve when the popular tide turns.

What all this means, therefore, is that Sri Lanka is presently burdened with a form of populist authoritarianism that is necessarily short-term, one that has to calculate how to reproduce itself at the next general elections. This tendency in its turn

generates its own problems and can cater to the expression of Sinhala majoritarianism within a context created by island's demographic composition and its distribution in space.[20] We are hung in the cleft between Scylla and Charybdis.

End of Volume 1

[20] Roberts (1978).