Gyges' Ring

The 1978 Constitution of Sri Lanka

Basil Fernando

ASIAN HUMAN RIGHTS COMMISSION
REHABILITATION AND RESEARCH CENTRE FOR TORTURE VICTIMS

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Asian Human Rights Commission (AHRC)

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This book is dedicated to my parents who among other things taught us the meaning of simplicity, truth and justice.

The anonymous people

We

Are the anonymous people
No photos
no paintings
to record our pasts
Our forefathers
collected no stamps
No public wall
bears our names
No awards for us
in public games

We

Are the anonymous people
Our forefathers were the same
Ages of suffering
connect us to the past
No memories of us
but our world is vast

We

Are the anonymous people
Silence is our mask

Basil Fernando - 1970

Gyges' Ring

The 1978 Constitution of Sri Lanka

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"I should have wished to live and die free: that is, so far subject to the laws that neither I, nor anybody else, should be able to cast off their honourable yoke: the easy and salutary yoke which the haughtiest necks bear with the greater docility, as they are made to bear no other.

"I should have wished then that no one within the State should be able to say he was above the law; and that no one without should be able to dictate so that the State should be obliged to recognise his authority. For, be the constitution of a government what it may, if there be within its jurisdiction a single man who is not subject to the law, all the rest are necessarily at his discretion."

Jean-Jaques Rousseau, *Discourse: What is the Origin of Inequality Among Men, and is it Authorized by Natural Law*

ARTICLE 35 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

(1) 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.

(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) 18[relating to the election the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:]
Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

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FOREWORD

Nick Cheesman

In 2009, Sri Lanka's president visited Burma. It was not Mahinda Rajapakse's first official visit to the military-run country. He had come previously as prime minister, and seemed to have a rapport with his Burmese counterpart, Senior General Than Shwe. Later in the year, the senior general made a rare trip abroad to visit Rajapakse at home.

To some, the exchange of visits signified a convergence of authoritarian political practices between the two countries. Yet the real convergence between the two has more to do with historical and institutional parallels, rather than some kind of awkward familiarity between autocrats with a sense of mutual self-interest in the power games of international affairs.

The true character of this convergence became increasingly apparent to me the further I read *Gyges' Ring: The 1978 Constitution of Sri Lanka*, a timely collection of writings by Basil Fernando.

Fernando in his introduction to *Gyges' Ring* quotes Amartya Sen on the great achievements of Sri Lanka since the 1930s on poverty reduction, health and education. He points out that those achievements were not accidental. They were made possible by the existence of a robust legal structure and efficient civil service.

Like Sri Lanka, Burma at time of independence in 1948 inherited a system of government that had been designed to suppress resistance to British rule, oftentimes brutally. But in this system the rule of law was not a figment. It was not mere rhetoric. It had enabled the territory to achieve its own successes, and afforded opportunities for the future through the existence of judicial and legislative bodies and patterns of thought that protected fundamental rights.

For this reason, when an applicant challenged the legality of extant law in the Supreme Court of Burma shortly after it began its work—on the ground that colonial law was invalid in the newly independent state—Chief Justice Ba U recoiled at his argument, describing the conceivable consequences of invalidating the prior legal regime as "startling and disastrous", and likely to cause "chaos in the economic and social life of the country" [*U Htwe* v. *U Tun Ohn & One*, 1948 BLR (SC) 541, at 552].

Fernando also talks of chaos; in his case, the chaos arises from the 1978 Constitution of Sri Lanka, which is the subject of his book. As he shows throughout, although the constitution purported to retain the extant legal order, it did precisely the opposite: it dispensed with its core forms and made a mockery out of the normative basis upon which the political and legal systems had up until that time stood, while retaining some of the paraphernalia and tinsel of the former system, with which to convince Sri Lankans that the changes brought were not so great after all.

Both Sri Lanka and Burma began their lives as independent states with a notion of legislative authority as the cornerstone of the state structure. In a landmark ruling handed down during 1950, Chief Justice U E Maung considered how the 1947 constitutional system of Burma rested on the legislative notion established under colonial rule:

> Customary laws, the Common Law of England and the principles of justice, equity and good conscience were not applied by their inherent force but were made applicable by enactment. It is by people who had lived or who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that when the Constitution speaks of "law" it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature. [*Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon*, 1950 BLR (SC) 17, at 25.]

This notion of the will of the legislature, and the role of the judiciary as interpreter of legislative authority, ceased to exist in Burma from 1962. Amid civil war and political unrest, General Ne Win took over by force, definitively ending the period of democratic government. The notion of constitutional rule also ceased to have any special importance: Ne Win ran the country as an extra-constitutional military dictator until 1974, when he changed into civilian garb so as to head a new one-party parliament. His successors carried on from 1988 to 2010 also without reference to any constitutional basis for their authority.

In Sri Lanka, although no abrupt military intervention caused an historical cleavage between parliamentary and post-parliamentary era—or constitutional and non-constitutional era—the country's drift towards authoritarianism is also intimately linked to the displacement of legislative power vested in the parliament, and the emergence of constitutions that placed growing authority in the executive.

The 1972 Constitution, as Fernando argues in chapter four, expressed a profound distrust of Sri Lanka's 1947 constitutional formula. It eliminated the Civil Service Commission so that the government could make changes to procedures that may in the short term have been justified but which enabled the executive to hijack and directly control appointments. It also abolished judicial review, signaling the demise of the courts as determiners of legal questions in pressing political matters.

The 1978 charter followed from its predecessor by enabling the impunity of the executive president, JR Jayawardene. In his keenness to aggrandize power, Jayawardene created a constitutional monster that has continued to swallow up Sri Lankans to the present day.

Fernando goes to the crux of the matter when in chapter one he asks, "Who is the guarantor of the observance of the [1978] constitution?" And he continues,

> It cannot be the Parliament, which itself can be dissolved at the whim of the President. In any event, no action of the Parliament can be executed by itself. Executive power rests with the President.

Hence, it is the executive president who is guardian.

This is the constitutional tie that binds Burma and Sri Lanka today. It is the linkage that enables the two countries' continued authoritarian convergence, since the 2008 Constitution of Burma has likewise established an executive presidency, structured so as to give the president—not the legislature or judiciary—this guardianship role.

To persons who have not thought through the consequences of the granting of constitutional guardianship to an executive president, this feature of the 1978 Constitution may appear to be little more than an interesting innovation, and not something with which we ought to be overly concerned. In fact, that the difference between this type of constitutional guardianship and one under the legislative authority is nothing less than the difference between democratic government and the worst types of dictatorship is made plain by Jürgen Habermas, who has written that,

> Anyone who would want to replace a constitutional court by appointing the head of the executive branch as the 'Guardian of the Constitution'—as Carl Schmitt wanted to do in his day with the German president—twists the meaning of the separation of powers in the constitutional state into its very opposite. (*Between Facts & Norms*, pp. 242-243)

This is precisely the problem at the heart of Fernando's study, because it is exactly this type of 'constitutional' state that he describes as having been established in Sri Lanka since 1978.

This model of constitutionalism, in which the meaning of the separation of powers is twisted, has profoundly authoritarian characteristics. These characteristics are not simply a matter of practice. They are inherent to the model, since the placing of constitutional guardianship in an executive officer is bound to a normative concept of absolute, unconstrained dictatorship of the sort championed by Schmitt under the Weimar regime in Germany, to which Habermas alludes.

The placing of the executive president outside the constitution itself, in that he alone can violate its terms and be beyond punishment, which Fernando in chapter five describes as a feature of the 1978 charter, is exactly as Schmitt would have had it, since the guardian cannot be bound by the constitution but must always stand beyond it.

Authoritarianism is, under this constitutional arrangement, not a side effect. It is embedded in the constitutional structure. It is essential. It is unavoidable. Thus, Fernando's closing warning about the shift from phantom democracy to complete dictatorship with the 18th Amendment to the 1978 Constitution is not exaggerated.

But constitutional arrangements do not by virtue of their own existence create institutional ones, and it is in this respect that comparison with Burma is again instructive. Here, in certain important respects it also represents something of a contrast to Sri Lanka.

Whereas the goal of authoritarians in Sri Lanka and Burma alike has throughout been to establish the primacy of the executive at the expense of other parts of the state apparatus, in the latter this

primacy was established through institutional design. The success of the country's military was not simply in defeating the capacity of all other institutions to operate effectively, but in its capacity to build up itself as the sole functioning national institution. In short, the regime that exists in Burma today, despite the country's decrepit condition and the abysmal circumstances in which tens of millions there are forced to subsist, is not built on sand. Its executive constitutional guardianship is grounded in the unrivalled political and material authority of the armed forces.

What Fernando shows of Sri Lanka, on the other hand, is that whereas much has been pulled down in order to elevate the executive, very little, if anything at all, has been built up. Unlike in Burma, there is no central institution holding things together, and insisting that it alone has the capacity to play a leadership role, having demolished any other institution that might once have done so in its stead. Sri Lanka's executive presidency, it would seem, is built on the simple insistence that the executive president is the boss. No firm institutional basis exists to validate this claim, and in the event that it were seriously challenged, it seems unlikely that it could be sustained.

In certain respects, this creates for Sri Lanka a more unstable and dangerous situation than that which arises from having a rapacious but confident and secure military in charge, as in Burma. But it also provides more opportunities for people to effect meaningful change through tireless critique of the prevailing structure.

Clearly, generating genuine debate about the 1978 Constitution and its persistent authoritarian legacy is one of Fernando's central objectives in publishing this book. And as he makes clear near the end of the text, debate is an altogether different thing from quarrel:

> Sri Lanka has turned into a land of many quarrels but no debates. Often quarrels turn into violence, sometimes murder, and even worse. And the violence itself leads to new quarrels, and the cycle repeats. Sadly, hardly anything ever turns into a debate. Debate has become a lost art and no one even seems to remember what it is.

Whether or not anyone in Sri Lanka remembers the meaning of debate, Fernando certainly does. And as he shows throughout *Gyges' Ring,* debate on the constitution and the role of the executive president in the destruction of Sri Lankan democracy is something that must at last be had. It falls to his compatriots to read this work and take his challenge seriously.

INTRODUCTION

Glaucon's story about the ring of invisibility and J.R. Jawardene's legacy

In Plato's *Republic*, Glaucon narrates a story about a ring of invisibility. The man who found the ring used his power to enter the palace, rape the queen, kill the king and to take over the throne.

> *'They'd have the scope I'm talking about especially if they acquired the kind of power which, we hear, an ancestor of Gyges of Lydia once acquired. He was a shepherd in the service of the Lydian ruler of the time, when a heavy rainstorm occurred and an earthquake cracked open the land to a certain extent, and a chasm appeared in the region where he was pasturing his flocks. He was fascinated by the sight, and went down into the chasm and saw there, as the story goes, among other artefacts, a bronze horse, which was hollow and had windows set in it; he stooped and looked in through the windows and saw a corpse inside, which seemed to be that of a giant. The corpse was naked, but had a golden ring on one finger; he took the ring off the finger and left.*
>
> *Now, the shepherds used to meet once a month to keep the king informed about his flocks, and our protagonist came to the meeting wearing the ring. He was sitting down among the others, and happened to twist the ring's bezel in the direction of his body, towards the inner part of his hand. When he did this, he became invisible to his neighbors, and to his astonishment they talked about him as if he'd left. While he was idling about with the ring again, he turned the bezel outwards, and became visible. He thought about this and experimented to see if it was the ring which had this power; in this way he eventually found that turning the bezel inwards made him invisible and turning it outwards made him visible. As soon as he realized this, he arranged to be one of the delegates to the king; once he was inside the palace, he seduced the king's wife and with her help assaulted and killed the king, and so took possession of the throne.*[1]

[1] Plato, *The Republic*-A New translation by Robin Waterfield, (Oxford University Press, New York: 2008) 359 c – 360 b

The following conversation illustrates the relevance of this story to this discussion on the 1978 Constitution;[2]

This is a discussion among several imaginary characters. These imaginary characters do not represent any living persons.

The Characters:

A journalist, conducting the interview;
A senior police officer who has agreed to speak on the condition of anonymity;
A retired judge;
A political scientist;
A philosopher.

Journalist: We have now discussed some important transformations in our country. We discussed Gyges' ring, which makes the wearer invisible, as part of our local experience now. In that transformation the 1978 Constitution played a very significant role. Now, the Executive President can wear Gyges' ring and what this does is make him quite invisible. Let us discuss this more.

Philosopher: At this stage, I think it is better to recall the legend of Gyges' Ring. According to the legend, the ancestor[3] of Gyges of Lydia was a shepherd in the service of King Candaules of Lydia. After an earthquake, a cave was revealed in a mountainside where Gyges was feeding his flock. Entering the cave, Gyges discovered that it was in fact a tomb with a bronze horse containing a corpse, larger than that of a man, who wore a golden ring, which Gyges pocketed. He discovered that the ring gave him the power to become invisible by adjusting it. Gyges then arranged to be chosen as one of the messengers who reported to the king as to the status of the flocks. Arriving at the palace, Gyges used his new power of invisibility to seduce the queen, and with her help he murdered the king, and became king of Lydia himself. King Croesus, famous for his wealth, was Gyges' descendant.

Political Scientist: Now, the moral of the story is that a typical person would *not* have morals if he

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[2] Basil Fernando, 'Replacing paramount law with a paramount personae' (7th July 2009) Sri Lanka Guardian <http://www.srilankaguardian.org/2009/07/replacing-paramount-law-with-paramount.html>

[3] In Book 10, Socrates refers to the ring as belonging to Gyges himself, not his ancestor, as Glaucon states in Book 2.

or she did not have to fear the consequences of their actions. If someone can be invisible, it is possible to do things that one may not otherwise do because of bad publicity and other adverse consequences.

Retired Police Officer: I think I understand this legend and what it tries to say, but I do not agree that we should encourage our officers or leaders to follow the moral of this story.

Political Scientist: You mean it is too Western?

Retired Police Officer: I mean, if we have to become visible, we cannot do anything. We will become powerless. How can we ask our officers to kill undesirable people, bad criminals, if they have to do that openly. If their wives and children know these things, they will think they are bad people. Ordinary folk need to observe morals. If they know what we do, they will try to emulate us, and then there will be more problems. We need to have the capacity to do many things in an invisible way.

Retired Judicial Officer: Some people might say that what our police officer says is wrong. However, he is simply saying honestly what everybody knows is happening.

Political Scientist: Now, let us go back to our original question: in 1978 when the executive presidential system was created, the President gave himself Gyges' Ring. We created a very powerful president, as powerful as those Kings who ruled before this thing called democracy came to the world. We rejected Western Democracy and created our own affair.

Philosopher: What you mean, I think, is that we replaced the idea that law is paramount with the idea of the paramount persona. Large, big, tall, fat personae as we see them in ancient statues, which is really our thing, our idea of who the powerful person should be.

Retired Police Officer: Let us be frank. Do you think that we can persuade people to work for the government and hold high office if they are told that they have to account for every cent they spend, that they would have to keep books and be audited; that they can't use their official position to help their family or friends and the like? If we ask our officers to bring every suspect before judges, that they should not torture people who do not give information, or that they have to produce every dead body before a magistrate to have a post-mortem, will they do anything? We will have to pay officers who do nothing.

Retired Judicial Officer: I think what you are saying is that we must be more flexible. We must give people room to exercise power - more freedom. Freedom of those in authority is more important than the so-called 'people's freedom'. People are free only if they obey rulers and respect rulers.

Philosopher: According to our officer and judicial officer, this is what has happened since 1978. This is our new order.

Journalist: Now I understand why so many journalists are being killed. Since we journalists believe in transparency and accountability, we no longer have any place under this new order.

When Sri Lanka said *no* to John Locke and Jean-Jacques Rousseau

The founding constitution of Sri Lanka at independence in 1948 was based on the tradition of John Locke and Jean-Jacques Rousseau. Britain's own political tradition has been shaped by the enlightenment tradition. All the political leaders of Sri Lanka at the time of the independence were schooled in this tradition. The drafter of the 1948 constitution, Ivor Jennings, was a well-known British expert in constitutional law.

In 1972 when the coalition government spoke of the creation of an 'autochthonous constitution,' all that it meant was that the constitution was not given by the departing colonial ruler but adopted by representatives elected by the people of Sri Lanka. It did not imply a rejection of the constitutional thought of liberal democracy. Despite some attempts to modify some rules, which in fact to some extent did interfere with the structure of a liberal democracy, the framers of the constitution were careful not to undo the basic framework of the founding document.

The 1978 Constitution went the entire way in undoing that basic framework and to abandon the enlightenment tradition altogether. The very notion of equality before the law was abandoned by placing the Executive President above all. The details of that complete overhaul are discussed in the subsequent chapters.

Although this document is called a constitution, which carries the idea of the supreme law, it is in fact a declaration of accepting arbitrariness as opposed to the law. The very foundation of law itself was removed.

It is the document that de-legalized the state.

Rousseau spoke of the bonds of law being equally strong as the bonds of blood. It is the legal bonds which hold citizens together. 1978 marked the removal of the hidden threads that hold the nation as a nation.

The subsequent chaos that descended on Sri Lanka is usually attributed to various conflicts and to terrorism. The constitutional unwinding of the nation has not been looked into, despite possibly being the most important cause of such chaos. This is the most important issue that this book aims to raise.

Days of Sri Lanka's great achievements

Sri Lanka was looked at as a model for development in the early 20th century. There are many commentators, including Nobel Prize laureate Amartya Sen, who have pointed to such achievements. In a recent book, *Half the Sky*, the authors Nicholas D. Kristof and Sheryl WuDunn write:

> "Poverty is obviously also a factor, but high rates of maternal mortality are not inevitable in poor countries. Exhibit A is Sri Lanka. Since 1935, it has managed to halve its maternal deaths every six to twelve years. Over the last half century, Sri Lanka has brought its maternal mortality ratio down from 550 maternal deaths for every 100,000 live births to just 58. A Sri Lankan woman now has just one chance in 850 of dying in pregnancy during her lifetime.
>
> That is a stunning achievement, particularly since Sri Lanka has been torn apart by intermittent war in recent decades and ranks 117th in the world in per capita income. And it's not just a matter of throwing money at the problem, for Sri Lanka spends 3 percent of GNP on healthcare, compared to 5 percent in India next door—where a woman is eight times more likely to die in childbirth. Rather, it's about political will: Saving mothers has been a priority in Si Lanka, and it hasn't been in India.
>
> More broadly, Sri Lanka invests in health and education generally, and pays particular attention to gender equality. Some 89 percent of Sri Lankan women are literate, compared to just 43 percent across South Asia. Life expectancy in Sri Lanka is much higher than in surrounding countries. And an excellent civil registration system has recorded maternal deaths since 1900, so that Sri Lanka actually has data, in contrast to vague estimates in many other countries. Investments in educating girls resulted in women having more economic value and more influence in society, and that seems to be one reason that greater energy was devoted to reducing maternal mortality. Beginning in the 1930s, Sri Lanka set up a nationwide public health infrastructure, ranging from rudimentary health posts at the bottom to rural hospitals one tier up, and then district hospitals with more sophisticated services, and finally provincial hospitals and specialist maternity centres. To make sure that women could get to the hospitals, Sri Lanka provided ambulances.
>
> Sri Lanka also established a major network of trained midwives, spread across the country and each serving a population of three thousand to five thousand. The midwives, who have undergone eighteen months of training, provide prenatal care and refer risky cases to doctors.

> Today, 97 percent of births are attended by a skilled practitioner, and it is routine even for village women to give birth in a hospital. Over time, the government added obstetricians to its hospitals, and it used its data to see where women were slipping through the cracks—such as those living on the tea estates—and then to open clinics targeting those women. A campaign against malaria also reduced maternal deaths, since pregnant women are especially vulnerable to that disease. Sri Lanka shows what it takes to reduce maternal mortality. Family planning and delayed marriage help, and so do mosquito nets. A functioning health care system in rural areas is also essential."[4]

Such stunning achievements were possible because of the legal structure that was introduced in Sri Lanka and the civil service that was created on the foundation of these legal norms. This legal framework provided the foundation for a well-organized society within which, with the cooperation of the citizens and the state, social miracles could be achieved.

It was this legal foundation that was removed in 1978 and the resulting chaos is no surprise.

In a place like Hong Kong, where a similar framework was created, people are thriving. They have even proved capable of effectively eradicating corruption on the basis of legal institutions created for that purpose, and these were built on the foundation of a legal structure which is similar to what existed in Sri Lanka prior to 1978.

[4] Nicholas D. Kristofand Sheryl WuDunn, *Half The Sky- Turning Oppression into opportunity For Women Worldwide (*Alfred A. Knopf, New York: 2009) pgs 117-118

CHAPTER 1

The 1978 Constitution: Its Foundation is Flawed

It has been more than 30 years since the promulgation of the 1978 Constitution of Sri Lanka. It has repeatedly been said that this Constitution is modelled on the French Constitution of 1958 — known also as the Constitution originated by Charles de Gaulle. Constitutional pundits and politicians alike have harped on about a 'de Gaullian Constitution' for so long that this misnomer has now become almost an article of faith. The reference is mostly to the institution of the Executive Presidency created by the 1978 Constitution, which is compared to the position of the French President under the 1958 Constitution.

The opening two lines in the French Constitution regarding the President of the Republic are as follows (Article 5):

> 'The President of the Republic shall see that the Constitution is observed. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the state.'

It is thus amply clear that the primary function of the Presidency in the French Republic is to see that the Constitution is observed. It is also his or her primary duty to ensure the proper functioning of the public authorities and continuity of the state. The French Constitution of 1958 is thus credited by observers with ushering in an era of stability.

The constitutional history of France is one of the richest in the world. Along with the United States, it was one of the first countries to put into practice the modern idea of a constitution. But the 1787 American Constitution is still in effect today, while the French Constitution of 1791 did not last for even one year. A good dozen regimes followed on the heels of one another thereafter until the idea of the Republic triumphed and finally, in 1958, the Fifth Republic brought a stable regime to France[5].

Chaos

How is it then that the 1978 Constitution did not bring stability to Sri Lanka? In fact, it may be said that the most chaotic period in Sri Lankan history has been during the operation of the 1978 Constitution, with horrendous atrocities, killings and 'disappearances' witnessed in the North and

[5] (http://www.france.diplomatie.fr/label)

East region as well as in the South. Also, national institutions have been at their weakest during this era.

So how has the French constitutional model affected Sri Lanka? Or is it simply a bogus claim? And is it that, on some superficial aspects, the two Constitutions are similar, but on a more substantial and fundamental level they are inherently different?

The answer perhaps lies in a further question: Does the Sri Lankan President have the duty to see that the Constitution is observed? The basic duty of the French President, as stated in that Constitution, is to see that the Constitution is observed. This may be considered in the light of certain observations made by Sri Lanka's National Police Commission (NPC) Chairman, Ranjith Abeysuriya. He observed that the Constitutional Council had been non-functional for more than one year and that this had resulted in the failure to appoint High Court judges, which in turn affected the functioning of courts in dealing with the heavy backlog of cases.

The Chairman of the NPC further said that the non-functioning of the Constitutional Council might affect the appointment of the IGP — when the present incumbent reached his retirement age— since a new IGP has to be nominated by the Constitutional Council. He was also quoted as having said: "*It is almost a year since the Constitutional Council ceased functioning and irregularities are rampant in public administration. The appointment of a new Constitutional Council is vital for a sound administration*." Who is to solve the tremendous deadlock that has developed in the operation of public authorities as a consequence of the non-functional Constitutional Council?

If it is the duty of the President to ensure the Constitution is observed, then the responsibility would be on the President to ensure that such a deadlock does not arise, and if it does, to resolve it immediately. To fail in this sacred duty is to fail in the most primary function of the President - if indeed the Constitution is based on the French model. However, to admit that there is no such obligation on the President under the Sri Lankan Constitution to see to the observance of constitutional provisions is tantamount to saying that the 1978 Constitution is substantially and fundamentally different to the French model.

Who is the Guarantor of the Constitution?

If the President of Sri Lanka was to say that there was no responsibility on the part of the President to ensure the proper functioning of the Constitution, then the question is, who is the guarantor of the observance of the Constitution?

It cannot be the Parliament, which itself can be dissolved at the whim of the President. In any event, no action of the Parliament can be executed by itself. Executive power rests entirely with the President. Now, in this respect too, Sri Lanka seemed to have been under the delusion that the

relationship between Parliament and the Executive President is similar - in France and in Sri Lanka. However, this too is far from reality, as one constitutional expert, Oliver Duhamal, noted:

> As defined by classic categories of constitutional law, France has a parliamentary system, since the government is answerable to the Parliament. In the eyes of public opinion, however, France has a presidential system, since the President is elected directly by the people. So specialists defined France's system as a mongrel one, since it mixed traditional notions, until the jurist Maurice Duverger conferred more dignity on it by dubbing it "semi presidential."

Constitutional Council

The third important difference between the two Constitutions pertains to the Constitutional Council itself. The French Conseil Constitutionnel is a powerful judicial body. Independent from both the executive and legislative branches, it had gradually carved out the role of a constitutional court.

Among the world's greatest judicial authorities on Constitutions are the Constitutional Court of Germany and the French Conseil Constitutionnel.

Sri Lanka's Constitutional Council is at best an administrative body basically dealing with appointments to important posts. It is not a judicial body at all. Furthermore, its functioning can be disrupted by the President or due to other contingencies (such as by non-appointment of the members). Currently this Council is experiencing such a disruption. Sri Lanka does not have a judicial body similar to the Conseil Constitutionnel and this lacuna is one of the fundamental differences between the Sri Lankan Constitution and its supposed French counterpart.

Public Authorities

The French President also has to ensure the proper functioning of public authorities (Article 5 of the Gaullist Constitution). Who is to ensure the proper functioning of public authorities in Sri Lanka?

Today, almost the entirety of the public administration is in a state of collapse. Public administration related to policing, elections, public health and education, as well as many other areas of life, is in a state of anarchy. Almost everyone, including members of the ruling parties and the opposition, agree on that point, as does the public and the media. The average citizen's daily complaint is the fact that public authorities function to his detriment and not for his benefit. And within the Constitution, there is no one to ensure the proper function of these public authorities.

If all these fundamental aspects of the Sri Lankan Constitution differ from the French model, then the question is who created this big lie about the similarities with the French model? And, more importantly, why is this lie being perpetuated? Have not whole generations of lawyers and law students been mis-educated about the paramount law of their country? Will the educational institutions carry on with their education based on this false notion to yet more generations of students? And is not the entire civic education of the country based on such serious misinformation about one of the most vital areas of the nation, its Constitution? If there is an attempt to answer these questions, the people may begin to see the whole constitutional debate in the country in a different light.

What are most important, however, are the practical questions raised by the NPC Chairman about the present non-functioning of the Constitutional Council and the implication of such non-functioning. Somebody must be held responsible in order to stop such non-functioning. The country's institutions cannot function until this responsibility is attributed to some office. Perhaps this will be the most important constitutional question to be resolved if there is to be a constitutional form of government in the country.

Dissolving Parliament

According to Article 12 of the Gaullist Constitution:

> *"The President of the Republic may, after consulting the Prime Minister and the Presidents of the Assemblies, declare the National Assembly dissolved."*

Thus the French President does not have the power to dissolve Parliament without consulting the Prime Minister and the Presidents of the Assemblies. However, under the Sri Lankan Constitution the President can dissolve Parliament without consulting the Prime Minister or the Speaker. In 2004, the Sri Lankan President (at the time Chandrika Kumuratunga) dissolved Parliament while the current Opposition party (United National Party) was in power, not only without consulting the Prime Minister or the Speaker, but in fact after having given assurance to the elected representatives and the people that Parliament would not be dissolved. The Sri Lankan President can take everyone by surprise by dissolving Parliament as and when he or she wishes. Such power places the government and Parliament completely at the mercy of the President, devoid of checks and balances and with little control over the President's power to dissolve Parliament.

The purpose of such dissolution could simply be to disrupt a government or to accrue some advantage for the President and/or the political party to which he or she belongs at a given time. Thus, purely for personal reasons a government can be dissolved by the wish of a single individual who does not have to convince even the Prime Minister or the leader of the National State Assembly (the Speaker) as to the necessity or justifiability of such action. Such power in the hands

of the President is one of the major causes of political instability for any government in power in Sri Lanka.

Emergency Powers

The French Constitution states:

> *"Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council [Conseil Constitutionnel]."*

Thus, emergency can be declared only upon certain conditions that obstruct the functioning of public authorities as well as after formal consultation with the Prime Minister, Presidents of the Assemblies and the Conseil Constitutionnel. Perhaps most important is the fact that the President is required to formally consult the Conseil Constitutionnel. The Conseil Constitutionnel is the highest judicial body on constitutional matters in France. Thus, declarations of emergency and the contents of such declarations come directly under the scrutiny of a judicial body. Further, such emergency measures should be for the shortest time possible and "the Constitutional Council shall be consulted with regard to such measures." Thus, in these matters the President is under the strict control of an independent judicial body, which wields the highest authority on constitutional matters in France.

However, as there is no such control in Sri Lanka. Thus it is of little surprise that in the South of Sri Lanka alone over 30,000 people "disappeared"[6] — meaning that they were illegally arrested, detained and killed during the operation of the emergency. Much larger numbers have also been killed in the North and East of the country. The wide powers afforded to the armed forces under the emergency regulations caused such gross abuses. Conversely however, in France such actions would have been considered by the Conseil Constitutionnel, which would have controlled the powers of the President and considered the validity of the emergency powers.

The Judiciary

The Gaullist Constitution enhanced judicial power in two ways. The first was the creation of the constitutional council and the other was through the functioning of the judicial authority. The Conseil Constitutionnel, consisting of nine members having power over several vital areas, has to

[6] The government's estimate is 30,000 however, civil rights groups estimate the number to be closer to 60,000.

ensure the proper conduct of the election of the President and shall examine complaints and declare the results of the vote; it also rules on the conduct of the elections of deputies and senators in disputed cases; it has to ensure proper conduct of referendum proceedings and declare the result of such. Institutional acts and rules of procedures of parliamentary assemblies must be referred to it and it shall rule on their conformity with the constitution. Acts of Parliament should also be referred to the Conseil Constitutionnel before their promulgation. The determinations of the constitutional council are binding on all public authorities, all administrative authorities and all courts. Other than the constitutional council, there are other judicial authorities.

The President is the guarantor of the judicial authority and is assisted by the high council of the judiciary. The high council of the judiciary shall consist of two sections, one for the jurisdiction of judges and the second for public prosecutors. Thus, the creation of the post of the President under the Gaullist Constitution did not limit the power of judicial bodies but in fact, enhanced it enormously.

On the other hand, under the 1978 Constitution judicial power was extremely limited. Judicial review was confined to the Supreme Court and no body with authority similar to the Conseil Constitutionnel was created. Acts of Parliament were referred to the Supreme Court for review before their promulgation, for the limited purpose of looking into the constitutionality of the provisions. This form of review is far more limited than the powers vested in the Conseil Constitutionnel. In Sri Lanka, there is no authority similar to the Conseil Constitutionnel to check the interference of the Executive President with the judiciary.

While the Gaullist Constitution wanted the Conseil Constitutionnel to act in balancing the powers of the Parliament and the President of France, the Sri Lankan Constitution primarily treated the independence of the judiciary as a threat to the Executive President. Therefore the 1978 Constitution gave complete immunity to the President and weakened the capacity of the courts to ensure proper checks and balances on the power relationships. While the Conseil Constitutionnel in France can be a major challenge to the arbitrary use of power either by the President or the Parliament or other public and administrative bodies, the role that can be played by the courts on such matters in Sri Lanka has been curtailed significantly by the 1978 Constitution.

Constitutional Logic, Pretext and Fancy

Constitutional logic is based upon sound principles that determine the relationships between different parts of a constitution and their implications. These principles are rationally applied case by case. For instance, there may be demands for a referendum to be held on a specific issue. These demands should be met with reference to general principles under the Constitution regarding referendums, as well as contemporary concerns. A proposal for a referendum asking people to forgo their right to elect a government by allowing earlier elected representatives to continue for

another term must be looked at through the constitutional logic of the Gaullist Constitution of 1958 on which the Sri Lanka Constitution claims to be based. Such logic however, would regard the proposal as absurd, as it contradicts all constitutional principles of democracy. The constitutional logic of the US Constitution would say the same.

A constitutional pretext is giving a semblance of logic to a proposition that falls outside the structure of the constitution. This can be done by simply referring to any constitutional process, such as procuring the necessary majority in Parliament. For instance, a pretext could be made that any proposal accepted by way of a referendum is valid if passed with an absolute majority. That the proposal contradicts the basic tenets of the Constitution can hence be completely disregarded.

Under constitutional pretexts then, even the most absurd proposals may acquire legality. This is how presidents are able to acquire the powers of dictators under a constitution that declares the nation to be a democracy.

The constitution of a democracy, as mentioned above, has principles that determine the relationships between the people and the state. In the Gaullist Constitution these principles are stated under the following headings:

PREAMBLE;

Title I. On sovereignty (As. 2 to 4);

Title II. The President of the Republic (As. 5 to 19);

Title III The Government (As. 20 to 23);

Title IV. Parliament (As. 24 to 33);

Title V. On relations between Parliament and the Government (As. 34 to 51);

Title VI. On treaties and international agreements (As. 52 to 55);

Title VII. The Constitutional Council (As. 56 to 63);

Title VIII. On judicial authority (As. 64 to 66);

Title IX. The High Court of Justice (As. 67 and 68);

Title X. On the criminal liability of members of the government (As. 68-1 to 68-3);

Title XI. The Economic and Social Council (As. 69 to 71);

Title XII. On territorial units (As. 72 to 75);

Title XIII. Transitional provisions relating to New Caledonia (As. 76 to 77);

Title XIV. On association agreements (A. 88);

Title XV. On the European Communities and the European Union (As. 88-1 to 88-4);

Title XVI. On the amendment of the Constitution (A. 89).

The principles stated in each section are linked to those in other sections.

The position of the President under the Gaullist Constitution is thus clearly defined and is linked to principles in other sections of the Constitution. The position of the President of France is different to that of the Sri Lankan President under the 1978 Constitution and, following Gaullist constitutional logic, the concept of the Executive President in the Sri Lankan Constitution can be described as a constitutional monstrosity.

Constitutional Fancy

A constitutional fancy is an idea of power and relationships based not on constitutional logic, but on imagination. The type of power attributed to the Sri Lankan President under the 1978 Constitution can only be the result of fancy.

In reality such a presidency is a constitutional absurdity. This is because the Sri Lankan President has almost absolute power, which is the very thing a democratic constitution is designed to prevent. In practical terms, this presidency can destroy every other constitutional body it relates to, such as the Parliament, the government, and the judiciary. In fact, it does not even have a body to oversee the interpretation of the Constitution, like the French constitutional council, which is a powerful body that ultimately determines all constitutional matters. The internal absurdities contained in the Sri Lankan constitution make it impossible for the state to function.

Fundamentally Flawed?

The question is whether there can be constitutionalism when a constitution itself is fundamentally flawed. The answer seems to be a resounding NO. The Sri Lankan constitution is one that is fundamentally flawed despite the pretensions that it is based on the Gaullist Constitution. The Sri Lankan constitution helped the Executive President to escape from all constitutional controls and become a creature capable of using power arbitrarily. Thus, the purpose of this constitution was not to create a constitutional government but to liberate the President from a constitutional form of government.

Under such circumstances the references to the Constitution in courts of law can only be on minor matters. Even the forms of references to courts can often be a pretext rather than of any substantive value. There have been many glaring examples of this since 1978. Perhaps most demonstrative of those was the 1982 referendum to allow the existing Parliament to continue for another term without an election. Such absurdity is possible only because constitutionalism has hardly any meaning in the Sri Lankan context since the promulgation of the 1978 Constitution.

Looking back into the experience resulting from the implementation of the 1978 Constitution, one may question the validity of the following assertion made by Dr. M.J.A. Cooray in a book published in 1982 entitled *the Judicial Role under the Constitutions of Ceylon/Sri Lanka:*

> "It is a truism that the modern administrative and judicial system of Sri Lanka has its origins in the institutions introduced by the British in Ceylon at the time it was ruled by them."

At the time this comment was made, the 1978 Constitution had been in existence only for 6 years and there was a prevalent assumption that, despite some changes such as the executive presidency introduced by this constitution, there was a continuity of tradition from the British times.

However, now — after almost 33 years of the practice of this Constitution — it becomes starkly clear that a claim of any continuity with British practices is farcical. Perhaps around 1982 much of the constitutional analysis consisted of purely looking into the text and comparing it with the text of the earlier two constitutions and the practices under those constitutions.

However, looking into the political interpretations given to the 1978 Constitution, it becomes evident that what was envisaged was an authoritarian form of government in which the President had unfettered powers without any of the checks and balances developed within the British constitutional system and mostly followed during the periods of the two previous constitutions. Dr. Cooray even thought that while the 1972 Constitution — which was said to be an autochthonous constitution — did not recognise the separation of powers, the 1978 Constitution recognised this separation.

However, the basic doctrine of the separation of powers had been flouted under the 1978 Constitution when the Executive President acted in sheer disregard for the Parliament as well as the judiciary. People who have had the experience of living during the administration of the earlier two constitutions could not imagine the extent to which the Executive President could act arbitrarily — the way it subsequently has done under the 1978 Constitution.

Thus, what took place by way of the1978 Constitution was to lose the continuity of the laws and practices of constitutionalism, which prevailed, with varying degrees of modification, up until 1978. In a constitutional sense, what took place was a rupture with the past and a turn to the sort of dictatorial practices that were not possible within the concepts of constitutional government that prevailed before it. If these departures from the administrative and judicial system of Sri Lanka were justified under the pretext of adopting a French model of a constitution, we have shown that this claim is untenable.

CHAPTER 2

The tussle between the Executive President and public authorities

Under the Gaullist Constitution, one of the major responsibilities of the French President is that he/she shall ensure, by his/her arbitration, the proper functioning of the public authorities (Article 5). However, in the last few decades Sri Lanka has witnessed a situation where not only have Executive Presidents failed to ensure the proper functioning of public authorities, but they have in fact become enemies of public authorities.

This is the situation that gave rise to the 17th Amendment to the Constitution. At the time, it was thought that the development of strict constitutional provisions were essential in order to place obstacles in the path of those – including the Executive President – who attempted to politically interfere with the appointments, promotions, transfers and other matters relating to officers of public authorities that are considered vital in the country.

The authorities recognised in the 17th Amendment are the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Bribery or Corruption, the Finance Commission and the

Delimitation Commission. According to the 17th Amendment, section 41(b)(1), no persons shall be appointed by the President as the chairman or member of any Commission specified in the Schedule to the Article, except on a recommendation of the Constitutional Council. Also, all important appointments of persons within the departments controlled by these commissions — except those specified in the 17th Amendment — cannot be made without the recommendation of the said commissions.

This restriction, placed on the President and others regarding the appointment of persons to some of the most vital public authorities, has a history. Since the promulgation of the 1978 Constitution, recruitment and control of important officers working in the various public authorities were arbitrarily carried out, often according to the dictates of politicians or on political consideration. This had reached such calamitous levels that a specific amendment to the Constitution itself was needed to put an end to the practice. Accordingly, the amendment was certified on 3rd October 2001 and the common term used to describe the evil that the 17th Amendment was supposed to cure was 'politicisation'. In the unanimous passing of the 17th Amendment there was a common consensus among all the political parties that appointments to positions in public authorities should be based on objective criterion and merit rather than on other considerations.

Under the 1978 Constitution, a practice had developed to the effect that the Executive President was directly involved in doing away with merit-based and objective criteria for appointments to public authorities. Once this happened, little possibility existed for these public authorities to function and perform in the manner expected from such authorities. Hence, public authorities had become dysfunctional due to undue interference by the Executive President and those acting on his behalf. The 17th Amendment was proposed as a check against the President acting in such a manner.

While a constitutional safeguard had been created against the arbitrary intervention of the Executive President in the running of public authorities, on a practical level the Executive President was still in a position to prevent the operation of these safeguards. There are three methods that can be used:

> Firstly, the President could make the Constitutional Council – which is the effective body in the structure proposed by the 17th Amendment – dysfunctional, and this may be done by delaying or obstructing the appointment of Council members.
>
> The second method is to delay or obstruct the appointments to the various Commissions i.e. by not submitting the nominations of proposed candidates for such positions.
>
> The third method, and the most resorted to, was not to provide the funding and other resources essential for the functioning of the Commissions. By this method, it

was also possible to prevent a Commission from doing what it is supposed to do, due to the lack of competent personnel, equipment or other financial resources.

So, while the 17th Amendment proposed some serious measures to control the President from behaving in the arbitrary manner that the 1978 Constitution made possible, nonetheless, the tussle between these institutions and incumbent Presidents goes on. And, sadly, the balance is still in favour of the President and the President can still prevent these public authorities from benefiting from the measures proposed by the 17th Amendment. This malady has currently befallen many of the public authorities.

The 17th Amendment was one of the most significant measures adopted by the Parliament to check the powers of the Executive President. Thus, we also see a tussle between the Parliament and the Executive President over the functioning of the public authorities.

However, it must be noted that while Parliament has proposed a constitutional framework for the control of the public authorities, and thus the powers of the President, it has not followed up with any practical measures to ensure the proper implementation of the law it created. It seems that the parties who collaborated to bring about the 17th Amendment have not pledged allegiance to their brainchild in any decisive or consistent manner. Thus, the tension between the Executive President and Parliament on this matter is yet to be resolved.

Today the Sri Lankan public is faced with a grave crisis because these public authorities are proving incapable of providing the services and facilities they are expected to provide. The provision of the 1978 Constitution still overpowers them in favour of the Executive President's capacity to act arbitrarily. Much of the ideological crises and the resultant loss of hope prevalent in the country also centre on the frustrations felt by the citizenry due to their inability to get vital public authorities in the country to function adequately.

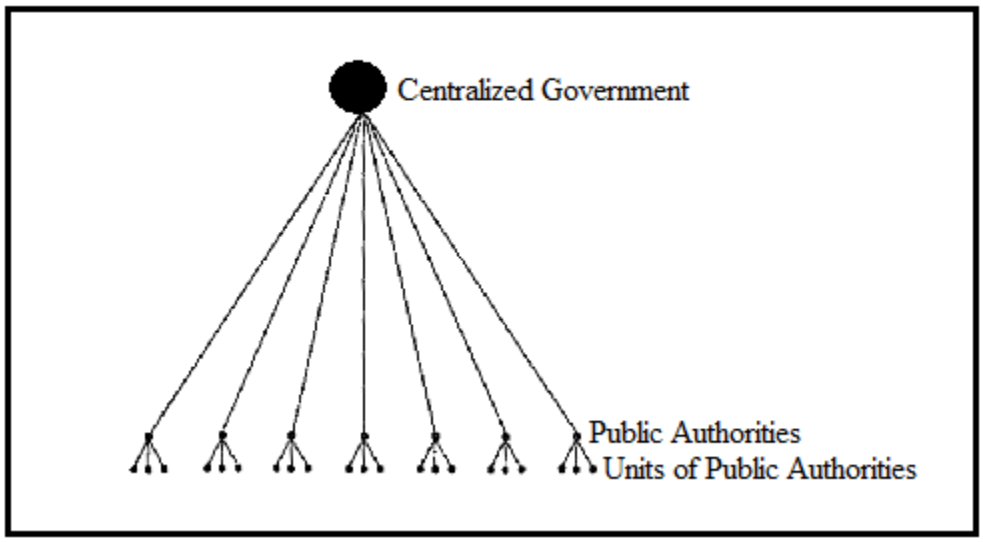
The Distribution of Power between the Centre and Public Authorities

We give three diagrams below that describe the distribution of power in three different types of systems.

The **First Diagram** shows 'centralised power', where the central government has greater control of public authorities. However, the public authorities also have a certain degree of independence and allowance for the use of discretion. The limits of the power of the authorities are defined and therefore a public authority can safely work within their boundary of power without feeling in any way that they will be in conflict with the central authority by doing so.

The differentiation with the second model is on the extent of power that has been allowed to the public authority – which, when compared to the second model, is much more limited. It may be said that the model of power distribution between the central government and public authorities under the Soulbury Constitution (1948) and the autochthonous Constitution of 1972 was based on this first model.

Model One — Centralised Power

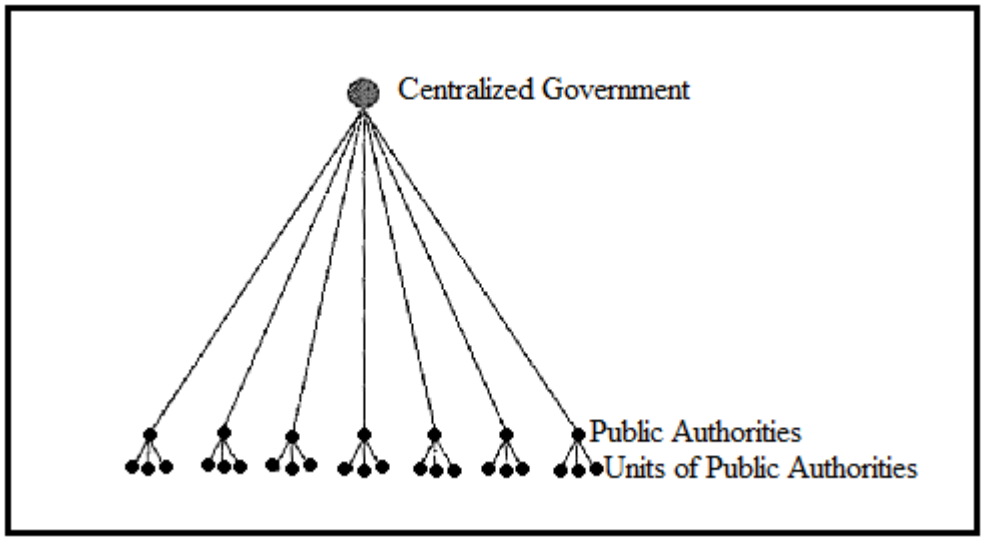


In this model, responsibilities and decision-making power is LESS distributed. That is, LESS power is entrusted to the public authorities while the centre controls more power.

The **Second Diagram** shows a situation where power is decentralised. Here, definite powers are assigned to public authorities by way of law and recognised practices. Some powers are kept at the centre. The relationship between the centre and the public authorities is defined by very clear legal demarcations. The public authority can feel safe in making decisions in several areas and thereby the initiative of the public authority to address the purposes for which it was created. This is the model usually followed in developed democracies. However, none of the Sri Lankan Constitutions developed their constitutional ideas on the basis of this model. Perhaps what the 17th Amendment was attempting to do was to introduce this idea of a more independent public authority in several areas that are vital to the state.

However, it is difficult for this type of distribution of power to coexist with the type of absolute power vested in the centre as in the third model. As a result, the central authority functioning under the 1978 Constitution has obstructed the development of public authorities in the way that was proposed under the 17th Amendment to the Constitution.

Model Two — Power Decentralised



In this model, responsibilities and decision-making powers are distributed. Public authorities are entrusted with more powers while the centre controls less power.

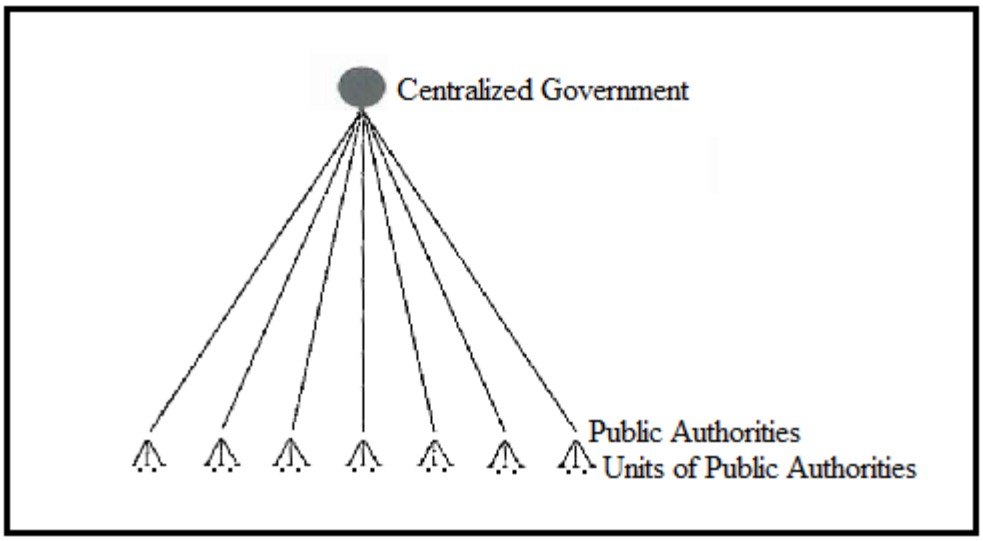
The **Third Diagram** shows a central authority that more or less completely controls power. In this model, public authorities do not have any decision-making powers or avenues to use their discretion in order to achieve the objectives for which the particular public authority is created. In almost any matter the public authority looks up for the orders from above before they act.

If orders from above have not arrived, the holders of authority in the public institutions do not feel confident to act. They always feel unsafe because they are afraid that the central authority may find fault in what they do.

Thus, the public authority develops a sense of dependence on the central authority to make decisions, even on day-to-day routine issues that they are supposed to deal with. The consequence of this on the public authority is that it begins to avoid the responsibilities and the objectives for which it is established.

In the first two diagrams we have used the term 'Central Government'. In the third diagram we have used the term 'Central Authority'. This is because in **Models One and Two**, a government as an executive means a system through which an executive operates.

Model Three — Direct Control or Authoritarian



In this model, responsibilities and decision-making powers are NOT distributed and no REAL power is entrusted to the public authorities. The centre is supposed to control it ALL.

Jean-Bedel Bokassa,
Central African Republic
dictator who is
compared with Idi Amin

J. R. Jayewardene, ex-President of Si Lanka who created a Bokassan-style Constitution

For example, in a government headed by a Prime Minister, the government will be the Cabinet of Ministers and the system through which they operate. There can also be a government within a presidential system where the President also acts through parameters laid down by law and works together with other agencies that are considered part of the government.

Nonetheless, be it the prime ministerial system or the presidential system, the functions of the government are controlled by an intricate web of checks and balances, not by a single individual. Here, the system processes all actions. However in the power model shown in **Diagram Three**, the centre can in fact be just one person. This one person can decide on policy as well as ensure that his will is carried out. Hence, it is not the government that rules, but a single individual acting as the authority. This is the model on which the 1978 Constitution is made.

Within this model, every aspect of rational government is killed by the one authority at the helm that controls all real power. Thus, in the absence of adequate checks and balances, this authority usually tends to act irrationally. The reasonable framework that is needed to maintain relationships within the system and to act and interact through a wide web of power distribution – in a limited manner as demonstrated under Model One (Diagram 1) or a much wider distribution of power as per Model Two (Diagram 2) cannot exist under the application of power within the framework described in Model Three.

The direct consequence of the use of power under Model Three (Diagram 3) is the creation of anarchy. This is the reason why Dr. Colvin R. de Silva described the 1978 Constitution as being modelled after the Constitution of Jean-Bedel Bokassa, the Central African leader who declared himself as emperor. The implication is that to get back to any rational form of government, the 1978 Constitution should be abandoned; the power model depicted in Diagram 3 should be eliminated.

Can such abandonment of the 1978 Constitution be done by the proper implementation of the 17th Amendment? Perhaps such implementation can pave the way for restoring or creating a new relationship between public authorities and the centre. This, of course, requires that the centre is genuinely willing to part with the absolute power given to it under the 1978 Constitution and allow the authorities created under the 17th Amendment to act in an independent and authoritative manner.

However, can a constitution work purely on the basis of the goodwill of any single individual? A fundamental principle within a democratic model is not to trust anyone who is in power but to create the conditions that will prevent these persons from abusing power. Thus the axiom, *power corrupts; absolute power corrupts absolutely*.

Thus, what is needed is to remove the absolute power concentrated at the top. To this end, there needs to be a government at the top – whether it is a prime ministerial or presidential model. It is only when the intricacies of this model are worked out, and powers are distributed into various organs of government, with the power of the chief executive being legally articulated in clear terms, can a rational form of government be established. Such a form of government can relate to the public authorities described in the 17th Amendment and give life to these authorities.

In terms of the policing system in Sri Lanka, the collapse of the policing institution is not merely due to the defects of that system alone. Its defects are the direct consequence of the prevailing Power Model (as in Diagram Three) through which it is compelled to operate. Whatever defects existed in the pre-1978 policing system could have been corrected by various measures adopted by the policing system itself with the support of the government. However, the problems that now exist within the policing system cannot be cured without a changed in the Constitutional Model (Diagram Three).

The attempt to de-politicise the system and create a rational system of policing by introducing an independent National Police Commission (NPC) has not produced the expected results. The main reason for this failure is that the centre (the Executive President) has sabotaged the proper implementation of the 17th Amendment by *inter alia*, depriving adequate resources for its operation. Within the policing system itself, there has been a serious attempt to sabotage the NPC. This, of course, is to be expected, as with any institution that is undergoing serious change. However, the lack of opportunity for the NPC to exercise its authority – due to the lack of the requisite resources — has created many tensions. The result is that the fundamental problems of the policing system do not get redressed.

CHAPTER 3

Paranoia of Regimes in Power

The paranoia of regimes in power has led to some major national catastrophes. Many examples of this phenomenon have occurred in Asian countries in recent decades. Perhaps the most glaring is that of Cambodia under the Khmer Rouge regime (1975-1979). The Khmer Rouge in power were paranoid that the city population would become a threat to the regime. The group was well aware that foreign elements — meaning the Americans, as well as the Vietnamese — could manipulate such groups against "the people's regime". It also feared that money circulation could be a means by which foreigners manipulated and destroyed the regime. Therefore, two measures the regime resorted to immediately upon gaining power were to evacuate entire city populations to the countryside and also to abolish the use of money as a medium of exchange. Both of these measures contributed enormously to one of the greatest catastrophes the world has witnessed in recent times.

The Sri Lankan catastrophe, which will be discussed in this article, cannot of course be compared with that of Cambodia. However, it also cannot be denied that what has been witnessed in Sri Lanka within the last 30 years or so is a significant catastrophe. Hence what is proposed to be discussed here is one aspect of this catastrophe, *viz.* the plight of the judiciary of Sri Lanka.

In recent decades, all major political parties when in power have had a tremendous fear of the judiciary as a possible enemy, or at least as a possible destabiliser of their regimes. Led by such fear, these regimes resorted to various actions, which in turn affected not only judicial bodies but also other public, political and other institutions. The consequences are the level of insecurity and instability that are now experienced in Sri Lanka.

The coalition of 1970 – 1975

In 1970, a coalition of three parties, namely the Sri Lanka Freedom Party (SLFP), the Lanka Samasamaja Party (LSSP) and the Sri Lanka Communist Party (CP), won the general elections with a large collective majority in Parliament and formed a government. The coalition parties that came to power considered themselves as being on the 'left' of the political spectrum, while their major opponents, the United National Party (UNP), was considered as the 'right'. This 'left' considered itself progressive, as against the 'right', which was considered conservative. These 'left' parties portrayed themselves as representing the common people, as against the 'right', which represented the interests of the more affluent middle class and the rich. The 'left' was fearful of the conspiratorial capacity of the 'right' and the possibility of threats to their regime that might be more sophisticated and subtle. Combating this was considered to be one of the vital aims of their strategies.

This 'left' considered the judiciary, particularly the higher judiciary, as part of the conservative lobby that could oppose what they thought to be their 'progressive' programs and ideas. Thus, a major component of their political strategy was to reduce the conservative influence of the judiciary. The mode of implementing this strategy came with the introduction of a new constitution in 1972, the promulgation of what was called an autochthonous constitution, as against the first constitution (which was known as a "Westminster Constitution", though leading British Constitution expert O. Hood Phillips thought it would be more appropriate to call it "a White Hall Model", as the ideas of this Constitution were evidently conceived in the old colonial office[7]).

One of the major features of this autochthonous constitution was to displace the separation of powers with what was referred to as the "fusion of powers".

Thus, judicial power over the people was to be exercised by Parliament through the courts. The 1972 Constitution removed the power of judicial review from the Supreme Court and limited its power to look into the constitutionality of laws before such laws were passed in Parliament. This was a significant departure from the previous Constitution, under which the Supreme Court had developed considerable powers regarding the interpretation of laws. The apex court had also developed a body of case law generally referred to as "judicial power cases".

The attacks on the independence of the judiciary, as it was conceived prior to the 1972 Constitution, marked the beginning of a rapid decline of judicial authority in dealing with constitutional matters. However, it was not only the power of judicial review that was lost to the Supreme Court, but also the prestige and authority attached to an institution that could involve itself in making vital decisions relating to important political and social issues within the framework of constitutional law. Where in more vital jurisdictions this power was enhanced by such bodies such as the Constitution Court of Germany and the Conseil Constitutionnel of France, Sri Lanka witnessed a leap backwards.

The post-1977 regime

The 'right' came to power in mid-1977 with an over 80 percent majority in Parliament. The fears of the 'right' were of a very different kind to that of the 'left'. This particular regime was headed by a person who wanted to rise above all institutions and establish an executive presidency in which all power was concentrated. He thus envisaged going far beyond the limitations of the separation of powers doctrine placed by the earlier regime. He promulgated a Constitution that is known as the 1978 Constitution. This constitution kept the phraseology of traditional liberal democracy, while in content the powers of the President were in contradiction with checks and balances usually prevalent within a democratic framework. The phraseology was such that early commentators of

[7] Forward to M.J.A Cooray's book Judicial Role Under the Constitutions of Ceylon/Sri Lanka - an historical and comparative study (1982).

the 1978 Constitution even believed that the concept of separation of powers — which was displaced by the 1972 Constitution — was in fact replaced by the 1978 Constitution. However, later experience was to prove that such commentators were too naïve in understanding the political scheme behind the 1978 Constitution.

The paranoia of this regime, and particularly its leader, was such that almost everyone in the country were 'enemies.' The foremost among such enemies were the political parties opposed to it, *viz.* the leading opposition party, SLFP. This enemy had thus to be subdued and suppressed if the dream of staying in power beyond legal limits was to become a reality. Then there were the bases of the opposition parties, which too, could interfere with the ambitions of the new regime. These were the trade unions and other organisations of the masses. There was also the growing militancy of disgruntled minorities, particularly the Tamils. Other elements, which pledged their allegiance to more liberal attitudes, were also enemies. And to suppress them all required more direct force than the mere use of constitutional means — as with the case of the earlier regime.

The new regime's approach to the judiciary was determined by this factor of how to deal with its 'enemies'. This was because the judiciary with greater powers and basic liberal attitudes — though some members of it may have been more conservative than others — was seen as a hindrance to the direct use of violence that this regime was to perpetrate on the population. Thus, the new regime too, like the one before, treated the judiciary as an 'indirect enemy'. The methods adopted to suppress the judiciary were more confrontational than those of the 1972 regime.
Firstly, all Supreme Court judges had to be re-nominated to continue under the 1978 Constitution. In doing this, a number of judges were left out, thereby breaking a cardinal principle, that of the continuity of the tenure of a judge of the Supreme Court until retirement.

The message was clear: the new regime would not tolerate the traditional conceptions of the independence of the judiciary. Later on, the confrontation grew into an open battle between the Chief Justice and the regime. The struggle continued in many other ways, in open confrontation and in subtle pressures, with a view to achieve a more subdued judiciary with as little power to influence constitutional matters as possible.

The period that followed was one of the most violent periods in the history of Sri Lanka. There was colossal violence in the North and East regions and in the South. Emergency and anti-terrorism laws were introduced and were used to conduct tens of thousands of illegal arrests, to use torture, and to conduct summary executions. In the operation of such laws it was also possible to reduce the powers of the judiciary to adjudicate on such matters. Besides direct restrictions, even where adjudication was possible i.e. in Habeas Corpus applications, there was heavy interference; one aspect of this was by even getting the Attorney General's Department at the time to coach police and military witnesses to provide false evidence relating to the allegations made in these Habeas Corpus applications.

By interfering in the criminal investigation mechanisms, the inquiries into large-scale disappearances, torture, maintenance of illegal detention centres and even crimes that would amount to crimes against humanity, were prevented. Thus, not only were the judicial powers limited, but the mechanisms, which make the functioning of the judiciary possible, were also subverted.

Although several regimes have come into power, solemnly pledging to undo what has been done since 1978, in actual fact these regimes also considered the judiciary as 'an enemy'. Expansion of judicial power, particularly its powers to influence the constitutional discourse within the country, is considered by all these regimes as having negative effect on their power.

Other factors

Besides the negative impact of regimes in power, mentioned above, there is yet another factor that mitigates against the enhancement of the powers of the judiciary and the strengthening of the independence of the judiciary.

Culturally, persons belonging to socially stronger social classes (as against the ordinary folk), have resisted the enhancement of laws within the country. Their idea of privilege includes the possibility of remaining outside the law in as many areas of life as possible. For example, imposed taxation laws, laws against corruption and the like have been strongly resisted by them. The law is perceived more to apply to the ordinary folk and the poor.

Expansion of the constitutional powers of courts under the modern state involves the 'equalisation of citizens' before the law. The measures for the implementation of laws in all areas of life are part of the conception of a modern democracy. There is serious resentment to this approach in Sri Lanka and this remains one of the serious obstacles to the enhancement of the judicial role in the country. The demand for equality before law and the re-establishment of the rule of law comes mostly from those groups comprising ordinary people or the 'common man'. Due to enhanced opportunity in the pursuit of education, in recent decades, the sophistication and the capacity for articulation among these groups have greatly increased. Participation of these groups in the political debate has also increased. Perhaps future demands for improvement in the rule of law will also come from these folk. If only there is greater understanding on constitutional matters among these groups, then the demands for enhancing the role of the judiciary will also be heard from them.

Therefore, it seems certain that the future of the democratic state of Sri Lanka rests largely on the shoulders of the common man rather than on those who are usually considered the more important sections of society.

CHAPTER 4

Executive Presidential System - A Constitutional Development Based on Distrust

The development of the Sri Lankan constitutions from 1972 was mainly based on the distrust that began to manifest itself after the system of governance introduced through the 1947 Constitution had been in existence for several decades.

It was a coalition government that brought about the 1972 Constitution. It considered itself a progressive government as against what it described as a conservative government of the past. The United National Party was considered the party of the more conservative sections of society and also the only one that represented the richer elements. The three parties that constituted the coalition government considered themselves as belonging to the left and as having a programme of development which was different to the programmes that existed in the past.

This coalition government looked at the government bureaucracy in the civil service as well as the judiciary with suspicion. In the view of the progressive government, the civil service was a more conservative apparatus and the new progressives feared the judiciary of the time as being more conservative and as having the potential of going against the moves of the coalition's development goals. The goals of this new government consisted of trying to achieve some rapid economic development on the one hand, and on the other, trying to bring about some measure of social change. The government feared that the civil service and the judiciary might obstruct these moves.

Distrust transformed into a constitutional formula

In the development of the 1972 Constitution we find that these fears and distrust are transformed into a constitutional formula and incorporated into the constitution. The constitution removed the Public Service Commission, which was the apparatus through which the civil service was organised from the colonial times.

Within this civil service there were certain traditions and there were also certain rules of work. There were officers that played prominent roles who were part of that system. The role of the permanent secretaries of the ministries was one of the most important positions within the service. They were usually persons with long years of experience within the civil service and therefore they represented the traditions of the civil service.

The new government wanted to ignore these rules and procedures in dealing with their development programmes. In order to do so, they abolished the Civil Service Commission and took over its functions. Then persons appointed by the government took over as the heads of the various ministries. The aim in doing so was perhaps to be able to carry out the directives of the cabinet as urgently as possible, with the view to achieving some development goals during their time in power

so that they could stand for re-election with the claim that they had achieved some major development objectives.

However, in treating the civil service as an obstruction, consisting to some extent of persons who may deliberately sabotage some major development objectives they looked for ways to overcome this problem. This distrust of the civil service therefore was one of the reasons to become interventionists in the making of appointments and that was the reason for the interference with the system.

Distrust of the judiciary

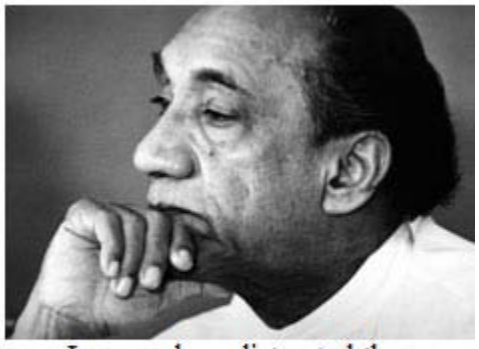
With regard to the judiciary, the 1972 Constitution abolished Judicial Review, which had existed up to then. Through Judicial Review it was possible to examine the legality of any law at any time by looking at whether it was consistent with the constitution. The new government distrusted the judiciary, who they considered as being more conservative and not so sympathetic to the objectives of their government. They thought that their opponents in the opposition might utilise the courts by taking cases to the courts to challenge the legality of various laws which would thereby create uncertainty.

When a bill was passed, they thought it would be uncertain as to whether it would remain law for any length of time if it was possible for the judiciary to declare them null and void on the basis of inconsistencies with the Constitution. Therefore a shorter period of examination of the legality of a law in terms of consistency with the Constitution was introduced.

The constitutional changes that were brought about in the 1972 Constitution, both in terms of the limitation of the judiciary and of the civil service, was of a very fundamental nature when compared to the 1947 Constitution, which was based on the principles of the British system and recognised the independence of the civil service as well as the separation of powers. Within that British system, the independence of the judiciary was considered as an extremely important cornerstone of governance.

More complete distrust inbuilt into the 1978 Constitution

In 1978, the new constitution was made by the United National Party, which had 80% of the seats in the parliament. This government's distrust was of a different nature. The president had been in politics for a long time and distrusted every institution and everyone except for himself. Therefore in his constitution there was an attempt to disempower everyone else so that they would not be able to challenge his authority.



Jayewardene distrusted the parliament, the judiciary, the cabinet and his own party MPs

Justice Neville Samarakoon
The Chief Justice who felt betrayed

Through Article 35 he placed himself in a position where no cases could be brought against him for whatever reason. The 1972 Constitution took the powers of the civil service into the hands of the cabinet ministers. In 1978 the Executive President took upon himself all the powers of the cabinet. The cabinet ministers could be appointed and dismissed at will and the Prime Minister did not have power of any sort.

The Prime Minister also could be appointed and dismissed at will. The parliament could be dissolved at his wish one year after its election. In this manner the capacity of the parliament itself to interfere with his functioning was virtually stopped.

It is a well known and well established fact that the president demanded and obtained letters of resignation from all his party members in parliament. He held these undated letters to be used as necessary. Thus the members who gave these letters (and, in fact, almost all of them did so) were at his mercy.

It was a system based on the complete suspicion of everyone except for the Executive President himself. The premise on which the system has operated since 1978 is that anyone who rules the country must be able to do so by himself. There are even newspaper articles written in favour of this system on the basis that culturally Sri Lankans are incapable of operating as a team.

A parliamentary majority can be lost if the opposition is able to poach some of the members, and thereby the government could lose its majority in parliament purely because of this . Indeed, there have been instances in the past where this has happened. Therefore there is distrust of the parliament. There is also the fear that the cabinet members might change their minds and shift their loyalties, and therefore the ruler could not and should not depend on the cabinet. Instead the ruler should be able to dismiss his cabinet and keep it in dependence to himself if he wants a stable government.

The underlying principle that is associated with the Executive Presidency is that, when in power, nobody can be trusted, and that therefore the ruler should be able to rule alone. This is why even a vice president has not been created within the constitution. There is no constitutional provision for this office in Sri Lanka as is available in, for example, the United States. The vice president might be able to cause the assassination of the president and thereby take power for the remainder of the term. That is the kind of thinking that is behind the idea that the only suitable person to rule should be a single individual with the capacity to dismiss anyone else and yet remain in power.

This same argument was later developed, mainly in terms of the issue of the minorities. The argument was developed by some that in a country where there is a majority Sinhalese the parliament will always take the side of the majority and therefore it is not possible to obtain any form of justice for the minorities through the parliament. The alternative suggested, and one tacitly agreed with for a long time, was to rely on the president rather than on parliament. For a long time this led the minorities' parties to keep on supporting the president in the hope that they might be able to obtain some concessions from him that they might not be able to get from parliament.

Another factor that strengthened the idea of one man being the ruler was the ethnic conflict that developed into 'a war'. An intense internal conflict remained for a long time and turned into an all out military conflict. Within that context also the more militant nationalists rallied around the president in order to demand a military solution to the problem, as they found that within parliament it was not possible to achieve that objective.

This same argument is now made in relation to development. It is argued that a man ruling alone is able to work better towards development than a more collective leadership.

In essence, the argument in favour of the executive presidency is that Sri Lankans are untrustworthy and they can only be led by a single man in power. A system of power that is built on the basis of this vision cannot create the collective leadership needed to deal with the problems of a nation. So long as this 'one man theory' is accepted, the type of abuse of power, the violence and irrationality that have been there throughout the period of the existence of this system, will remain as unavoidable consequences of such a system.

CHAPTER 5

How has the judiciary been diminished in value since 1978 and why?

This chapter has been prepared in question and answer form to discuss how the status and the value of the courts have diminished since the implementation of the authoritarian 1978 Constitution.

The present degeneration of the court system makes the courts an obstacle to the rule of law and the enhancement of justice. However, this problem is little discussed within the framework of the Constitution, although lamentations on the judiciary's collapse is a common topic talked about daily by citizens and lawyers alike. This chapter also tries to highlight that the separation of powers doctrine exists in the country in words only. An understanding of this issue is vital to the understanding of all other contemporary issues on the rule of law and democracy in Sri Lanka.

Q. Is there any basis to say that the 1978 Constitution has diminished the value of the courts?

A. We are now looking at this problem after twenty-eight years of living under this Constitution. The experience clearly shows that the quality of the judiciary has severely been diminished. To inquire into the link between the constitution and the actual situation, we must first go into the principles of constitutionalism. The 1978 Constitution was a departure from constitutionalism. In fact, although the 1978 Constitution is called a 'constitution' it was a declaration which said that several basic facets of constitutionalism have been removed from the constitution of Sri Lanka. Some of these removed facets are the supremacy of the law over everyone and the supremacy of the constitution above all laws; the accountability of the executive to the parliament and the judiciary; the linkage of the government to the governing institutions through the responsibility of a chain of command; the upholding of the law and order by the executive accepting the responsibility for the maintenance of law and order; and finally, the safeguarding of basic human rights for all, within a framework with especial emphasis on safeguarding minorities.

Q. What is the position of the 1978 Constitution on the supremacy of the law and the supremacy of the Constitution above all laws?

A. The most important article in the 1978 Constitution is Article 35. This makes the Executive President immune from any legal action or omission, official or personal. It is the subsection 35 (3) that is more to the point. It prevents cases against the President even when he violates the Constitution other than in three exceptional situations mentioned in this subsection. Thus, the President is not obliged to follow the Constitution and is free to act in contravention against the Constitution.

When this matter recently came before the Court of Appeal [CA Application/2006] on matters regarding violations of the Constitution by the President in the appointment of persons to the Public Service Commission and the National Police Commission, the court held that Article 35 (3) provides blanket immunity to the President[8]. With power that applies also to the appointment of even superior court judges, the Executive President can function without restriction by any laws or any form of checks and balances. Also, since the President is allowed to contravene the Constitution, the supremacy of the Constitution itself is then diminished. The President is above the Constitution which means that he or she is above the law. When the overreaching legal situation has reached this level, there is hardly any meaning of constitutionalism.

Q. Why is Article 35 considered to be of such primary importance?

A. According to the 1978 Constitution, the executive head of the state is the President. The Prime Minister's role is very limited. In the Sri Lankan Constitution there are no mechanisms recognised for the questioning of the actions of the President in Parliament. The only form of censure against the President is an impeachment in the Parliament, which is a serious political matter that requires the approval of a two-thirds majority. However, other presidential systems in democracies provide various forms of questioning of the President on a routine basis. Such systems are not available within the Sri Lankan setup. There is also no possibility for routine questioning of the Prime Minister. However, even if there were such avenues, it would not be of much use as the ultimate responsibility for the actions of the government lies with the President. Flowing from this is also the diminished positions of the cabinet ministers. These ministers hold their positions at the pleasure of the President. Their work in the ministries allocates limited opportunities for questioning them in parliament or in court. In the Sri Lankan Constitution the real decision maker is the Executive President and he is above the law in that no law suit can be brought against him. This is why Article 35 is the real central article of the 1978 Constitution.

Q. How does the 1978 Constitution impact the courts?

A. The 1978 Constitution maintains the jargon of recognising the independence of the judiciary. However, this constitution changed the structure of power so much that the words of separation means very little. This was demonstrated within just a few years of the constitution being passed when a serious conflict developed between the Chief Justice (CJ), Neville Samarakoon, who was in fact brought in as Chief Justice from the unofficial bar by the Executive President himself. Chief Justice Samarakoon, who was known to be a lawyer with a very wide practice, probably took the words of the constitution at face value and did not understand the change in the structure of power

[8] For details please see SRI LANKA: Implications of Court of Appeal judgement on the 17th Amendment to the Constitution AS-139-2006 on the Asian Human Rights Commission webpage.

contained in the constitution. However, after President Jayawardena consolidated his power he wanted Neville Samarakoon to kneel down and accept the changed version of the relationship between the judiciary and the Executive President. This devastated Chief Justice Samarakoon and he devoted the last years of his office trying to fight back. Obviously there was no unanimous defence of the Chief Justice from the Supreme Court. When the most crucial decision on the constitutionality of the 1982 Referendum Bill came before the Supreme Court, it was divided five to four, and the CJ is known to have been among the minority of four who held against the Bill's constitutionality.

The scale has begun to change within the Supreme Court itself, tilting in favour of the Executive President. Chief Justice Neville Samarakoon, who retired some time later, died within a few years of his retirement. Those who were close to him report on their conversations with the Chief Justice and how much he was deeply disturbed and wounded by the transformation that was taking place. There are records of the long series of harassments by both the first and second presidents to bring the Supreme Court to understand the change of the power relationship in favour of the Executive President.

This situation continued under other Chief Justices and Supreme Court judges, but the remnants of the older tradition of independence were still there, despite quite visible forms of adjustment to the new reality. It was in the period of the fourth Executive President, who was elected as a protest against the first and second presidents, that the relationship of the judiciary to the Executive President took an even more fundamental turn against the judiciary itself. With S.M. De Silva being brought to the Supreme Court by the fourth president, open collaboration between the Executive President and the Chief Justice developed.

This went so far as to the Chief Justice imprisoning a minister who was a former colleague of the fourth Executive President, one who politically shifted his alliance by moving to the opposition party. When this minister made a comment in a public meeting about the courts, it a case was filed before the Supreme Court and he was convicted of contempt of court and sentenced to two years of rigorous imprisonment. This, as well as many other forms of open allegiance to the fourth Executive President, are quite visible, and left a deep impression on the legal profession. While there were divisions on this issue in the Supreme Court itself, there were no open conflicts, and the Chief Justice S.M. De Silva was able to keep the majority of judges on his side.

The two remarkable exceptions who were in fact sidelined by the Chief Justice were Mark Fernando, the senior-most Supreme Court Justice at the time, and C. Wignesharan. Both retired, and the latter expressed his disagreements in the strongest possible terms. Later, when the fourth president was about to end her term, the Chief Justice changed his allegiance to the next Executive President and paved the way for his ascendancy into power by openly betraying the fourth Executive President. Thereafter, the Chief Justice's political involvement with the incumbent Executive President was

made blatantly visible. Again, the majority of the judges in the Supreme Court went along with the Chief Justice.

However, two senior judges resigned from the Judicial Services Commission, which has the powers of appointment, transfers, promotions and disciplinary control of judges below the Supreme Court and the Court of Appeals. In their resignations from the three member body, of which the third member was the CJ, they stated that they were resigning over a matter of conscience[10]. . This indicated that they had reached a point where they could no longer work in the commission together with the CJ. A very strong and visible partnership had developed between the incumbent Executive President and the Chief Justice.

Q. How far do the lawyers bring issues arising from constitutionalism to court?

A. Now these challenges are very rare. There are many reasons. One is that the 1978 Constitution, following the 1972 Constitution, limited the power of judicial review only to review bills prior to passing them in parliament. On other matters, interpretations of Article 35 has restricted access to court.

Besides such legal issues there has been a breakdown of morale in the legal profession and also in circles of persons who used to take constitutional matters to court for adjudication. There is a general impression of the futility of such actions. Many senior lawyers do not accept to appear on behalf of clients for public law issues to be adjudicated before courts.

Many arbitrary practices have also developed in dealing with cases. Bench fixing at the Supreme Court itself, where sensitive matters are brought before selected benches, are often presided by the CJ himself. The habit of not stating reasons for the refusal to grant leave to proceed has become common. The encouragement of reaching settlements has taken over from the pursuit of cases to decide on matters of principle. Rough and impolite language and rudeness towards lawyers have prevented many lawyers from wanting to undertake public law issues. A general sense that an outcome of a case cannot be reasonably predicted on the basis of legal principles has become the common perception of the leading circles of lawyers. Gaining favours from the CJ is seen as a more probable way of proceeding in cases. That the CJ has prior knowledge about some important cases that are filed and that he even instigates cases being brought before him so that he could make important political determinations have also become a commonly talked of subject among many lawyers.

End Note:

[10] AS-018-2006, AS-028-2006 at the AHRC webpage.

The following quote is taken from SRI LANKA: Justice on a razor's edge - An interview with retired Supreme Court Judge C.V.Wigneswaran (Sunday Leader - 31 October 2004)

[i] **Q: You said in your last statement on the bench that there was a constrained atmosphere within the judicial system. How is it constrained and who is responsible for it?**

A: My answers to your other questions must have enlightened your readers as to how such constrained atmosphere came to engulf the judiciary and who could be the cause for it.

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.

Errant politicians and policemen who should not have received any patronage from the judiciary were perceived as important persons and original court judges have been compelled to comply with orders illegally issued to protect or pamper such errant offenders. Judges who publicly recorded such issuance of orders by intermediaries on behalf of their principals were dealt with severely.

Perceived wrong judicial orders by judges must be challenged in the appropriate appellate court. Any attempt by persons howsoever highly placed to countermand such orders through extra judicial means must be considered to be a constraint on the original judiciary.

CHAPTER 6

The Politics of *Habeas Corpus* and the Marginal Role of the Sri Lankan Courts Under the 1978 Constitution

"Habeas Corpus in Sri Lanka - Theory and Practice of the Great Writ in Extraordinary Times" (2011) is a study of 880 judgments of various courts of Sri Lanka on habeas corpus applications from pre-independence times up to the present period by Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne. The effort examines an impressive number of judgments on *habeas corpus* during this period.[11]

Their basic conclusion is that, by and large, the Sri Lankan legal system has demonstrated significant failings in giving effect to *habeas corpus* as a judicial remedy. The decisions of the courts are markedly different from the way that *habeas corpus* was dealt with in the pre-independence period, as evidenced, for example, by the famous Bracegirdle case,[12] which demonstrated the will of the Supreme Court at the time to defend the freedom of the individual against the arbitrary actions of the state. It also demonstrated the Court's power to stand up against the state to protect the freedom of the individual.

This study concludes that in recent decades the approach of the courts has changed substantially. In almost all cases studied, with a few exceptions, courts have dismissed cases rather casually, and shown little sympathy for the applicants.[13] *Habeas corpus* as a judicial remedy for the protection of the freedom of the individual has failed in Sri Lanka, and, as the title of Pinto-Jayawardene and Gunaratne's study suggests, this important writ may disappear altogether from the country. This failure is not due only to factors such as scandalous and shocking delays, but also due to much more important changes of attitudes on the part of lawyers and judges (effectively, the legal community) towards the remedy itself.

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[11] The cases for the Study were not selected from various sources but taken from a book that was bound and maintained at Sri Lanka's Court of Appeal, constituting therefore the official record for all intents and purposes.

[12] *In re* Mark Antony Lyster Bracegirdle (1937) 39 NLR 193.

[13] According to conversations had by this writer with the two authors during 2010; 'The analysis combines an academic and in-depth analysis, arriving at particular conclusions which show that, in the generality of cases, the courts' response has been marked by a lack of judicial sympathy for the petitioner.' The court dismisses applications of petitioners across the board for various reasons—and all the reasons are looked at in the Study—ranging from failing to name a respondent correctly in the petition, failure to put a surname of the respondent in the petition etc.

The failure of the remedy of habeas corpus in Sri Lanka as evidenced by this study needs to be examined against the background of the political changes that have come about in the country since the 1978 Constitution in particular. Most persons on whose behalf these cases have been filed in this period fall within the category of 'disappeared' persons. The most important judgments come from the Court of Appeal from 1994 to 2002. Out of a total of 844 cases for this period there were 368 applications for 1994; 127 applications for 1995; 142 applications for 1996; 137 applications in 1997; 31 applications in 1998; 6 applications in 1999; 11 applications in 2000; 7 applications in 2001, and 15 applications in 2002.[14]

The study of *habeas corpus* in Sri Lanka cannot be delinked from a political understanding of the forced disappearances that took place from the late 1980s to May 2009, and the approach of the State in dealing with certain issues of perceived security, in which the use of forced disappearances was an approved practice for curbing insurgency.

On the one hand, mass disappearances were a result of a political approach to national security, during which the use of forced disappearances was an approved practice. On the other hand, the courts, which are also a branch of the state, were called upon to examine this phenomenon from a legal and judicial perspective. The study finds that in the application of legal principles, the courts have tended to favour the state over the liberty of the citizen when determining many of these cases. This apparent legal problem, if seen within the political atmosphere in which the disappearances were carried out, seems less of a surprise, as the courts would have had to go against this approved policy of causing disappearances if they were to protect the rights of the individual as against the interests of the state.

In a classical sense, the remedy of habeas corpus is meant to protect the individual against the abuse of authority by the state. If there is a failure in this regard, it is a failure of the very concept of the protection of the individual. However, the assumption that the courts could have protected the rights of the individual in a situation where there was an approved policy of the state relating to causing forced disappearances is to expect the courts to be at loggerheads with the state on a very important issue of policy at a time when it was impossible for them to be in this position.

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[14] From 1987 to 1991, the South of Sri Lanka underwent extreme political violence. According to the reports from a number of presidential commissions of inquiry, the total number of involuntary disappearances during this period was around 30,000 persons. From 1978 up to May 2009, there was military action in the North and East, where there was a continuous insurgency. Arrests, detentions and other forms of repression were commonplace throughout that time. From 1994 to 2002 the orders in habeas corpus cases were primarily concerning Sinhalese caught up in the southern insurrection, but there were a fair number also from the ongoing conflict in the North and East as well. From that point onwards, probably from about 1998 onwards, the majority of the cases were from the North and East.

Here we see a fundamental contradiction. On the one hand, if Sri Lanka is a liberal democracy and if its constitution is based on the principle of the rule of law, then it is the obligation of the courts to uphold the rights of the individual even against an approved policy of the state to the contrary. Within a liberal democracy, if the law and the policy contradict one another it is the duty of the courts to uphold the law as against policy. But this is possible only if we assume that the 1978 Constitution gives precedence to democratic norms and that Sri Lankan democracy is based on the rule of law. However, is this assumption itself correct? This is the issue that we should first examine regarding the 1978 Constitution.

1. Article 35 and its Impact on the Constitutional Structure

For almost 32 years, there has not been a discussion of the impact of Article 35 of the Constitution of Sri Lanka on constitutional law and constitutionalism as a whole. Much of the discussion has been confined to the issue of the immunity from prosecution granted to the president without consideration of the actual impact of this immunity.

Article 35 reads as follows:

> *(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.*

The Executive President is Head of the State, the Head of the Executive, Head of the Government, and is Commander-in-Chief of the armed forces. Under the earlier Constitutions, though the President was head of state, the Prime Minister was head of the cabinet. The Prime Minster was answerable to court. Under the 1978 Constitution, the head of the executive, who is also the head of the government, is not answerable to court. All decisions relating to national security are those of the head of the executive. All policy decisions relating to national security are also those of the head of the executive. Under Article 35, the Executive President as head of the executive is not answerable to the courts.

The Executive President of Sri Lanka is not subjected to any controls by cabinet or any other constitutional body. In fact, the Executive President controls the ministers and all public authorities. The entire aim of the 1978 Constitution was to place the President in charge of everything. He has the right to appoint the ministers and to control the ministries themselves. In view of this, the public institutions that are run by the ministries are under his direct control. When Article 35 made the president unanswerable to the courts of Sri Lanka, it placed all decisions on the governance of the country attributable to him outside the control of the judiciary.

Within a rule of law-based system, a nation functions through its public institutions and the manner in which they are subjected to control constitutes the discipline that controls the lives of the people. The laws that govern these institutions, the laws that are developed and the commands that are given by those who are responsible to these authorities are important aspects of the system by which people of the country are governed. Undoubtedly, the internal running of the country and the institutions must have an independent life of its own based on a legal process that is not subjected to the control of those in political power. The running of this internal structure of public institutions needs the supervision of the public to ensure that basic notions of protection of peoples' liberties and freedoms are superior, while governance is carried out from day to day.

The protection of the freedoms of individuals and the functioning of public institutions are therefore deeply linked. The public institutions, if they are managed for the achievement of various goals of the government, such as development, national security and the like, should at all times protect the freedoms of individuals. Therefore, there are two factors to consider in the management of public institutions. On the one hand. there are the objectives of the government, which tries to achieve various targets at a particular time. This may be a particular development target in relation to various public institutions. such as the speedy recovery of taxes, or projects such as roads or markets or housing projects. It may be national security objectives such as ensuring that political sabotage or insurgent activities are not interfering with or obstructing the smooth functioning of the institutions to achieve their normal objectives.

On the other hand, constitutional institutions must simultaneously (that is, along with development and security targets) protect the liberties and the freedoms of individuals, who have certain entitlements and expectations. At all times the public institutions should respect these entitlements, even in a conflict over the performance of a public institution working towards any development or security objective.

If there is a conflict between the freedoms of the individual by way of denial of entitlements, then it is the function of the courts to intervene and to deal with this problem in order to safeguard the freedom of the individual. The executive pursues various objectives, such as national security. It is the judiciary that protects the freedoms of individuals, so that the objectives of the state will not crush the entitlements of the people.

Yet, by placing the Executive President of Sri Lanka (who is the controller of public life under the 1978 Constitution) outside the jurisdiction of the courts, what was in fact achieved was the removal of the judicial function to protect individual liberties. The idea was that the president, as the driver of national objectives through various development and security projects, like anti- terrorism activities, is not under the control of the judiciary. Therefore, the protection of the individual, as opposed to the pursuit of objectives of the government, was removed through Article 35. What can be construed from this Article is that if an attack on the freedom and liberties of an individual can

be attributed to the decisions of the Executive President, such actions are outside the jurisdiction of the courts. In such instances, the courts are functionless.

The 1978 Constitution itself removed the constitutional basis for the protection of the freedom of the individual from the jurisdiction of the courts. It is the character of this fundamental attack on the idea of constitutionalism under liberal democratic government, in which the protection of the individual is a primary objective of the constitution, which has been lost sight of amid public debates relating to the 1978 Constitution.

Article 35 was a profound deviation from the notion of constitutionalism as understood within the liberal democratic discourse. In the liberal democratic discourse, protection of the liberties of the individual is a primary objective. Whatever other objectives the executive may aim to achieve in a particular context and at a particular time, it cannot infringe on the liberties of the individual in the manner made possible under this section of the 1978 Constitution.

Consequently, the role of the Sri Lankan courts on constitutional matters, including those relating to the protection of individuals, became marginal. The courts no longer had the position they enjoyed under the 1948 and 1972 Constitutions. The role of the Executive President was enlarged and the role of the courts reduced. Many Sri Lankans still imagine a situation in which the courts enjoy similar powers, authority and prestige as in the past. However the actual situation has changed substantially. In an earlier publication entitled *The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka*,[15] I have explained this situation. The protective power of the judiciary over the freedoms and the rights of the individual has diminished, while the power of executive to encroach on their rights has increased enormously through the constitutional invention of the Executive President.

Article 126 of the 1978 Constitution was a new creation:

> *" (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."*

This jurisdiction does not extend to executive and administrative actions attributable to the Executive President as the head of the executive, since Article 35 covers such actions.

The addition of judicial remedies such as the fundamental rights jurisdiction under Article 126 was no substitute for the removal of liberties by Article 35. The fundamental rights jurisdiction does not

[15] By Basil Fernando and Morten Koch Andersen, published in 2009 jointly by the Asian Human Rights Commission, Hong Kong and the Rehabilitation and Research Centre for Torture Victims, Denmark.

extend to the Executive President. Its jurisdiction is limited to certain rights that are called fundamental and therefore it is binding on certain acts of the administration that may affect those rights. However, this jurisdiction does not extend to the acts of the Executive President, who is the total controller of the entire apparatus of the government, without any kind of limitations to his power and without checks and balances.

2. What if the Bracegirdle Case[16] were to be Heard Under the 1978 Constitution?

M.A.L. Bracegirdle was a young Australian planter in Sri Lanka who became an activist in a leftist party, the Lanka Samasamaja Party, because he supported workers' struggles. The colonial government issued an order of deportation against him in 1937, which required that he leave the country in 48 hours. He resisted and went into hiding.

A writ of *habeas corpus* was filed before the Supreme Court and the Court quashed the governor's order. It established *habeas corpus* as prestigious remedy for the protection of the individual against the state.

If the Bracegirdle case were to be heard before a court under the 1978 Constitution, the state would raise an objection under Article 35. As the Executive President now occupies the place that the governor once took, it would be argued that the courts have no power to hear the case. The courts would uphold the objection as it has upheld similar objections when they have been raised.

The Bracegirdle judgment was based on the principles of the Magna Carta. As stated by Abraham CJ,

> *"There can be no doubt that in British territory there is the fundamental principle of law enshrined in Magna Carta that no person can be deprived of his liberty except by judicial process. The following passage from The Government of the British Empire by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII of Part I, he discusses 'The Rule of Law and the Rights of the Subject' p. 234. He says: -*
>
> *'Throughout the Empire the system of Government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principles that no man can be made to suffer in person or property save through the action of the ordinary courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action. The value of the principles was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the overseas territories. Persons both British and alien were deprived legally but more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens*

[16] *Supra* note 2.

were severely-restricted and supervised; the courts of the Empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the war, and which in foreign countries they often exercise even in time of peace.'"[17]

What is disturbed by Article 35 is the basic principle underpinning *habeas corpus*; a basic principle that is contained in the Magna Carta itself. It is the rule of law that,

"[N]o man can be made to suffer in person or property save through the action of the ordinary courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action."

By the operation of Article 35, the Executive President became empowered to arbitrarily remove rights of subjects and deprived them also of recourse to court. Under a rule of law system, deprivation of personal and property rights can be done only through courts, which are obliged to adhere to due process. Under the 1978 Constitution, however, this very principle has been rejected. The things that the Executive President can do includes the deprivation of life and liberty of subjects without any legal process, and the judiciary can be deprived of the right to intervene on such matters by excluding its jurisdiction via Article 35. The 1978 Constitution thus violates the basic principles underpinning *habeas corpus* in the Magna Carta.

The design of the executive presidential system is such that government objectives, such as those for the achievement of various development projects or national security, could infringe on the liberties of the individual by the removal of the possibilities of judicial intervention into these areas. The very notion of the centrality of the liberties of the individual as a primary aspect of the national life and a primary aspect of constitutionalism was removed from the Constitution of Sri Lanka in 1978.

3. Structural Contradictions in the Constitution

The judicial failure to protect the remedy of *habeas corpus* in Sri Lanka is the result of the structural contradictions in the 1978 Constitution, which removed the idea of the freedom of the individual as a fundamental aspect of the constitution, while claiming to do the opposite.

The protection of rights has been confined to a minor area with enormous limitations and the judiciary can operate only within that limited area for the protection of rights. Therefore, within the 1978 Constitution, the judiciary has only a marginal role in the protection of individual liberties. The

[17] From the judgment of the Supreme Court, reproduced in The)3racegirdle Affair: An episode in the history of the Lanka Samasamaja Party, edited by Wesley S. Muthiah and Sydney Wanasinghe, Young Socialist Publication, 1998.

Executive President is at liberty to pursue whatever objectives and policies he thinks fit without the burden of having to be concerned with the freedoms of the individual, which would otherwise be protected by the judiciary. The judiciary is granted the power to interfere in only a marginal way.

It is these structural contradictions in the 1978 Constitution that have not been brought into constitutional discourse in any meaningful way and since the Constitution was passed this discourse has in fact been greatly diminished. This is despite the fact that in recent times the structural contradictions, whereby fundamental rights are ostensibly protected but judicial intervention is denied in many important matters affecting personal and property rights, have been glaringly obvious.

Take for example the whole issue of displaced persons in the North and East, who were placed outside the jurisdiction of courts after the end of the military intervention in May 2009. The government's refusal to investigate alleged forced disappearances, extra-judicial killings, torture and alleged crimes against humanity and war crimes; the forced evacuations of persons from properties without any legal process in many parts of the country; the manifest failure to investigate crimes, accompanied by a program to kill rather than prosecute alleged offenders; the failure to implement constitutional provisions, as demonstrated by way of the non-operation of the 13th and 17th Amendments to the Constitution.

The Habeas Corpus study in Sri Lanka looks at hundreds of *habeas corpus* applications which fall into this same category. Enforced disappearances were approved and pursued as policy for perceived security reasons at various points of time in this country's history. Forced disappearances constitute the worst form of deprivation of the liberties of individuals, without any intervention of courts and without any reference to legal process. International law considers the causing of such disappearances as a most heinous crime, a crime against humanity. However, such acts were/are not against the "legal order" established under the 1978 Constitution, which excludes the jurisdiction of courts on such matters by way of the operation of Article 35.

The following observation of one of the authors of this Study is relevant in this regard:

> *"(a) If Article 35 is read in conjunction with Article 44 (2) and (3)- there could arise a situation where, if he/she chooses to do so, the President will be in charge of all subjects and functions thus the jurisdiction vested under Article 126 (re. fundamental rights) in the Supreme Court being set at zero.*
>
> *(b) Despite the judicial boast by the Supreme Court in cases such as W K C. Perera v. Prof Edirisinghe (1995 0) SM,) and Heather Mundy v. CEA & Others (S. C./ 58/03, & C. Minutes of 2O January 2004)— that, by enhancing fundamental rights in the Constitution the Scope of Writs under Article 140 vesting jurisdiction in the Court of Appeal has been expanded (See also: Atapattu v. Peoples Bank (*

*(1997(1) SLR) (SC) and Moosajee v. Arthur & Others * (2004(1) ALR 1) (SC), this judicial expansion would also be rendered nugatory by reason of the immunity clause.*

(c) Additionally, the "Public Trust" doctrine which has been a driving force in these decisions (see also: Dr. Kunandandan v. University of Jaffra (2005(1) ALR 16 (CA)) would also lose its judicially expressed constitutional sigi4flcance. (NB; Although, the Waters Edge Case (SC) handed down by S.N. de Silva, Cl against President Kumaranatunge put her conduct (on Head of State/Cabinet / Govt.) on issue after she had relinquished office, in the meantime, the former president herself escaped unscathed personally.[18]

4. The Executive President's role as the Policy-maker

Under the 1978 Constitution, the Executive President, as the head of the state as well as the head of the political ruling party, is also the chief policy-maker. All matters of public security are policies that are developed by the president himself. Perceived insurgencies and all other matters of national security are under the purview of the Executive President. The whole period from 1978 has been marked by the extensive use of emergency and national security regulations, together with legal and constitutional amendments, to suit the policies that the head of state insists are necessary for the nation. This vast body of regulations, by way of emergency or national security laws, has imposed heavy limitations on the power of the judiciary to deal with matters concerning freedoms of the individual. A large body of rules depriving the judiciary of the power to interfere in matters of arrest and detention, and even to enable the creation of various extraordinary places of detention and also put entire areas of the country outside the jurisdiction of the courts, was built up through government policy decisions.

A vast number of forced disappearances have taken place during the time since the 1978 Constitution was passed into law, occurring within the spaces created by the national security laws that follow from the Executive President's role as policymaker. These laws removed the courts' supervisory role.

Thus, the abductions of persons by various secret agencies with no regard for the law and normal regulations; the interrogation of these persons in detention centres, with no records though these would be required by the law; the conduct of these interrogations without any kind of supervision, which gave room for torture as well as cruel and inhuman treatment; and, finally the killing and disposal of the person, all happened within a policy framework that the Executive President approved, and was enabled by security laws and regulations, which were also designed and approved by the Executive President. The courts of Sri Lanka had no jurisdiction to challenge any of these policies, whatever may be the consequences for individual liberties. Thus even completely immoral decisions that could shock the conscience of any civilised nation were made by the Executive

[18] As contained in a personal note to this writer from Dr. Jayantha de Almeida Guneratne, December 2010.

President of Sri Lanka without the possibility of these being reviewed or scrutinised by the courts. This situation continues today. This is the basis for the incapacity of the courts to deal with various illegalities that result from arrest and detention and other actions that are supposed to be addressed by *habeas corpus* applications.

A further observation is also pertinent;

"The situation has been further aggravated by giving a clean slate to the Defence Secretary-

> *(a) To justify continuing emergency;*
> *(b) Approved by a Parliamentary majority which the Govt. enjoys;*
> *(c) Where, disappearances are alleged, mere affidavit by the said Secretary (viz: his ipse dixit is accepted by the courts (CA as well as the SC) that the arrest, detention (is lawful) and where a disappearance or involuntary removal (is denied) without or further ado. Thus in the context of the writ of habeas corpus, the same is rendered meaningless, whereas, if Article 3 read with Article 140 and Article 141 read with article 126(3) (as interpreted officially) in the context of article 140) is to be extended, the courts must assert their power of judicial review (in the light of Article 3 read with article 4(c) & (d) in conjunction with the aforesaid articles in pursuing an objective approach in requiring (rather than a subjective attitude); the Defense Secretary must be enjoined to place material in relation to an arrest/detention an alleged disappearance/involuntary removal"*[19]

5. The Limitations on Law-making Processes and the Role of the Executive President

Prior to the 1978 Constitution, the 1972 Constitution had already removed the powers of judicial review from the ordinary courts of Sri Lanka. It established a new Constitutional Court to deal with matters relating to the Constitution. The 1978 Constitution removed the Constitutional Court and removed the limits of judicial review created by the 1972 Constitution. Under the 1978 Constitution, a bill to be passed by the parliament had to be submitted to the Supreme Court, which in turn had to look into the constitutionality of the bill within a short period.

Other than this, it gave no scope for the Supreme Court to look into the legality or otherwise of a bill. Under Article 122 (1) (c) of the 1978 Constitution put further limits on the power of the Supreme Court to look into a constitutional bill, where the president submits a letter to the court asking for the review to be done within one to three days, if the president considers the bill important enough to be introduced through an emergency process.

When J. R. Jayawardene needed to remove the civil rights of his chief rival, Sirimao Bandaranaike, and there were certain limits to what he could do due to the law relating to this in Sri Lanka, he

[19] Ibid,

referred to this section in order to introduce a bill in parliament for the amendment of the Constitution, known as the 3rd Amendment, on an emergency basis. The same procedure was later followed in 2010 when the 18th Amendment was introduced to the parliament. Thus the passing of laws to amend the Constitution itself was brought under the ambit of emergency procedure, giving the Supreme Court no more than three days to conduct judicial review. Thus, the law-making process was changed to deny possibilities of consultation on legal change with the people, as well as to limit the powers of the courts to review the possible implications of new laws.

The fundamental notion of the rule of law is that laws are made with the consent of the people. The consent of the people is given by way of public discussions within which the public express their considered views on whatever law is proposed. This consent in law-making is at the heart of the notion of the sovereignty of the people. The people cannot be sovereign when they cannot give consent to the laws by which they will be bound in the future. Thus, more than any other aspect of law-making in a democracy, it is the consent of the people that makes or destroys democracy. The 1978 Constitution took away this process of law-making and, with it, Sri Lankan democracy and the rule of law.

6. Some Comparative Discussions

As against Sri Lanka, contemporary Cambodia and Burma are countries where the courts have no effective judicial power at all. These countries arrived at this situation through different historical factors, which are instructive for the purposes of comparison with countries where the courts have a marginal role.

Cambodian society went through one of the worst tragedies that humanity faced in modern times from 1975 to 1979, when the Khmer Rouge was in power. The entirety of the urban Cambodian population was ordered to vacate the cities and move to the countryside. In the years and months that followed, the Khmer Rouge pursued a ruthless collectivisation programme according to radical communist ideas. The use of money was abolished, as were private kitchens. Children were separated from their parents and brought up by others. This experiment killed at least two million Cambodians out of a population of seven million.

Those who were pursued most ruthlessly were the educated classes and those who had any connection with the military. Although the arrival of the Vietnamese by the end of 1979 brought this catastrophe to an end, by that time the entire population was impoverished, and in the coming ten years or so a large number of people lived in refugee camps along the Thai-Cambodian border.

Many who belonged to the more educated sections and had survived also fled to other countries. Doctors, lawyers, judges and all types of professionals who had survived were lost to the country.

This process also destroyed what system of justice had existed in the country. The previous system was a short-lived one introduced by the French. The Vietnamese, who took control of Cambodia, assisted in the reorganisation of Cambodian society through their experts, who planned all aspects of Cambodian life at that time. They organized courts according to a socialist model, which was introduced to Vietnam from the communist bloc.[20] Under their system, the interests of the government and those of the public were presumed to be in alignment. In these circumstances, the concept of the judiciary as a defender of rights against the intrusiveness of other parts of the state apparatus was an absurdity. As the architect of Soviet justice , Andrei Vyshinsky, put it,

> *"Under socialism the interests of the state and those of the vast majority of citizens are not, as they are in exploiter countries, mutually contradictory... Safeguarding the interests of the socialist state, the court thereby safeguards also the interests of citizens for whom the might of the state is the primary condition essential for their individual well-being. Safeguarding the interests of separate citizens, the court thereby safeguards also the interests of the socialist state, wherein the development of the material and cultural level of the life of the citizens is the state's most important task."*[21]

The system that was established was aimed at ensuring some form of stability for the state, and within this system the idea of the protection of the individual from the state was a totally alien concept. The interests of the individual were protected, it was presumed, when those of the state were protected. Thus, the system of courts that was introduced by the Vietnamese from around 1980 to 1993 was a system that was meant to carry out administrative functions on behalf of the state, and the very concept of the protection of the individual against the state was missing.

In May 1993 an election was held under the UN Transitional Authority for Cambodia, which created a new government. A new Constitution was adopted based on liberal democratic principles. However, the basic infrastructure of the administration remained the same and remains so even up to now. Some training was given to judges and some new laws were introduced. However, almost all of the human rights organisations in Cambodia have observed and mentioned in their reports that the ground reality did not change at all. Basically the Cambodian court system as it exists today cannot protect individual freedoms against the state. In fact, they are instruments through which the political regime enforces its will against its opponents, as seen through the prosecution of the opposition political leaders through various cases filed in these courts.[22] Thus the system as it stands

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[20] For an overview of the transplantation of Soviet law into Vietnam, see Borrowing Court Systems: The experience of Socialist Vietnam, by Penelope Nicholson, Leiden; Boston: Martinus Nijhoff Publishers, c2007.

[21] Andrei Y. Vyshinsky, The Law of the Soviet State, translated by Hugh W. Babb, Westport, Cn.: Greenwood Press, 1948, pages 497—98.

[22] The views of successive UN Special Representatives on human rights in Cambodia that support this statement are available on the website of the Office of the High Commissioner for Human Rights: http://www.ohchr.org/EN/countriesfAsiaRegion/PagesfJCJlJndex aspx

in Cambodia today is unable to realise the protection of the individual against the executive in any manner.

The story of the Burmese system of courts and justice as it exists today began with the coup d'état that brought General Ne Win into power in 1962. Prior to this, the superior courts that emerged at the time of independence in 1948 struggled hard to establish liberal democratic principles, including through the writ jurisdiction of the Supreme Court, established under the 1947 Constitution, and the appellate criminal jurisdiction of the High Court, under section 491 of the Criminal Procedure Code. The situation is described in a recent article by a researcher of the Burmese criminal justice system:

> *"In the two years immediately after independence… the courts interpreted their role liberally. Justice E Maung in the definitive 1948 G. N Banerji ruling described the authority of the Supreme Court in issuing habeas corpus writs to be 'whole and unimpaired in extent but shorn of antiquated technicalities in procedure' (pp. 203—04). In 1950 as chief justice he stressed in the Tinsa Maw Naing case that 'The personal liberty of ci citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present' (p. 37). He and other senior judges ruled to release many detainees on various grounds, including that orders for arrest had been improperly prepared or implemented, that indefinitely detaining someone was illegal, and that police or prison officers were without grounds to justify arrest, be it of an alleged insurgent sympathizer or notorious criminal "*[23]

After the coup, the new regime did not remove the established laws but restructured the judicial system according to ostensibly socialist principles based on the same notions as were used in Cambodia, but according to a conservative rather than a radical agenda, so that the earlier protections for individual rights were no longer operative in the courts. Ne Win's chief jurist, Dr. Maung Maung, provided ideological justifications for the defeat of judicial independence and the supremacy of the executive powers.

The superior judiciary's writ jurisdiction fell into disuse, and was completely removed from the 1974 Constitution that established a one-party authoritarian state under military control.[24] While the courts maintained a façade of socialist legality on the one hand and continue to apply many of the same laws as before the coup, the structural rearrangement of the political and legal systems by the regime eliminated the possibility of protecting individual rights against intrusion by the state.

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[23] Citation from, "The incongruous return of habeas corpus to Myanmar", by Nick Cheesman, in Ruling Myanmar: from Cyclone Nargis to national elections, Singapore: ISEAS, 2010.

[24] For a discussion see "Ne Win, Maung Maung and how to drive a legal system crazy in two short decades", Article 2, vol. 7, no. 3, September 2008, available online at http://www.article2.org/mainfile.phP/O703/

Although the military regime that took over from its predecessor in 1988 demolished the one-party system and made changes to the courts that were purported to bring them back into line with what existed at the time of Ne Win's takeover, in fact the system that exists today is functionally a continuation of what existed in Ne Win's time, since its purpose is to incarcerate political opponents or perceived opponents of military rule and maintain social order through the threat of sanctions against persons who do not enjoy the privileges and protections of executive authority. Internally, there is no capacity for the courts to protect the individual against the state, since the courts are no more than bureaucratic agents of the state and judges are also legally mere public servants under the same authorities as departmental officers. Nor will this situation change with the creation of another façade in the form of a semi-elected parliament in the near future.

7. Non-Existence of Judicial Power *vis a vis* the Marginalization of Judicial Power

In systems like those operative in Cambodia and Burma today, the memory of a functioning justice system in the liberal democratic tradition does not exist. Law is not equated with the protection of individual rights but with transgression of any kind from any order given by anyone representing authority, irrespective of the contents of that order or its degree of rationality. They are aware that any such transgression can lead to punishment, with or without judicial sanction. State authorities have full power to decide on punishment as they wish, and although superficially there are rules, procedures and structures for deciding punishment, how all these things operate in essence is completely arbitrary.

There is no serious attempt to prevent arbitrariness. In fact the systems in these countries are dependent on it, as people are forced to adjust their habitual behaviour to respond to official whims on short notice. Why somebody in authority does something one way today and a different way tomorrow is not questioned. It is just the usual form of behaviour. Thus there is not even a conceptual basis for making a distinction between what is arbitrary and what is not. The whole notion of constancy through legality has departed from the way that the state operates.

In contrast to systems where judicial power is non-existent, the system in Sri Lanka today is one where judicial power is marginal, in that people still have memories of times when courts had greater influence than in the present. This memory often creates expectations that the system can still operate in certain ways that are in fact beyond it. People with such memories may get confused when courts act arbitrarily. The idea of law still exists, yet the law is not operative to the extent or in the manner that it was in the past. Students may be educated to believe that laws are present and working. External references to law and legal habits based on various practices that had validity in former times may be repeated. This also often confuses participants in the system, who may be unable to comprehend whether law still really exists or not.

In countries where courts have no judicial power, the executive authorities have no fear of the courts at all. They consider courts as part of the same unitary system to which they belong. They are aware that they are highly unlikely to have to face contest in courts from the citizens asserting their rights, and certainly will not be approached by anyone as equals. The contrast with courts that have marginal power is that persons representing state authorities do fear the prospect of contests from citizens in courts, since they cannot be completely sure of the outcome of such contests.

Likewise, where courts only have administrative functions, the authorities are more secure and do not need a great use of force to control persons, except in very exceptional situations, since they can rely upon the judiciary to carry out their bidding against individuals who threaten the established order. On the other hand, where courts have even marginal power, authorities are less secure, since they cannot be certain of compliance.

This causes those authorities to resort to more extra-legal actions than they might in the other situation, since they feel the need to take care of things themselves rather than rely upon judges to cover up crimes on their behalf. In such cases, forced disappearances in particular are more likely to occur, as the state officers are obliged to commit crimes rather than resort to judicial measures to remove threats to their authority, and then must also take a certain number of steps to cover up such crimes.

On the other hand, where courts have no effective power, the use of the judiciary for bargaining and negotiating is likely to be greater than in places where their authority is marginal. Bribery becomes the customary way of dealing with accusations in courts, other than in high-profile cases that have political qualities. Citizens, either directly or through intermediaries such as lawyers, engage in such bargains routinely and without thought to any alternative, There are no genuine legal impediments to such bargains. On the contrary, such bargains are essential for success. In contrast, in countries where courts still have marginal power, bargaining takes place less and with less certainty of outcome. However, people do realize that the space for bargaining is wide and there will be more experimentation in that direction as the power of the courts wane. Consequently, political influence extends to the courts through indirect methods, rather than through direct control of the courts as in the first category of cases.

8. Implications of the Study on *Habeas Corpus* in Sri Lanka

Should the courts take on the role of an external controller of police? This is a related issue to the discussion on *habeas corpus*. The judicial view at the time of the Bracegirdle case was that when the question of the liberty of the individual was at stake, the courts were under an obligation to intervene. Thus, on the powers of courts to control the police and military as an external controller of the police, those powers had no limit when the issue of the liberty of the individual is raised before the courts. Even the existence of a situation of war did not take away that power of the

court. Once Sri Lanka became a republic, rather than a colony, there was no reason to reduce that power of the court to intervene to protect the liberty of the individual.

In fact the very essence of being a Republic is the sovereignty of the people. The liberty of the individual should have taken a greater significance in this context. In fact, the very idea of independence implies greater protection of freedom of the individual. However, the 1978 Constitution, while retaining the formula of sovereignty of the people, reduced the protection of liberty of the individual. This is the basic contradiction existing in the Constitution. Under the Constitution, executive power of the state is exercised by the Executive President: the Executive President is not under the control of courts, meaning that even when he/she violates the liberties of the individuals, the courts have no power to intervene to protect the individuals.

On matters of security, the president is in control, *de jure* as well as *de facto*. Actions done for security reasons by the police and military are executive actions for which the president bears responsibility. If the courts are to question such actions, even for the protection of the individual, the courts are thereby questioning the actions done under the authority of the president. However, the Constitution does not allow the courts jurisdictions over the president and president is thus protected in an absolute sense.

The simple conclusion that one arrives at is that the Sri Lankan president has the power to take away the liberties of individuals without any limit, and even the King of England had no such power under the Empire. The powers that courts had and in fact exercised in the colony, as shown by the Bracegirdle case and many other cases from many of the colonies of the British empire, is not now available to courts under the 1978 Constitution of the Republic of Sri Lanka.

The courts' reluctance to intervene in cases cited in the relevant Study under consideration has made it possible for the courts to not enter into a conflict with the Executive President. However, this raises questions about the possibilities of relying on courts to protect the liberty of the individual, so long as this constitution exists. That again raises even more fundamental questions about the very reasons for the existence of the Sri Lankan courts. If the *raison d'être* of the courts is not the protection of the individual, what is the nature of the courts and their functions under the 1978 Constitution? I have previously raised this issue in the publication entitled *The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka.* [25]

Thus, the claim that the 1978 Constitution has continuity with the constitutional tradition of Sri Lanka Prior to the 1978 Constitution is a basic fallacy. Equally, the second notion that the Sri Lankan Constitution is based on the sovereignty of the people, is itself a fallacy since there can be no peoples' sovereignty where the protection of rights is not possible. It is the liberty of the

[25] *Supra* footnote 15

individual that is at the core of peoples' sovereignty, in contrast to sovereignty of the monarch in a monarchy. It is the recognition of the individual through the protection of individual liberties from all threats, including the threats from the monarch itself, that constitutes democracy.

The test is the unlimited capacity of courts to protect the liberties of the individual. No such protection exists in Sri Lanka. The dismal fate that has befallen the legal remedy of *habeas corpus* is only an illustration of that reality.

CHAPTER 7

Abysmal Lawlessness and the Zero Status of Citizens

Introduction: The distinction between genuine and counterfeit actions for justice

Leo Tolstoy once wrote that the art of his time in Europe was counterfeit. In counterfeit art, the artist believes himself to be creating a work of art but is in fact only creating impressions of art. These impressions are derived from an understanding of some external qualities of art, which the artist tries to recreate. The work produced in this manner appears to have the external characteristics of genuine art. By imitation, artwork was mass-produced to suit the appetites of people willing to pay for it.

The analogy is relevant for the protection and the promotion of human rights. Do activities really address the problems towards which they are directed? Do they really go into the deeper qualities or are they merely restricted to the superficialities? This depends upon the extent to which the real problems are addressed through mature use of judgment. It depends on the extent to which the solutions are real ones, not mere imitations of other works.

In counterfeit human rights work, the actor begins on the basis of some training or some understanding gained from observation or reading on the general nature of some problems, and assumes that there is no need to develop specific knowledge about the specific problems that they may encounter in real life, in the particular circumstances in which they have to work. It is possible for someone to gain some knowledge of what other people have done to resolve some problems without understanding the particular reasons as to why those things were done in those other circumstances. The person might get some impressions about those activities and then try to replicate them. Externally, the replicated activities will have some of the qualities of the original. They may have the appearance of genuine human rights efforts, but will in fact be mere counterfeits.

In a particular country, disappearances, extrajudicial killings, torture, illegal arrest and detention may have taken place on a large scale. Well-intentioned and highly motivated citizens may demand that impartial and competent bodies investigate and prosecute perpetrators. If these demands are made within a country where criminal justice institutions genuinely exist, then there will be results sooner or later. But if these institutions do not exist at all, or are completely dysfunctional, however long demands for justice are made nothing will happen because there are no institutional possibilities. Even with regime change, institutional capacity will not be automatic.

Under such circumstances, the honest citizen who engages in work with the best of intentions can make demands for many years but not attain results. The citizen may think that he or she has done as much as possible, on the basis of impressions gained from others who have dealt with similar problems in other circumstances. Both in terms of attempts and in terms of failure, the citizen's honest activity remains a mere imitation.

Where institutional impediments to justice exist, it is the task of anyone who desires justice to struggle for the creation of or improvements to its institutions. Particular methods and strategies need to be developed with comprehensive knowledge of the local context. Lessons learned or impressions gathered from others can be useful, but are no substitute for knowledge of the actual circumstances.

For some years, the Asian Legal Resource Centre (ALRC) and its sister organization, the Asian Human Rights Commission (AHRC), have, through *article 2* and other publications, attempted to bring this point home very firmly in regard to the human rights situation in Sri Lanka. Just a few of the major reports and other publications that it has produced towards this end include: *Sri Lanka: Disappearances and the collapse of the police system*, AHRC, 1999; "Torture committed by the police in Sri Lanka", *article 2*, vol. 1, no. 4, August 2002; "Endemic torture and the collapse of policing in Sri Lanka", *article 2*, vol. 3, no. 1, February 2004; *An exceptional collapse of the rule of law*, AHRC, 2004; "UN Human Rights Committee Decisions on Communications from Sri Lanka", article 2, vol. 4, no. 4, August 2005; *An x-ray of the Sri Lankan policing system & torture of the poor*, Basil Fernando & Shyamali Puvimanasinghe (eds), AHRC, 2005; *The other Lanka*, by Meryam Dabhoiwala & Rob Hanlon (eds), AHRC, 2006; *Sri Lanka's dysfunctional criminal justice system*, by Jasmine Joseph (ed.), AHRC, 2007; *Conversations in a failing state*, by Patrick Lawrence, AHRC, 2008; *Recovering the authority of public institutions*, by Basil Fernando (ed.), AHRC, 2009; and, *A baseline study of torture in Sri Lanka*, by Basil Fernando & Sanjeewa R. Weerawickrame, AHRC, 2009. Most of these are available online at the *article 2* website (www.article2.org) or the AHRC bookstore (http://www.ahrchk.net/pub/mainfile.php/books/).

From these publications and the work that it has conducted with partners in the country over the last 15 years, the centre has concluded that what exists in Sri Lanka today is a situation of abysmal

lawlessness, resulting in the zero status of citizens. The word "abysmal" is here used in its ordinary meaning to mean limitless, bottomless, immeasurably bad and wretched to the point of despair.

Lawlessness of this sort differs from simple illegality or disregard for law, which to differing degrees can happen anywhere. Lawlessness is abysmal when law ceases to be a reference. What would normally be crime ceases to be thought of as crime and lawlessness becomes routine. This kind of abysmal lawlessness manifests itself in "arrests," "detentions," and "trials" that require no legal justification.

Under these circumstances, the idea of legal remedy or redress also ceases to have any meaning. All legal systems are built around the idea of legal redress. Laws and procedures are meant to make redress possible, to one degree or another. Abysmal lawlessness implies a complete loss of the linkage between redress and whatever may be called law.

The situation of abysmal lawlessness will not be changed through the victory over the Liberation Tigers of Tamil Eelam (LTTE) that the military finally achieved in 2010. The suppressing of violence does not in itself guarantee that human rights will be better protected. In fact, the military victory can easily be utilized to further strengthen authoritarianism and to suppress democracy and the rule of law even more.

With this perspective, this essay is organized according to the following themes:

1. The lost meaning of legality: how the notion of legality itself has been defeated, accompanying the collapse of institutions for justice and leading to the zero status of citizens to which the title alludes; the loss is associated with the suspending of criminal procedure law through antiterrorism and emergency laws.

2. The predominance of the security apparatus: with the decades of conflict and final victory over armed groups in the country, the security apparatus is now both the paramount and most comprehensive agency for political and social control in Sri Lanka; it is unbound from conventional rules that once at least delimited its sphere of activity and extent of its authority thanks to the use of emergency and antiterrorism laws; it can act with unlimited secrecy and without challenge, on the pretext of national security.

3. The disappearance of truth through propaganda: with the first two elements of the state in Sri Lanka, the government propaganda machinery is no longer bound by any rules of truth or falsehood; even the distinction between the two is completely lost.

4. The superman controller: a constitutional and political arrangement that allows a single person to manipulate the three elements above as he or she wishes; the superman controller was created through the political and legal vacuum of the 1978 Constitution, in which the rule of law could not

survive, but has over time accumulated even greater powers through the combination and manipulation of the three elements.

5. Destroyed public institutions: the institutions for the administration of justice have been completely destroyed through the combination of the above four elements; this is the feature of life in Sri Lanka today on which a great deal of the earlier work of the ALRC has turned, so as to document and demonstrate this fact and in order to arrive at an understanding of the present situation in terms of the four elements; there is nothing sacrosanct or predetermined about any institutional practices now, and the citizen who goes before public institutions knows not what to expect.

6. The zero status of citizens: Sri Lanka's citizenry, while believing that nothing has significantly changed, is doomed by the four elements and the consequences of its destroyed institutions; due to conflict on the island, at present the hundreds of thousands of persons detained in camps outside the framework of law and without legal status are suffering the greatest consequences of this zero status, but in fact it is a feature of the situation in the country that is common to all citizens to one degree or another. The material used for this chapter has been variously drawn and adapted from the ALRC's and AHRC's statements and other appeals, the author's articles on online websites, including the *Sri Lanka Guardian and Ground Views*, and some outside sources, which are cited in the text.

The lost meaning of legality

At one time it was common for lawyers and judges, and even some politicians, to boast about Sri Lanka's long tradition of law, judiciary and legal profession. Books have been written on the history of its modern legal system; however, they are hardly read today. In their place, in the corridors of courts, in the chambers of lawyers, and even in general conversation there are just curses about an accursed system in which legality has lost its meaning and citizens are reduced to zeroes.

The law in Sri Lanka today is an exercise in futility. After 31 years of the 1978 Constitution, it is not even possible to recognize what is law and what is not. When the Executive President placed himself above the law, there began a process in which law gradually diminished to the point of no significance. This is unsurprising. The constitution itself destroyed constitutional law, by negating all checks and balances over the executive. When the paramount law declares itself irrelevant, its irrelevance penetrates all other laws. Thereafter, public institutions also lose their power and value. The consequences would be comical were they not life threatening. Take the whole debate on the 17th and 13th Amendments to the Constitution. Debate goes on endlessly about these amendments because of an underlying false assumption that a constitutional amendment to an irrelevant constitution is a matter of some significance. There is unwillingness to accept that the grafting of a living branch to a dead tree brings life neither to the branch nor to the tree.

Today, underground elements have taken over the functions of law enforcement agencies, guided by the institutions of administration of justice. For example, if a debtor does not pay back his loans, the creditor may turn to a reputed criminal to get his money back. The criminal is able not only to get the money back, but also to do so quickly, whereas the legal process is so beset with delays that a creditor may have to wait years and spend more money than what is owed to have the same result. The criminal is far more efficient in this setting than the legal process. Politicians too rely more on criminal elements than they do on legal agencies. Every election is a contest between criminals supporting this or that party. Instead of a democratic process to persuade voters about policies for the improvement of their lives, there is a coercive process to intimidate voters about the risks of not choosing this candidate or that.

When there is a loss of meaning in legality, terms such as "judge", "lawyer", "state counsel" and "police officer" are superficially used as in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organizing principle.

For instance, under normal criminal procedure in a society based on the rule of law there is an obligation to investigate all crimes, and the methods of investigation are standardised. Now there is no such obligation in Sri Lanka. Where investigations are carried out, they are done so manipulatively. If someone desires to destroy another person, completely bogus inquiries can be conducted. The criminal investigation process ceases to be a mode of maintaining law and order, and becomes a mode through which to victimize and terrorize citizens.

The diminishment of the lawyers' role is also indicative of the loss of meaning of law. Today, even constables run roughshod over lawyers who intervene on behalf of their clients at police stations, or in magistrate courts. Bribing policemen is a better method for getting bail than following procedures and insisting on legal rights. Questioning police illegality will only provoke harassment of the client as well as of the lawyer himself or herself. When the law loses meaning, the quality of legal practice naturally diminishes. No one will waste energy on futile exercises. If people can be arrested, detained and punished without trial, without recourse to the protection of the Criminal Procedure Code, then lawyers too can do no more than look for methods that are outside of the normal process. In this way their role too ceases to have legal meaning.

The judiciary is the biggest loser of all. The conceptual basis of judicial independence has been completely displaced in Sri Lanka. In the early years of the 1978 Constitution's operation, judges, lawyers and citizens still had thinking and behavioural patterns from earlier times that acted to buffer the courts against its impact. Now that resistance has been greatly diminished. As the system has adjusted itself to the executive presidency and everything that it entails, it has been emptied of significance.

The lost meaning of legality can be illustrated with reference to the government policy to abduct and kill alleged criminals— not those criminal elements working with politicians, but those identified as criminals to be eliminated for political advantage.

The method of killing is, like the collecting of debts, now cheaper, quicker and less risky than going through the courts. The police, military or anyone acting under them, including other criminal elements, are assured of impunity because of the secretive manner in which killings are conducted and the many protections afforded to the perpetrators. This is revealed in two incidents that occurred during 2009.

An assistant coordination officer working under of the Ministry of Disaster Management and Human Rights was abducted from his house. After receiving frenetic calls on his behalf, the minister made telephone calls all over and managed to locate this person in the custody of some police; it was the minister's intervention alone that saved him. The police accused the person of being a dangerous criminal and the leader of a criminal gang. They also, according to reports, stated that they found a firearm and ammunition in his house. The minister himself had to make a public statement condemning the kidnapping.

In another case, Ravindra, a school-going son of the director of the Colombo Criminal Investigation Division (CID), had a quarrel with another schoolmate named Chamie. When Chamie and a friend Nipuna were having tea, Ravindra came and tried to provoke a fight. When the two left the teashop and were walking towards their boarding house, a police jeep followed them. The jeep turned and blocked their path. About four persons with firearms got out of the jeep. They held Chamie against a wall and put a pistol to his head, and another to that of Nipuna. The latter shouted to let go of Chamie and to take him instead. Then, these policemen took Nipuna in the jeep to Ravindra's house. He was told to get down and forced to crawl. While he was crawling, he was beaten with poles. Ravindra's mother, wife of the director of the CID in Colombo, allegedly stood on his body and asked, "Do you know my weight now?" After that the police took Nipuna to the Paliyagoda CID, where the director himself allegedly joined in, threatening to charge him with possession of bombs, and telling him that the only way to avoid the charge was to sign a statement. In this case the boy's life was saved due to quick intervention from his family, who reported the matter to the Inspector General of Police (IGP) and other authorities.

Not only is it institutionally more convenient to kill, but also the very notion of killing as an illegal act has been lost upon the persons responsible for this policy. When the Sinhala BBC service interviewed the official police spokesman, the correspondent asked how the victims of killings are treated as criminals when in fact they are only suspects in alleged crimes. The spokesman said that according to the police, they are criminals and not suspects.

According to the law, anyone at or before the stage of interrogation is merely a suspect, and cannot be named as an accused. A person is named as an accused only when the charges are filed before courts; however, the official spokesman for the police does not accept this distinction. Since what he says represents the official position of the Sri Lankan police, then the police themselves have taken the power to convict, through killing. Thus, the presumption of innocence is no longer of any significance, nor is judging a person and imposing punishment any longer the sole prerogative of the judiciary.

The lost meaning of legality coinciding with the rise of extrajudicial killings under the pretext of crime prevention is not merely confined to the work and reasoning of the police themselves. It has also taken a sinister shape in the magistrate courts, where in most instances magistrates declare "justifiable homicide" purely based on the police's own incident reports. Thus the police spokesman told the BBC that obviously no such killings of criminals are taking place in the country because the judges have confirmed that these are justifiable homicides.

When magistrates conduct inquests and other inquiries, they are expected to follow the legal procedure in the country. The Criminal Procedure Code obligates investigations into all suspicious deaths, particularly in cases where the police conduct is suspicious. It is the duty of the magistrates to ensure that the proper legal process is carried out in all cases of suspicious deaths, including ensuring that independent investigating units, which are able to resist the pressure from the police of local areas, should carry out these inquiries. The failure of magistrates to perform this duty is a further illustration of the lost meaning of legality in Sri Lanka.

The predominance of the security apparatus

The security apparatus that arose through the conflict with the LTTE will continue to exist despite the declared end of the conflict. Judging by the statements of the government, the strategy is to strengthen and broaden this apparatus to cover the whole country.

In the north and east this will be done on the pretext of preventing the LTTE from reappearing. Elsewhere, it will be done to ensure political control and to paralyze institutions for the advantage of the ruling regime.

The targets of the security apparatus are ordinary citizens. They include people engaged in simple protest, whether about wages, living conditions or other matters of societal importance. Everything is now under surveillance of this apparatus. Trade unions, journalists, civil society organizations and opposition political parties are all of special concern. The security apparatus is particularly keen to control the electoral process. It targets the grassroots political activities of opposition parties so as to deny a fair contest during elections. In fact, it acts to prevent any opposition group from operating freely at any time. It also targets groups within the ruling party itself, who compete for

privileged positions in electoral lists or in local government bodies. The system of preferential votes encourages this. There is an assumption that those who receive a larger number of preferential votes may obtain higher positions as ministers or members of local governments. It in turn gives rise to intense competition among members of the ruling group.

Groups exist within the security apparatus for the purpose of activities that are not authorized by law. They monitor political leaders and any other persons whom the government targets, and abduct, torture, interrogate and kill with impunity.

The Prevention of Terrorism Act (PTA) continues to give very wide powers to the security apparatus. All legal safeguards available through the normal law can be suspended through use of the PTA. Most of its provisions cannot be justified to deal with an emergency; their real purpose is to arbitrarily extend state power. But the security apparatus does not feel limited to the provisions of the PTA. It can do anything whether the PTA allows it or not, because with the loss of the meaning of legality there is nothing to stop it from acting completely outside the law. There is no way for the parliament or the judiciary to monitor or intervene.

Within the last few years there have been no investigations into complaints against the security apparatus. Calls for such investigations are actively opposed. The mentality developed during the conflict, which persists today, is that demands for investigations are treacherous, analogous to acts of sabotage or the aiding and abetting of terrorism. The security apparatus has consistently attacked the media from this ideological position and the propaganda campaign that has followed is the subject of the next section.

Today the term security apparatus refers not to the military and policing structures of the state in Sri Lanka, nor the laws that are supposed to guide their work, but to a whole political system and a way of life. The predominant position of this apparatus reflects the reduction of law to meaninglessness. This is why the AHRC has referred to Sri Lanka as the Gulag Island.

Aleksandr Solzhenitsyn used the word "gulag" to describe a type of experience that is being repeated in many parts of the world. His three-volume study was of Russia from 1918 to 1956. The dreaded Cheka, the security organization, exercised the function of informer, arresting authority, interrogator, judge, executioner and even gravedigger. All these functions were exercised in complete secrecy with whatever procedures the Cheka offices chose to adopt. What the law in the country was and how it was implemented was almost completely left to the Cheka; only the communist party general secretary had greater authority. Within this system decisions of life and liberty were made casually, without transparency or accountability.

The insurgencies in Sri Lanka from 1971 paved the way for the emergence of such an authority in the form of the security apparatus. Tens of thousands of people from all parts of the country have been forcibly disappeared in a similar manner to that described by Solzhenitsyn.

The recent investigations into an open letter that 133 well-known Sri Lankan citizens signed illustrate how the gulag is extending into and overwhelming all parts of the judicial process. The letter was published in newspapers to condemn the death threat against Dr P Saravanamuttu, a civil society activist. The president instructed the defence secretary to verify the facts, asking if there was such a threat or whether there might be some international conspiracy against Sri Lanka. Officers from the CID then visited and questioned many of the signatories. The officers asked how they knew of Dr Saravanamuttu; whether there was any meeting of all the signatories; whether they had in fact seen the threatening letter, and who had sent it.

The CID visits and questions had no legal basis. They werea direct interference into the basic rights of citizens to engage in any solidarity work within the law. The defence secretary has no legal authority to direct inquiries into the legitimate acts of citizens. The CID officers have no duty to obey such orders. They particularly should not be carrying out political work aimed at suppressing those that the government considers its political opponents.

In this instance the letter containing the death threat was brought to the notice of the government and it was widely publicized right from the start. But like in earlier similar cases, no investigations were carried out into the letter itself. Instead, when the prominent citizens published the letter condemning the threat and demanding protection for the target, it was they who were subject to investigation. In this manner the entire legal process has been turned upside down and inside out.

The defence ministry in 2009 also went to the stage of directly threatening lawyers who appeared for clients against it in court. Midyear, the following article appeared on its website:

> Leader Publications (Pvt) Ltd, publishers of the Sunday Leader newspaper was charged with Contempt of Court for publishing an article comparing Secretary of Defence, Mr. Gotabaya Rajapaksa with Velupillai Prabhakaran, who was responsible for the death and destruction of over 100,000 civilians, despite extending an assurance in Court not to publish any defamatory content in reference to the Secretary Defence and the Sri Lanka Forces. The article in question was published minus a by line, which is a rarity in
> professional journalism.
>
> Leader Publications (Pvt) Ltd was given time to show cause and the case was heard yesterday 9 July 2009 at the Mt. Lavinia Courts before the Additional District Judge Mohammed Macky. The original Defence team had voluntarily resigned from handling the case citing it was against their ethical and moral standing to oppose a national hero like the Secretary of Defence, with whose unwavering commitment and focus Sri Lanka is a free country today.
>
> A new team comprising of some who have a history of appearing for and defending LTTE suspects in the past, namely Srinath Perera, Upul Jayasuriya, S. Sumanthiran, Attorney-at-Law Viran Corea, Attorney-at- Law instructed by Athula Ranagala, Attorney-at-Law appeared for Leader Publications.

> It was the observation of some senior independent lawyers who were present in court that day, that this team of lawyers share a common antipatriotic sentiment fired by pro-UNP activism and following. One such Lawyer speaking to the media mentioned his disbelief and shock at the manner in which these Lawyers had banded together in the face of prima facie proof of Contempt of Court. As a respected senior member of the legal fraternity, he opined that the behaviour of these Lawyers was an insult to the whole profession and totally unacceptable at a time when Sri Lanka is enjoying its veritable independence after 30 long years. He went to the extent of branding these Lawyers as traitors of the nation.

Lawyers are officers of the court. Any attack on them in relation to their official functions amounts to contempt. The publication of this article, with photographs of three of the lawyers, is an attack not only on them but also on their official function. The article calls these lawyers traitors simply because in this case they appeared against the defence ministry. It also implies that the status of a "national hero" before the law is unequal to that of other parties, even though the basic principle of the law is the equality of all citizens before it. Such is the condition of law under this security apparatus.

The disappearance of truth through propaganda

Over years of conflict the government has increasingly adopted a position that it alone should have a monopoly on information. Part of the military strategy was to create a single version of truth. The LTTE for its part claimed to be the sole representative of the Tamil people and from that position to be the single source of information regarding the country and its history. The war was of arms and of interpretation. People were called to stand at one or the other of these two polarities.

Society has for the most part accepted the claim of the state to be the sole arbiter of what is true and false. Those who run the media also usually comply with demands to reproduce and disseminate government propaganda. Those who do not comply are threatened. In this way, a cynical attitude has developed regarding the concept of truth. Accusations against the government are described as conspiracies of international agents or opposition figures. No critic is regarded as a person with genuine intentions. At best he or she is considered to have unintentionally fallen into traps set by people whose sole aim is to destroy the nation.

When the distinction between truth and falsehood is cynically disregarded, it leads to a lack of interest in information itself. People cease expecting to know the truth of anything. This cynicism then seeps down to the minute details of life. People do not know what to believe about a death even in their very neighbourhood. Was it natural, or a murder? Was it done for a political purpose or for no purpose at all? Was it suicide or some trick? Who knows? Government spokesmen deny

allegations of gross human rights abuses and accounts of crimes by replying simply that they have not seen any evidence of such incidents. They can take for granted that no one will really come forward to state whatever they know, either because of fear or out of a sense of sheer futility. The extent to which propaganda has overtaken the truth can be found in an episode around a letter from Justice P.N. Bagwati, the chairman of the International Independent Group of Eminent Persons (IIGEP), which was established to observe investigations into recent grave human rights abuses in Sri Lanka. Justice Bhagwati wrote his letter to the president, Mahinda Rajapaksa, in response to the meeting of a number of members of the IIGEP with the president to discuss and clarify some of the issues arising from the public statement of the IIGEP, announcing its resignation from the monitoring mission due to the government's disregard for the group's mandate.

In his letter, Justice Bhagwati wrote

> I would like to point out to Your Excellency that if you would kindly look at the Public Statement at the relevant part you will find that IIGEP has not accused the Government of Sri Lanka of any lack of political will insofar as the functioning of [Commission of Inquiry into serious rights abuses] is concerned. What has been recited in the Public Statement is about "IIGEP's apprehension regarding absence of political will". IIGEP has never alleged that there was absence of political will on the part of the Government of Sri Lanka. It was merely an apprehension which was voiced by IIGEP in view of the facts before them.

IIGEP of course could not voice anything more than a mere apprehension because it was not within their jurisdiction to find whether there was absence of political will on the part of Government of Sri Lanka or not. That was not within their terms of reference which were confined merely to observing whether the proceedings before the Commission of Inquiry were transparent and in accordance with the international principles and norms.

The government propagandists thereafter used this letter to create the false impression that the IIGEP had retracted its April 15 final report (available online at http://www.ruleoflawsrilanka.org/resources/IIGEPnbspSTM.pdf). Nowhere in the letter is there any such retraction, neither of the apprehension of the lack of political will on the part of the government to uncover the truth, nor over conflicts of interest in the role of the Attorney General's Department or the problems of witness protection. The letter itself was not reproduced in the propagandists' materials or in the media in Sri Lanka.

Among the leading propagandists using the letter for this purpose was the secretary general of the government's Secretariat for Coordinating the Peace Process, Dr Rajiva Wijesinha. The role of the so-called peace chief throughout this and other recent episodes has been to spread the official version of truth. In a statement responding to comments on the letter by another member of the IIGEP, Sir Nigel Rodley, Wijesinha accused Rodley of "sanctimonious bluster" and of not understanding the IIGEP's mandate. Wijesinha particularly objects to the use of adjectives. He writes in response to the work of the AHRC that, "Basil Fernando cannot conceive of abuses, they have to be gross, a crisis must be acute, a situation must be abysmal, helplessness is utter. The

adjective 'political' is applied to lunacy, realism, intellect and disasters, plus another half dozen or so words." In reply Fernando wrote,

> The problem about adjectives is that when describing situations of the collapse of the rule of law it is difficult to find words that can adequately describe the actual depth of the tragic situation. Like some natural tragedies, for example the recent experience of the tsunami or manmade tragedies by way of wars and civil wars, language becomes an inadequate tool to describe the experience. One has unfortunately to rely on adjectives, which fall far short of expressing the enormity and human and social consequences of such tragic experiences. However, Rajiva Wijesinha, in his role of Squealer [from George Orwell's *Animal Farm*], objects to these adjectives for a very simple reason: he has to make out that no really big problems exist in Sri Lanka. His role is to deny or trivialize or understate the situation that the country is actually facing.
>
> Orwell's argument in "Politics and the English Language" is that the bad language used is a result of the failure to think clearly. That is really the problem that one has to address in thinking about the continuing catastrophe in Sri Lanka. What I mentioned in my column is that there is a degeneration of the political intellect in the country and a lack of capacity to develop political realism that some of the political leaders in places like Nepal and Cambodia developed as a result of the sufferings caused by a prolonged crisis. Even bad leaders who have themselves contributed to the civil war in these countries realized that, even from the point of view of their own self-interest, some outside help was needed to bring an end to the ongoing civil war. The help obtained from the United Nations did not and could not solve all their problems. But it did help to bring the violence and civil war to an end. It is on those issues that clear thinking is needed in the country. And of course if one has opted to play the role of Squealer, then one has to abandon even the wish to think clearly.

The point here is not that the situation in Sri Lanka is equivalent to that previously or presently in either Cambodia or Nepal. No country in conflict is the same as another. But the consequences of prolonged conflict in one place can be studied usefully for the purposes of understanding those in another. The effects of prolonged conflicts on notions of legality in particular deserve special study.

In this respect, Cambodia and Nepal are examples of how an outside intervention helped to create a beginning for some kind of recovery, however fraught, while in Sri Lanka the downward spiral has continued despite attempts at such intervention over some years. Wijesinha is himself aware of the downward spiral. For many years he has been writing books and articles on the erosion of democracy in Sri Lanka. Among his best are the detailed analyses of J.R. Jayawardene's contribution to the collapse of democracy via the executive presidency and other measures when he because the first Executive President.

Unfortunately, Jayawardene's scheme is continuing with greater vehemence now, and, sadly, even some critics of that scheme such as Mahinda Rajapakse and Rajiva Wijesinha have also become its agents, as Executive President and peace secretariat chief respectively. Wijesinha also knows that questions of the sort raised by the IIGEP are not new to anyone who has followed the decline of

the legal system in Sri Lanka. For a person who wrote a book entitled *Declining Sri Lanka*, the outcome of the IIGEP's work could not have caused any surprise. Therefore, his expressions of outrage in response to this type of international intervention can only be understood as part of his role as master propagandist-cum-peace chief.

Wijesinha also writes about the emotional language of what he calls the foot soldiers of the human rights army. The choice of this expression is no accident. He is a spokesman for the real army, therefore he sees his opponents in the same form. Like Don Quixote, Wijesinha as propagandist needs to invent armies that he can fight and conquer.

As propagandist he has also acquired the capacity to speak unemotionally about, for example, the massacre of 17 aid workers belonging to Action Contre La Faim. His comments on the issue were to the effect that this French aid agency was itself responsible for the deaths, which caused embarrassment even to his employer, who through the foreign affairs minister clearly stated that his comments did not represent the view of the government. An appeal to be unemotional while talking about mass disappearances, extrajudicial killings, torture and lawlessness implies that one has to accept these things rationally as the unavoidable consequences of conflict, and as inevitable features of the security apparatus on whose behalf he is working.

This is quite a different Wijesinha from the one who once wrote emotionally about the killing of his schoolmate, Richard de Zoysa. In that article he exposed everyone involved in the killing, including the role of the then Attorney General, Sunil Silva, regarding the subsequent inquiries. Perhaps his school chum deserved different treatment from the aid workers as he was a member of the aristocracy to which Wijesinha thinks he also belongs, and whom he likewise represents as propagandist. The elite are of course quite unemotional when talking about the disappearances, killings and torture of people belonging to classes in the south, north or east whom they have either never met or hope not to meet.

In a letter of 8 January 2009, Basil Fernando addressed Raijva Wijesinha in his capacity as secretary in the Ministry of Disaster Management and Human Rights as follows:

> As a servant of an institution called the Executive Presidency that has ruined the parliament, the judiciary, the executive itself and all the public institutions of the country, you share the same guilt as anyone else who has contributed to the destruction of the Sri Lankan state and the spread of anarchy and lawlessness...
>
> All sorts of pettiness found in your letters indicate the type of mind that can participate in the political hooliganism that has ruined Sri Lanka. No issue of importance concerns you. The issues of witnesses being killed or intimidated would upset anybody who had even the slightest understanding of the rule of law and the administration of justice. You, however, have been a propaganda agent to justify witness assassinations and witness intimidation. After all, to 'poo poo' all complaints and

allegations about human rights abuses is your job and therefore you may claim that could not have done otherwise...

As we are writing this letter the news of the shooting of Lasantha Wickramatunga was brought to my notice. This, without doubt, is the work of your political clique and as a Sri Lankan I accuse you also as being complicit in the shedding of his blood. Of course, it would be foolish on my part to ask you to initiate inquiries into this attempted assassination. However, for the purpose of record I am bringing this matter to your notice as an issue on which you are officially obliged to act. I am doing this to forestall a future accusation that the matter was not brought to your notice.

As the issue of the attempted assassination requires my attention I will stop this letter at this point. My last reminder is a letter that I wrote to you personally when you falsified a personal conversation I had with you in Cambodia. That letter is available on my website for future reference. At that time I called you a liar. Despite of that we did try to communicate with you officially although we knew that you are neither willing nor capable to do anything on complaints about human rights except to deny the very existence of human rights abuses in the country. Therefore your threat that you will have no further communication does not invoke much concern on our part, because your position as an apologist for the government and our position as persons concerned with human rights are incompatible. There never was any real communication and there cannot be any now. But as a matter of routine and out of the sheer tradition in human rights, anyone holding a title relating to human rights will be informed about human rights abuses in the country and we shall send our letters to you or anyone else that might hold your post in the future. We are fully aware that you can do nothing more than to pass it to an officer and that, that officer will not respond.

The superman controller

At the heart of the political, social and psychological problems of Sri Lanka is the executive presidency of the 1978 Constitution. It has turned into a political monster with virtually no parallel. The Executive President is a person freed from any and every kind of check and balance. He is not under any constitutional, economic or social force. He is a power unto himself.

The Executive President, while holding such power, is completely disconnected from the apparatus of the government. Since he alone has power, nobody else has real independence to run the institutions of state. He must run them. All below depend upon him. None have authority or entitlements of their own. This is unworkable. It is not possible for any single person to run all institutions all the time. Therefore, institutions malfunction, to the point of complete dysfunction in Sri Lanka to which the AHRC has adverted many times previously. The dysfunction characterizing Sri Lanka's public institutions will continue for as long as the executive presidential system under the 1978 constitution is in effect.

Michael Roberts has described this style of misgovernment as a consequence of the 'Ashokan Persona':

The Big Man (invariably male) has to control every fiddling little thing. My theory therefore highlights a deeply-rooted cultural tendency towards the over-concentration of power at the head of organisations and a failure (if not an ingrained inability) to delegate power.

Elsewhere, novelist Aravind Adiga has in *The White Tiger* brought out a similar idea of social control through 'the rooster coop':

> The greatest thing to come out of this country in the ten thousand years of its history is the Rooster Coop. Go to Old Delhi, behind the Jama Masjid, and look at the way they keep chickens there in the market. Hundreds of pale hens and brightly coloured roosters, stuffed tightly into wire-mesh cages, packed as tightly as worms in a belly, pecking each other and shitting on each other, jostling just for breathing space; the whole cage giving off a horrible stench — the stench of terrified, feathered flesh.
>
> On the wooden desk above this coop sits a grinning young butcher, showing off the flesh and organs of a recently chopped-up chicken, still oleaginous with a coating of dark blood. The roosters in the coop smell the blood from above. They see the organs of their brothers lying around them. They know they're next.
>
> Yet they do not rebel. They do not try to get out of the coop. The very same thing is done with human beings in this country.

He thereafter explains why the rooster coop was made possible. He attributes it to the Indian conception of family and the system of punishment where entire families of the servant class are punished for any transgression of one member. Asking the reason for its existence and why no one tries to get out of it, he continues:

> The answer to the first question is that the pride and glory of our nation, the repository of all our love and sacrifice, the subject of no doubt considerable space in the pamphlet that the prime minister will hand over to you, the Indian family, is the reason we are trapped and fled to the coop. The answer to the second question is that only a man who is prepared to see his family destroyed — hunted, beaten, and burned alive by the masters — can break out of the coop. That would take no normal human being, but a freak, a pervert of nature.

From this perspective we can return to the problem of the superman controller in the 1978 Constitution. This constitution was meant to dismantle, or at least to undermine seriously, the rule-of-law system introduced by the British so that the 'rooster coop' could resurface. It was meant to remove barriers against corruption, undermine every possible avenue—including judicial intervention— to abuse of authority and not to have any system at all except the direct use of force on all, trade unions, and opposition political parties, young radicals looking for new avenues and on everyone else. A further important component was to close the electoral map. The survival of the constitution was greatly enhanced by the rise of militancy in the south from the mid 1980s and Tamil nationalism, which finally came under the grip of the LTTE. It was possible to deflect the

attention of people to the need for repressing terrorism and thereby to ensure that no real democratic challenge was made against the constitution itself.

Roberts correctly points out that, "What the Sri Lankan President gives as a constitutional gift, he can withdraw too"; the 17th Amendment is an example of this. This remains possible as long as the constitution is premised on the notion of the superman controller rather than the balance of powers. In a place where the law has little meaning and the supremacy of the law has been removed and replaced with the supremacy of the 'Big Man' all that can happen is the continuance of the 'rooster coop'.

Destroyed public institutions

An article by retired Senior Deputy Inspector General (DIG) Gamini Gunawardane, "What is wrong with the police?" was published on the Sinhale Hot News website on 7 September 2009; the following is an extract that speaks to the problems of policing attendant to the lost meaning of legality in Sri Lanka today:

> The police department in its existence for the last 142 years has passed through several stages of evolution:
> 1. A colonial police (1867-1948)
> 2. A post-colonial police (1948-1972)
> 3. Political interference stage (1972-1988)
> 4. Politicization stage (1988-2001)
> 5. Reduction to a status of a virtual private security service of the party in power (2001-to date).
>
> Though specific years are given for convenience, they really overlap, because it is an evolutionary process. Of course, there is a strong reason among others for the rapid passage in to the latter three stages. It is the damage caused to the police service while it was going through the socio-political trauma owing to the coup d'etat in 1962 and the 3 insurgencies that occurred in this country since 1971.
>
> In fact, after the post-colonial stage we should have evolved ourselves into a 'people's police' as vaguely envisioned by the Mr. Osmund de Silva IGP [Inspector General of Police]. But [because of] the rapid political developments since his time followed by the insurgencies, the police instead became militarized and in the process, many sound policing practices of the post-colonial era fell by the wayside.
>
> Owing to the fifth stage above, even the most junior police constable knows that [the] people are not the primary client of the police, but that his top client really is the politician. Politician's requirement always takes priority. Though the politician is supposed to be only a representative of the people, the peoples' requirement came only after his requirement. Sometimes some members of the public with political clout do get their things done when they too approach the police through a government

> party politician. That is how the parents of the SLITT student were able to stop the police from doing what they intended to do with their abducted son. The parents moved fast through a relative who was a Minister. The people of Angulana had no such luck. The parents of the deceased youth had to be consoled after the event, by an embarrassed President, having being invited to his residence. Naturally, one is embarrassed when one's domestics misbehave.

The Angulana case to which the former senior DIG refers is indicative of the extent to which abuse of police power in Sri Lanka is associated with corruption. The Angulana police murders of two youths, Dinesh Tharanga Fernando and Danushka Udaya, shook the whole area and led to violent protests. The army and Special Forces had to be sent in to restore peace, while the local officers were transferred out. According to Tharanga's mother, speaking to the BBC Sinhala service,

> That gentleman [the Officer in Charge, OIC, of the police station] can't stand the sight of young boys. He arrests them and takes them to the police station and assaults them. Parents go to the police station and pay money to get the boys released. He arrests the boys in order to make money. We also went to the police station when we heard about the arrest of our son, and we took money to give him. But we were not shown the boy and we were unable to rescue him.

The boy's father said, "When we went to the police station we found that all the police officers were heavily drunk." Jeevan Kumaranathunga, the Angulana parliamentarian, told the BBC that he had received many reports about the drunkenness of police at the Angulana police post and that he had made representations to the relevant authorities about this situation, but because no action had been taken, this unfortunate tragedy occurred. Drunken police misbehaviour is not exceptional to the Angulana police. It happens everywhere, like torture, extrajudicial killing and bribery. It is the duty of the member of parliament of an area to receive complaints about state officers, including policemen.It is also his or her duty to intervene promptly on behalf of citizens whom the police harass.

However, in the Angulana case there is no indication that the families of the boys rushed to the house of their member of parliament to get his intervention so as to save the lives of their children. In so many other cases also, people do not go to their members of parliament seeking protection when events such as these occur, due to a loss of confidence and alienation of citizens from their supposed representatives.

One reason for this alienation is that around the country members of parliament work hand in glove with the local police. Since people know of these close relationships, there is a general feeling that it is futile to complain to a parliamentarian about police abuses. It is also well known that local politicians intervene to save suspects when they are supporters of their party. The illicit liquor sellers, drug dealers and others who engage in all kinds of seedy businesses get the patronage of local politicians. The ordinary citizens who come into contact with the police without breaching any law get into serious trouble and find no support from the politicians.

If the member of parliament for Angulana had received information on the drunkenness of the local police, it was his duty not just to make some representations to authorities—knowing well that nothing would come of it—but rather to take all the measures that he is empowered to take as the representative of the people in order to protect their rights. If his initial protests were not heeded, he could have made representations to the higher police authorities, such as the IGP and the National Police Commission. He could have done so in writing. If that also did not work, he could have taken up the matter through his political party, which is in government.

Even if all these methods had failed, he could have made a statement in parliament. He could have called for an inquiry. He could have sought the intervention of the president. And as a member of the parliament he has access to the media and any statement by him on the drunkenness of policemen at a police station should have created sufficient pressure for action.

Thus, looking into the causes of the murders of the two young persons from Angulana and the police abuse that is rife across the island requires some examination not only of the police's own behaviour but also of the responsibility of the member of parliament of the area.

Another agency that should be acting to counter-balance the authority of the police but instead has for years worked closely with them to the detriment of the system is the Department of Attorney General (AG's department). One feature of the close relationship
between this department and the police has been its complicity in cases of police violence and torture.

To reduce torture, complaints must be investigated. However, it is a long-established practice that investigations are deliberately sabotaged. The main saboteurs are of course the police themselves and the AG's department in its capacity as prosecutor.

The role of the AG's department as a co-conspirator in abuses goes back some way. In the late eighties, for instance, emergency laws were used to encourage extrajudicial killings. At least 30,000 persons, mostly from the south, disappeared during this period. The disappearances were caused through the emergency regulations, which were framed in a manner to make such extrajudicial killing possible. Magistrates were deprived of the rights to conduct inquests into all suspicious deaths by giving police officers the right to grant permissions for burials. As a result of this regulation, which shifted the law that all suspicious deaths must be investigated, the bodies of people whom police or related agencies had killed were not brought before a magistrate, and were buried without autopsy. This was a regulation designed to permit mass murder.

There is reason to believe that the AG's department was involved in advising on the draft of these regulations. There is also no evidence at all to indicate that the department in any way opposed them, or pointed to the illegality of arranging for and permitting mass murder. Similarly, when

Tamil prisoners were killed inside the Walikada prison in July 1983, officers from the AG's department participated in the inquest proceedings not in order to prosecute the offenders, but so as to hush up what really took place.

A case that became famous in the 1990s illustrates the point further. Richard de Zoysa—a well-known film actor, author and journalist and a popular socialite—was abducted from his house, and several days later his body was found washed up on a beach. It is speculated that after he was arrested and tortured, his body was dumped from a helicopter into the sea in the hope that it would never be recovered.

The news of the killing was one of the most shocking events that influenced politics at the time. Local and international media coverage was extensive and fingers were pointed at the security forces, which were then engaged in wiping out an insurgency in the south in which tens of thousands of people were similarly abducted and killed.

Despite enormous pressure, the government of the day persisted in covering up de Zoysa's murder. On the first anniversary of his death, the Liberal Party—which no longer exists—took up de Zoysa's case. A whole volume of the Liberal Review was devoted to his assassination.

That volume included a long letter written by the party to the government, analyzing the manner in which the inquiry had been sabotaged. The letter blamed the police and the AG's department for failing to investigate. The party called for a commission to inquire into the murder. The reasons it gave are revealing:

> There is a significant possibility of the complicity of elements of the police in this crime and the apparent unwillingness of the Attorney General and his department to act impartially in this case, which prompts us to suggest the appointment of a commission of inquiry.

The letter was written in February 1991. From then until now, nothing has happened to improve confidence in either the police or the AG's department with regard to independent and impartial inquiries into human rights abuses of this sort. One of the major reasons for this failure remains the complicity of the police and the prosecutors, who work to prevent proper inquiries into serious crimes.

Today, the position of the police is much worse than it was in the late 1990s. Everyone acknowledges this, even highranking police officers that have made public statements expressing bewilderment about the situation. In current times, even a person accused of murder can continue to work as a police officer. Suresh Gunaratne, a police sub-inspector accused in the murder of torture victim Gerard Perera, continues to work as an investigator at the Gampaha Police Station. Many others accused of serious crimes are not even subjected to investigation.

One of the known pastimes at many police stations is to intimidate witnesses who make complaints against police officers. What is more shocking is the way the AG's department has undermined its duty to help prevent torture. There were some positive developments in the early part of this century when the department filed a large number of torture indictments against police officers. These were made under the then AG, K C Kamalasabayson, who was not one of the destroyers of institutions in Sri Lanka, but rather a captive to their destruction. Kamalasabayson held the post from October 1999 to April 2007. Compared to others, he tried to be more politically neutral and to keep some balance even as the ship of state tossed and turned. By the time Kamalasabayson became the AG, the country had already witnessed some of the most colossal human rights abuses in its modern history. It was a difficult time for anyone with some integrity to hold the post. Kamalasabayson did not deal decisively with the threats to his institution. He was unable even to prosecute effectively many cases of disappearances concerning police and military officers, against whom commissions of inquiry were reported to have adequate evidence. As the prosecuting of police and military officers for disappearances is a highly sensitive issue, it would perhaps have taken a giant to withstand political pressure and do his job according to the law.

Kamalasabayson was not a giant, but he did show that he was aware of the acute problems caused by the collapsed rule of law. Giving the 13th Kanchana Abhayapala Memorial Lecture on 2 December 2003, he spoke of many of these problems. He highlighted the absence of a witness protection law and program, delays in courts, lack of legal provisions protecting the victims of crime, lack of investment in administration of justice, and even the inadequacy of staff at his department. He was also aware of the crisis over the country's criminal investigation function, exercised through the police.

His most important decision was to prosecute cases under the Convention against Torture and Other Cruel and Inhuman Punishment Act, No 22 of 1994. Procedurally, he did this by referring all the complaints of torture received from United Nations agencies or local channels to a Special Inquiry Unit (SIU) of the CID. Within a short time, several SIUs investigated a large number of cases and submitted files to the AG's department for prosecution of officers. The department held over sixty files on which it had decided that it had adequate evidence to prosecute. In many of these cases, it filed indictments in High Courts.

Most cases are still pending. After Kamalasabayson retired it did not take long for the department to change policy on the referral of complaints through SIUs. His successor, C.R. de Silva, often mentioned that the department would not bow to the pressure of NGOs, meaning that prosecuting cases of torture is somehow something that is a result of pressure that should be resisted. Under him, there ceased to be any high-level inquiries into allegations of torture. Even where evidence emerges by other means, the department now most of the time refers the cases to magistrates to be prosecuted under the Penal Code as simple hurt. Departmental officers have also made reports to

UN agencies, including the Committee against Torture—which monitors the convention— stating that there is no serious problem of torture in Sri Lanka.

Even in cases where fundamental errors have been made in the facts and application of the law, the AG's department has refused to file appeals or revisions, despite requests on behalf of aggrieved victims. The tacit policy today is not to eliminate torture but to protect perpetrators.

As a consequence, policemen who arrest, detain and torture for the purpose of getting money are common throughout the country. The well-publicized case of Sugath Nishantha Fernando of Negambo illustrates how adventures relating to bribery can lead to so many other police crimes.

Nishantha Fernando initially complained about a police inspector who had sold him a lorry of which he claimed to be the owner, while in fact it was a stolen vehicle. His complaints led to the fabrication of charges against him. He had to pay bribes and to promise payment of more in order to get the charges dropped.

Finally, when the demands were too much, he complained to the Bribery Commission. The commission, after inquiries, filed charges against a police inspector.

Thereafter, Nishantha and his wife were pressured not to give evidence in the case. When they failed to pay heed, about 20 police officers, including the OIC of the Negambo police station, surrounded their house and assaulted them and their two young children, and took them to the police station. Later, the family filed a fundamental rights application regarding torture of all the four family members, and the Supreme Court granted leave to proceed.

The family named 12 police officers as respondents. Then, some unknown persons visited the family and told the couple to withdraw the fundamental rights application in 24 hours or the whole family would be killed. Nishantha complained to the IGP and all the Sri Lankan authorities, including the Ministry of Disaster Management and Human Rights.

On 21 September 2008, two gunmen shot Nishantha Fernando in front of his young son (see "The price of fighting the state in Sri Lanka" by Julianne Porter, article 2, vol. 8, no. 1, March 2009). No one has yet been arrested and there seems to be no inquiry at all about this murder. The mother and the two children received further death threats and they had to move from house to house over several months for security. The family has remained in hiding. Hundreds of cases of this sort, arising not from security concerns but from the adventures of policemen abusing their authority to make a profit, can be narrated due to the AHRC and its partners' documentation over the last few years. The fundamental rights cases before the Supreme Court alone, tell a tale of enormous cruelty and of abuses of power that neither the police authorities nor the government have made any attempt to stop.

In all discussions relating to development as well as peace in Sri Lanka, radical reform of the police should have a significant place. However, as retired DIG Gunawardane points out, this is not likely to happen any time soon:

> Judging by what is going on at present, no government is likely to change this arrangement with regard to the police. In the short term it is advantageous to the party in power to be able to directly manipulate the police. For, this is the direct exercise of civil coercive power. The party in power only realizes the adverse effects of this when they become the opposition. They then dare the party in power to hold elections having implemented the 17th Amendment etc. But when they get back into power they do not wish to change this set up, in the interest of the people whose sovereignty they exercise. Neither is there a strong movement by the people to have this situation changed. It is doubtful whether even the public wants a totally independent police or whether they would like a police manipulatable through politicians depending on which side of the law one is placed in a given situation! No proper research has been done on this question. Thus, the saying 'people get the police they deserve.'
>
> In these circumstances, there is no hope that the character of the police will be allowed to develop oriented towards people as its chief client, despite lip service to current world trends such as community oriented policing etc. So the police are compelled to work within this latest paradigm. Hence, public interest will be only marginal.
>
> Now I come to my point. I see a problem for the police to function effectively as an organization even under this paradigm. It is really a structural and a managerial defect. Of late, the Senior DIGs who form the Top Management team of the IGP are posted to the provinces, to the forward headquarters. He sits over and above the local DIG in the provincial capital. He is thus drawn towards the ambit of the sphere of activity of the DIG, as the most senior officer present. He is thus compelled to encroach on the work of his DIG.
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> Similarly, the DIG is drawn to do some of the work of the SSP [Senior Superintendent of Police]. The SSP in turn is led to do some of the work of the ASPs [Assistant Superintendents of Police]. And the ASP is very often seen doing the work of the OIC. Thereby the supervisory function at each level suffers. The OIC in the meantime has not much work to do other than to be present at the many occasions of a VIP who visits his area.
>
> In view of the political character and also owing to the security concerns, the entire local hierarchy tend to be present, mainly to be seen by the VIP. Thus the OIC has not much time to supervise his men or look at his records or do any court work. The snowballing effect is that most senior officers are found to be immersed in office work, working late into the night, mostly doing their subordinates' work. As a result of the senior officers doing the work of their subordinates the subordinates miss the opportunity of acquiring more skill, experience and maturity at their different rank levels. Hence, as they go up the ladder, they possess less and less experience both to manage their jobs and to give appropriate directions to their subordinates. They also do not have sufficient confidence in the subordinate to discharge his responsibility. So superiors themselves do the work of

> the subordinates to ensure that there is no slip up. This is because, the responsibility of getting the job done falls ultimately on the senior officer. So to be sure, he does the subordinate's job himself! So the subordinate never learns. Thus the situation keeps on deteriorating in a counter snowballing effect. The senior officers on other hand, have no time to pay attention to detail or to do any creative work in their higher capacity, beyond performing their routine tasks. The norm is, to get by each day. Neither the officer nor the subordinate is tested or held accountable. So no improvement, or deeper levels of supervision. The result is occurrences such as Malabe and Angulana, incidents of custodial killings and serious acts of torture by police.
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> Many more such killings in police custody were have happened in police stations throughout the country.
>
> Consequently, the officer levels lose the opportunity to develop their managerial and interpersonal skills though they may acquire the technical skills required for their survival. Thus, there is lacuna in the officering skills at the officer levels. This is the complaint of many subordinates of their superiors. This problem has become further complicated as a result of the absorption of the Police Reserve into the regular force, consequent to an election promise. The details of this problem could not be discussed here as it is beyond the scope of this essay.
>
> In these circumstances, mediocrities have a field day. Of course, to facilitate their upward mobility and protection for incompetence, one needs the 'political clout, for, efficiency is not the criterion. Hence, out of necessity, they develop skills of 'politician management' as against personnel management etc. Starting from here, problems escalate from one to the other and spread like a cancer. Thus, it is surprising that even the present level of service delivery is possible.

The article talks about some of the problems associated with the management of the police hierarchy. Had the system not been so heavily politicized for so long, the policing system would not have emerged as a serious threat to the security of the country.

A policing system is a hierarchical institution. Those at the top have responsibility for the behavior of those in different layers within the institution. It is the job of those who are at the top to ensure that all those below do as expected of them. Departmental orders lay down the responsibilities of leadership and of supervision. They prescribe intricate arrangements for the maintenance of documents. The officer in charge of a police station is responsible for what happens within it; the ASP of an area inspects books, makes visits and takes his own notes, by which he keeps track of the work of all police stations under him; superintendents supervise and guide the work of the ASPs; senior superintendents exercise further monitoring and supervision; and deputies to the IGP look after the entirety of the institution.

That was how it was and that is how it is supposed to be. But now any police officer may think this is just a fairytale. Today, the police hierarchy from ASP to IGP cannot even arrange for the proper transport of an alleged suspect when he is escorted to find some material evidence. The oft-repeated story is that during the journey the handcuffed suspect takes a gun or bomb and tries to

attack the police, who in turn shoot him dead. Are the officers of the police hierarchy incapable of devising a system for the safe transport of criminals from one place to another for purposes of investigation? Surely it is not such a difficult task to design guidelines and instructions about the transport of suspects during criminal inquiries. All over the world such things are done quite safely. It does not require extraordinary intelligence to design and implement such a system; however, Sri Lanka's police hierarchy has proved incapable of doing this much.

Instead of command responsibility, complete carelessness has spread from top to bottom of the law-enforcement infrastructure. Take the case of Douglas Nimal and his wife. Nimal was a police inspector who took his job seriously and tried to arrest some persons involved in drug dealing. Some persons at the top moved against him, and finally he and his wife were killed. No one was arrested or prosecuted for killing a law enforcer who was discharging his duties.

In the Supreme Court and high courts there are constant revelations of police tampering with documents. In fact, there are hardly any cases relating to fundamental rights or torture complaints at high court trials where police have not tampered with books and made false entries. In all cases where arrested persons are later extrajudicially executed, the documents in the books are also manipulated. Had the ASPs and those above them exercised their supervisory powers as required by departmental orders such distortions would not be possible.

The police hierarchy is paid with public funds; however, it is not performing its public duties. There has not been sufficient scrutiny of its work in parliament or in the media. If the lawlessness that the country has descended into is to be addressed, the public must ask questions about what the IGP and his deputies are doing. If by not following legal and departmental procedures they are breaking the law, then who is there to safeguard law and order in the country?

Another feature of the system that Gunawardane identifies is the ever-present danger of greater military control over policing. He notes that:

> There seems to be a line of thinking these days that since the military officers who did well under a capable leader, appointing an Army officer will be the panacea to all problems. The naiveté in this thinking is indeed astounding. Because each field is so specialized these days. The thinking seems to be that "you appoint the 'right' man and the rest will fall into place." One shudders to imagine the consequences.

In fact, analyses of the country's police problems—from the Soertsz Commission Report in 1946, followed by the Basnayake Commission of 1970 to the Police Service Report of 1995— demonstrate that a central problem from the inception of Sri Lanka's police system has been its militarized rather than civilian policing style. Insurgencies since 1971 have further militarized it. The appointment of an inspector general from military ranks would only compound problems.

These days, anything and everything is possible within that system, however illegal. Whether police officers engage in drug dealing and protecting the drug dealers; whether they use their powers of arrest and detention to obtain bribes for themselves; whether they help politicians by putting their opponents behind bars under false charges, using anti-terrorism laws and anti-drug laws; or engage in any other type of illegality, there is hardly anything the system can do to stop it. Cosmetic measures such as arresting a few low-ranking officers do not make any difference.

How can these problems be resolved by appointing a military officer to head the police force? Can a military officer establish command responsibility for officers from the lowest to the highest rank? Will not the introduction of a military officer only help the errant superior officers even more, because they can easily mislead and even cheat their new leader, who is totally unfamiliar with the area of work in which they are engaged? Similar experiments elsewhere, where top posts have been given to people from completely different fields, provide enough examples of the distortions that can happen under such circumstances.

A policing system is a public service devoted to law enforcement. Thus, the relations with the public that are required of a policing system are of a completely different nature than those of the military. The political leaders who have proposed bringing an inspector general of police from the military are aware of this. Why, then, do they want to introduce a military leader into the already collapsed police system? They may have other ambitions. A more militarized police may be what is needed to subject the population to greater controls and to displace the rule of law altogether.

For a more militarised system, one need only look as far as Burma—whose military supremo in November 2009 visited Sri Lanka after the president had paid him a call in his own country.

In same year, the junta again arranged to keep democracy party leader Daw Aung San Suu Kyi locked up in her house. That case is widely known and condemned globally. A court sentenced Aung San Suu Kyi to five years of rigorous imprisonment. Within hours the junta chief reduced the sentence to 18 months of detention in her own home. The sole exercise of this trial was to give a semblance of legality to an executive order for imprisonment so that this lady cannot participate in any events relating to proposed elections in her country.

In Sri Lanka the case of J S Tissainayagam, though not as well known as Aung San Suu Kyi's, also created waves internationally in 2009. The arrest, detention and trial of this man, a prominent journalist and a human rights activist, received the attention of many governments. The American president, Barack Obama, himself mentioned this case as an example of the repression of journalists throughout the world. All leading media organizations worldwide condemned the arrest, detention and trial and repeatedly called on the government for Tissainayagam's unconditional release.

Tissainayagam was charged with aiding and abetting terrorism and instigating racial violence by writing a few lines in an article that referred to the armed conflict then taking place in the north. Tissainayagam, who had been a veteran journalist and a human rights activist, had over a long period of time reported matters regarding internal conflicts in the south as well as the north and east.

In the late eighties he helped the incumbent president, who was then in the opposition, by preparing and translating documents relating to disappearances and other atrocities in the south. There was nothing in Tissainayagam's writing to indicate any attempt to instigate violence or promote racial hatred. There are thousands of similar pieces and none of their authors have been prosecuted. Tissainayagam was singled out for arrest, detention and prosecution solely to intimidate other journalists and newspaper editors publishing materials relating to the war. Several other journalists left the country after his case emerged. Like the case of Aung San Suu Kyi, in the case of Tissainayagam there were no real grounds on which to base a criminal charge. In both cases the charges were fabricated. The issue before the court in both cases was to decide on the legality and the validity of the charges in the first instance. Both courts proceeded on the basis that fabricated charges had some basis in law and found the accused guilty.

Joseph Stalin's prosecutor, Andrei Vyshinsky, also conducted trials in which the outcome was predetermined. The trials of the 1930s were known worldwide as show trials. The accused were not really the targets of the proceedings. The accused were mere exhibits to be advertised before the rest of society in order to pass a message to the people. Vyshinsky's biographer Arkady Vaksberg wrote that the "purpose of the trial had not been to disgrace or, indeed, to annihilate some of the accused but to create a precedent and pave the way for a psychological attack on the population".

In a similar fashion, the prosecutor proceeded against Tissainayagam and the court sentenced him to 20 years. Previously the Supreme Court had asserted the rights of citizens to freedom of expression and publication. The court has also upheld the rights of citizens to criticize the existing government. However, the High Court trying a case based on special regulations under anti-terrorism laws had gone completely against these traditions.

Sri Lanka's Ministry of Foreign Affairs has gone even further and in a communiqué stated that criticism of the judgment against Tissainayagam is a slur on the independence of the judiciary. However, in this case, like that of Aung San Suu Kyi, it is the destruction of the judiciary that is the problem, and to point to the court's non-independence is not a slur but a mere statement of fact. When the Tissainayagam case came before the UN Human Rights Council in Geneva, the AG himself argued that the 20 years of imprisonment was a minimum sentence and that it was a decision of the court, since Sri Lanka respects separation of powers, just as the regime in Burma disingenuously insisted that the court, not it, was responsible for the Aung San Suu Kyi verdict. What was not placed before the council was that under the PTA—through which the conviction

was secured—confessions are admissible as evidence, and acts that are not otherwise crimes are under this law considered offences.

Within Sri Lanka, this does not matter as the whole system of criminal justice is anyhow standing on its head. The law is manipulated and twisted to get whatever result the prosecutor wants. The prosecutors can even serve as defenders, particularly when they participate in preliminary enquiries and subvert the process by various means. For instance, on 30 July 2009 the Lanka News Web reported that,

The Attorney General has requested courts to grant bail to two of the five respondents produced before courts for the alleged financial fraud amounting to Rs. 4,300 million at the Finance and Guarantee Company, which is a subsidiary of the Ceylinco Group.

The reason for requesting to grant bail to the two respective respondents in the case according to the Attorney General is that they had cooperated with the inquiry into the company.

However, it is learnt that the Attorney General's friendship with the respondents developed during the time he served as the Legal Advisor to the Finance and Guarantee Company is the reason for the request to grant bail to two of the respondents.

The accused in the financial fraud case, who were produced before courts are Deputy Chairman and Chief Executive, Finance and Guarantee Company, Mervyn Jayasinghe, Financial Director Sunil Jayatissa, Executive Director Mohan Srinath Perera, Legal Officer Malini Sabharathnam and Deputy Financial Director Samanthika Jayasekera.

Legal sources say that although the Attorney General wanted to get bail only for Sabharathnam, Jayasekera's name had to be included to avoid any suspicion.

A team of lawyers led by Attorney Kalinga Indatissa appeared for the respondents when the case was taken before Colombo Chief Magistrate Nishantha Hapuarachchi.

Upon being told by the Attorney General that two respondents should be granted bail due to their cooperation with the CID investigation, Indatissa had challenged the Attorney General in open court to reveal how the said respondents aided in the inquiry.

He had further said the five respondents had equally cooperated with the investigation. The Attorney General was represented by Deputy Solicitor General Yasantha Kodagoda.

Lanka News Web earlier revealed in a story that the Attorney General did not institute legal action against the respective company due to his close affiliations with it.

Following the Attorney General's request Sabharathnam and Jayasekera were released on a surety bail of Rs. 100 lakhs each and a financial bail of Rs. 1 lakh each. The other respondents were remanded till August 11.

In September the AG shocked the nation by requesting the High Court of Colombo to withdraw an indictment against an accused charged with preparation of forged documents and misleading the CID. The accused, B A Abeyratne, is the principal of a well-known Colombo school who was indicted in 2008. The indictment stated that he had influenced an investigating police officer to accept a number of forged documents in an inquiry with regard to the admission of children to the school.

The request to withdraw the indictment was made on the basis of an affidavit filed by the accused, which stated that he would resign from his service at the school and in which he expressed regret about the damage caused to the school by his actions. Besides this, a number of persons wrote to the AG asking him to exonerate the principal, considering his service to the country, to the school and to the sphere of education. It was on the basis of this affidavit and the letters that the AG made the request for the withdrawal of the criminal indictment, despite the fact that there was sufficient evidence to continue with the prosecution.

Although the High Court refused the request and ordered the trial, the very attempt to withdraw it raises disturbing questions. Are affidavits from accused persons promising good behaviour and letters by others about various services rendered now going to be grounds for the chief prosecutor to withdraw criminal charges? If these are valid criteria for not prosecuting then the AG should not prosecute anyone, as every accused will be willing to give an affidavit promising not to misbehave again. And these days, it would not be difficult for any accused to get letters of recommendation from even the highest places, requesting that an indictment be withdrawn.

Only innocent persons, who have failed to develop connections with the corrupt and the powerful, might fail to get such letters. Let us suppose that the judge allowed the application. Then the AG would argue that it is the court that has made this decision not to prosecute, not his department, and that Sri Lanka respects the separation of powers. Thus, the responsibility for the decision would have been placed on the court. This is the manner in which the responsibility of the absence of investigations and prosecutions into extrajudicial killings at police stations has been explained away on many occasions, where the decision of a magistrate that a killing is "justifiable homicide" is used to exonerate all other parties and cease prosecution.

What is not discussed in these cases is that the investigative authorities and the prosecutors have invariably not placed all the circumstances relating to the killing before the court. With no impartial investigations into such killings and documents forged to give the police version of events, the courts only have the evidence that the police and the prosecutors place before them. Yet later when complaints are made over the absence of investigations and improper prosecutions, the magistrate's finding is pointed to as the reason for inactivity or inadequacy.

From the above it can be said that whereas at one time there existed a department called the Attorney General's department, today it exists only in name. It has lost its place as the government's legal adviser and lost its way as the prosecuting agency. From the way that the government acts now, it is not doing so on the basis of proper legal advice. And judging from the number of cases that constitute serious crimes that are not prosecuted, it is also not possible to say that there is a genuine and authentic prosecuting agency in the country. Nor is it possible to say that the prosecutions in Sri Lanka are being undertaken on the basis of law.

The demise of the AG's department is a matter of grave concern because its functions are vital if a nation is to accord with the rule of law. By contrast, where legality itself ceases to have meaning, as in Sri Lanka, the department also becomes meaningless. How did the department lose its role and arrive at the present position of pathetic subservience to the executive? It did not happen within one day. It was a long journey in which the department leaders gave in to the wishes of the executive, some due to pressures, but mostly due to the opportunism of officers who were too eager to please the executive.

Some episodes are well known: under presidents Jayawardane and Premadasa, the department's legal advisory function was ignored. It did not resist the 1978 Constitution. There is no evidence to suggest that the department had given any advice to the government about the implications of this constitution for the legal system of Sri Lanka. When Jayawardane started a war on the judiciary, the department did not give advice to the government on the unconstitutional nature of his interference and its possible adverse consequences.

Under these two regimes, the AG's department persecuted political opponents. The case against Srimawo Bandaranayake and others had its full cooperation. During this time there were also several criminal cases filed against SLFP politicians such as Vijaya Kumaranatunga, the present president Mahinda Rajapaksa and others, purely for political reasons. Though these cases didn't end up in prosecutions, the initial steps were initiated through the department.

The 1982 proposal for holding a referendum to extend the term of parliament for another six years would have shocked any legal department working according to common law traditions; however, Sri Lanka's AG had no legal advice to offer against this move. Not only was the country's electoral system completely destroyed, but so too was the very basis of law through which government derived legitimacy.

The best test of legal advice is the advice given on constitutional matters. The AG should have resisted executive moves to undo the basis of constitutionalism. If that led to conflict, the legal adviser should have faced the conflict, rather than avoid it by unconscionable compromises. Had the AG resisted, it would have set off alarm bells about the executive's serious attack on the legal framework of the country. Even if the executive would not have wavered from its path, it would

have met opposition, and the complete destruction of the institutions of law could have been avoided.

While the AG's department failed to act to oppose extralegal executive actions done in the name of law, the judiciary was dramatically attacked and damaged from within thanks to the work of the former chief justice, Sarath Silva, who resigned midyear.

On 7 July 2009 *The Sunday Leader* published an article by telecommunications expert Dr. Rohan Samarajiva, "Curtain closes on the Sarath Silva saga" to mark the occasion, of which extracts follow:

I recall a conversation with a telecom CEO when I returned to Sri Lanka in 1998 to work in government. I asked him what his blackest day was. He said it was the third or fourth day of the extended blackouts resulting from CEB unions trying to blackmail the government. He had used up his backup power, backups to the backups, and there was no diesel.

He was trying to supply reliable telecom services; his day of black despair came when the external infrastructure he depended on failed. My nadir was the day I realised that the judicial system of Sri Lanka was failing. It is the external infrastructure for everything. My day of black despair came under the watch of Chief Justice Sarath Nanda Silva, who retired last Friday.

...

The Supreme Court is the final bulwark against assaults on the Constitution in any country. It is customary to say that the Constitution of a country is not what is written down in black and white on paper, but what it is said to mean by the highest Court. But how did the Silva Court safeguard the Constitution?

Abject failure on the 17th Amendment. Selective enforcement on the 13th Amendment (annulling the ad hoc merger of the Northern and Eastern Provinces while turning a Nelsonian eye to the other egregious violations). Outright failure on safeguarding the principle of parliamentary control of public finance, something fundamental to the parliamentary system of government and something written into our Constitution: "Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed 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" (Article 148).

The 2006 budget allowed the Treasury to move funds around among different heads without parliamentary approval, blessed by the Silva Court. The list goes on. Court tries to set petrol prices, infringing on the powers of the executive; executive refuses to implement court orders; court withdraws orders. Persons held on non-bailable offences are released without explanation by the highest court. The Constitutional terrain at the end of the Silva term looks like what Lanka must have looked after Lord Hanuman's tail was set on fire. No principles established; no doctrines for guidance; just random devastation.

...

The broad sweep of judicial activism has signalled to all who make economic policies and implement them that it is no longer enough to follow procedure, but to act in ways that would be acceptable to a future court... or to ensure that no one will be offended by the decision, thereby precluding a fundamental-rights challenge. These being impossible, the best course of action is inaction.

This is worse than what happened with government-personnel decisions a decade or so ago. But at least, people in government knew what the rule was and what it applied to: personnel decisions. Now, there is no such certainty or delimitation. All executive actions are fair game. The rule is that there is no rule; one has to guess what the Supreme Court would find acceptable.

Is it worthwhile trying to figure out what the present judges would decide? No, because the time limit on instituting cases has been thrown out. So the decision maker has to guess what would be acceptable to any court in the present and in the future. So what is the end result? Policy paralysis, something we can ill afford in a fast changing world.

A friend of former AG Kamalasabayson said that when asked at time of retirement what he thought of the legal system of the country, he is said to have remarked that he saw nothing anymore that can be called a legal system; only some buildings. While the former AG tried to keep something of the system intact, the former chief justice played a part in its destruction. In the end, both of their institutions have fallen to zero, and with them, the status of the citizenry who depend upon them.

The zero status of citizens

When all legal entitlements are denied to citizens their formal rights are insignificant. Anything can be done to them and no consequences will follow. Today every Sri Lankan citizen is a legal non-entity in this sense. Their entitlements are on the statute books but have no actual relevance. Abysmal lawlessness and individual rights cannot coexist.

The situation in Sri Lanka at present demonstrates this fact with great clarity. Even senior persons suffer from misunderstandings about this fact until they themselves are made victims of it. For instance, in several video clips Dayan Jayatilaka, a former ambassador to Geneva, talks about his removal from his post.

He states that Sri Lanka has no foreign policy, as if it should be a surprise to learn that there is anything other than the abuse of power. He talks about his removal as irrational as if it should come as a surprise for the Sri Lankan state to act irrationally. In fact, everyone there is treated irrationally all the time. The concept of merit in appointments and rationality in decision-making is absent.

The 17th Amendment failed for this reason. The parliament made an attempt to acknowledge merit in appointments, dismissals and transfers of civil servants. It did not succeed. The principle now is that irrationality in appointments, dismissals and all such matters is normal.

Why is it that many people still do not grasp that the system in the country has gotten so warped that it is not capable of rational behaviour? Here the notion of zero status requires further explanation. The word here is used in the sense that Solzhenitsyn used it in his masterpiece on repression, *The Gulag Archipelago*.

Millions of Russian citizens were turned into zeroes just by somebody knocking on their doors or telling them that they were under arrest. Many citizens began to expect such a call at any time. However, the group that was surprised when such a call came and would never understand it, even after being brought into prisons, were the privileged sector that belonged to the party. Solzhenitsyn devotes an entire chapter to describe the plight of these people, who could not grasp how the system could treat them so irrationally. It never occurred to them that the rest of the country was treated far more irrationally all the time.

They had participated in the creating of a society of zeroes and were shocked to find that they too were counted among those with no status or value whatsoever. This is why the irrationality of the entire country escapes the attention and comprehension of those from the more privileged sections of Sri Lankan society, who still think that they have some kind of status by virtue of their positions in the hierarchy and relative wealth.

The problem for them is that when society is reduced to a zero through the devaluing and destruction of public institutions, then the rights on which the system is premised also have no meaning, and there is no more for them than for anyone else.

The murder of Lasantha Wickramatunga, a prominent journalist, can be used to illustrate. Wickramatunga was the chief editor of *The Sunday Leader*. Two gunmen shot him and one of the newspaper's senior journalists on 8 January 2009, as they went to work; the second man was wounded.

Wickramatunga was a prime target of the government and particularly the Secretary of the Ministry of Defence, Gottabaya Rajapakse, who had earlier tried to have him arrested. Thereafter a group of unidentified persons attacked and burned his paper's printing press; they were never arrested. It is widely believed that the ruling party sent the group, and that it was probably from some section of the armed forces.

Just two days earlier about 20 unidentified attackers raided the premises of Sirasa TV and caused huge damage to equipment. The group assaulted the staff and left a large Claymore mine. Sirasa TV

is the most important centre for the independent media in Sri Lanka. The opposition leader said that the government was responsible for the attack and that members of a military unit carried it out. The attack provoked protests from journalists and opposition also from foreign embassies. Following the attack the AHRC issued a statement ("The attack on Sirasa TV an early warning of worse things to come", 7 January 2009), which predicted:

> The massive attack on the Sirasa TV station brings gloomy predictions of things to come in the very near future to a country, which is already bedeviled by lawlessness, violence and corruption. However, there is no rational basis to expect things to become any better but in fact reason to believe that worse things are yet to come. If there was to be political assassinations of opposition leaders, trade union leaders, journalists, human rights activists and others who stand for democracy, rule of law and human rights it would be the natural course of things arising out of a buildup which has already taken place.

In less than 48 hours this prediction unfortunately proved true. Globally Sri Lanka has been declared as the second most dangerous place for journalists, the first being Iraq. It is also among the most dangerous places for anyone that the government suspects to be an opponent, as shown in the case of Ranga Bandara, an opposition parliamentarian whose house was attacked and burned on 6 October 2009. Shortly after he gave a recorded interview to the AHRC, of which the following is a summary:

> A group of people entered my premises on Sunday night, October 4 after breaking the decorations outside. They arrived in two vans. After entering my premises they spread highly inflammable liquid throughout the premises and set the premises on fire. The spread of the liquid had been done very carefully to ensure that they could raze the premises to the ground in the shortest possible time. Then they left the premises. I was away attending to election work on behalf of my party at the time. I learned that the neighbours gathered immediately but were afraid to go in because they were aware of recent experiences where bombs were placed inside when this type of attack is done. The people tried to throw water from outside to stop the fire. It was only after one of my employees, a lady, rushed to the place and entered the premises that others also entered and tried to put out the fire. However, they could not do much to stop everything from being destroyed.
>
> My house and office are situated next door to each other. All the documents relating to my work as a member of parliament was inside both premises. I also had five computers for the purposes of my work. There were many other pieces of equipment that were also used for communications. And there were also the household goods. All has been burned down and the total damage in monitory terms is about Rs. 11 million.
>
> Immediately when the news about the fire had been spread the police were informed and they in turn informed the fire department of the Negombo area. The head of the fire department and the chairman of the provincial council were also informed. Initially, the fire department asked for Rs 15,000 as costs for putting out the fire. The police informed that they will pay the money but the order had not been given for the fire department to move. So, they did not come at any time to deal

with the fire. In fact, during this same time the vehicles used by the fire department were seen in the roads in Negombo being used for putting up flags for the ruling party.

The police in the area of Negombo also have water bowsers but none of these were sent, despite of the information that they had, to help in putting out the fire. After I arrived at the place with several others I received a lot of detailed information about who was involved. It is a member of the provincial council who had given orders to the group of people who attacked my house. According to the information I received they will be protected because he, the provincial council member, received these orders from high above.

I have also been told about the names of several of the persons who participated in this attack. I have also got to know the number of one of the vehicles that were used for this attack.

However, there is a big problem. The people who confided in me and gave me this information are mortally scared. They don't want to take the risk of coming forward to give evidence in these matters because it means very serious trouble for them. Of course the fear is real and everybody in the country would understand that kind of fear.

Among those who talked to me were two police officers. They gave me a lot of information about how this attack was carried out and by whom. However, they also told me that they simply have to keep quiet because if they try to do their duty in terms of the information they have received, they will lose their jobs. Once again this is not a surprising revelation. A complaint about the incident has been made to the police and three witnesses have given statements regarding what they have seen at the initial stages of this incident. The police have said that they will also record a statement from me. I will make that statement. However, I do not have the least amount of faith that there will be any sort of credible inquiry. It is not simply possible for the police to do that kind of inquiry in Sri Lanka now because of the political directions that they have to work under. So here we have evidence about who did this act and how, but what is the use of that information? The police are not going to do what they are expected to do under the law on the basis of such information. On the other hand these people who come forward to give information would be put at very great and real risk. That is the situation that I am facing about the investigations into this system and regarding that I do not know what to do. I have no doubt at all that this is a completely political attack directed to ruin me completely, politically and otherwise. Now all that I had is lost. Even the basic equipment I used for my work has been burned down. I do not have any money at all to buy any of these things back. Now I have been reduced to a position below zero. The political environment of today is such that opposition politicians are first exposed to such attacks to ruin them from engaging in their political activity. On the other hand there are constant death threats. My possible assassination by this regime is a very real threat. I have been under threat all the time. Earlier there were two occasions on which bombs were planted at my political offices in my electorate. On one occasion as I received information earlier I was able to get the bomb squad to disarm the bomb.

However, the second one exploded on the same day. While such attempts are made to intimidate me as a member of the opposition there have also been constant attempts to buy me over. This has happened at the very inception of my political career nine years back and it has continued until now.

> Persons coming on behalf of the present regime have offered me huge sums of money and positions if I join the government.
>
> A deputy minister approached me and offered me up to Rs. 20-50 million if I joined the government and also offered a deputy minister's post. Then another politician close to the president approached me with similar terms. Then there is a family known to me in Colombo. The lady who had connections approached me and offered me the same terms. I have informed all this to the leader of the opposition. I have also mentioned these things to some newspapers in the past.
>
> Today, the existing political environment is a very dangerous one. The opposition political party members are not only prevented from doing their jobs but even the media is afraid to give us any space. Several media channels that earlier invited me to attend various public broadcasts no longer invite me. The media does not report what we say properly. Sometimes when the media try to do their jobs properly I was told they are called by someone from the top and severely warned to desist from giving such publicity.
>
> I have a wife and three children. My son is 16 years old and my daughter 14 years old and they are both at school. The youngest child is very small. It is the political culture today to assassinate the wife and children if you cannot destroy the person who is your target. I am afraid that my family will be exposed to serious threats to their lives merely to teach me a lesson. That is how bad things are.
>
> For years I have been writing to the international bodies of parliamentarians and the international bodies of the UN complaining about the threats I have been facing. I have copies of all the letters written to them. The file containing all these letters is now about one and a half kilos in weight. Despite of all such threats I had to face this arson attack and the threats to my family, my supporters and I. I can do nothing but to appeal to all those people in the international community to come to my assistance and ensure protection to my family and I. There is no one else to appeal to. So I appeal to all persons with good hearts in the international community on this occasion for understanding of this situation and also to take steps for protection.

Another person targeted in 2009 for opposing the government was Stephen Suntharaj, 39, who had been working for the Centre for Human Rights and Development (CHRD) since March 2008 as a program officer. He formerly worked for the Child Protection Authority in Jaffna, where he took up so many cases of child abuse that he was threatened and ultimately had to leave the area.

In early March, a group of armed men in uniform took him from the front of the CHRD office in Aloe Avenue Kolpity, Colombo. A colleague witnessed the event. Immediately, CHRD sent its lawyer to nearby police stations and found Stephen at Kolpity police station. Stephen was kept at the Kolpity station for two months, under a detention order. During this period Stephen's wife and his lawyer had regular access, and he told them that he was treated decently but that the CID had interrogated him.

On May 7, the Supreme Court (Halstrup) ordered his release and he went with his lawyer back to the office. Later Stephen's wife and three children joined him there, and a colleague volunteered to take them to her house. Since the Kolpity police had withheld Stephen's passport and national identity card, they went to the station and collected the documents. At this point the lawyer left. But some minutes later the lawyer got a call from the colleague who had accompanied Stephen that a few men in uniform abducted Stephen in a white van.

The car that carried Stephen was stopped by a motorbike just close by the Buddhist Ladies college (near Turret Road junction), with one man holding a pistol at the driver's side, while another man in uniform opened the side door, dragged Stephen out and then pushed him into a white van parked by the side of the car. There were many bystanders and Stephen's 8-year-old son begged the man in uniform not to hurt his father. Stephen's wife and others saw the men's faces, except for the man on the motorbike, whose face was fully covered. All were in uniform and armed with pistols.

Despite this, the abduction remains unsolved. There is no reason to believe that those who abducted Stephen were acting on any other instructions other than those from the people who authorised his detention in the first place. The entire responsibility for this abduction lies with the Sri Lankan government, as with those of tens of thousands of other victims of recent decades.

The zero status of Sri Lankan citizens today is perhaps best illustrated in the detention camps that have been created completely outside the law to house hundreds of thousands of persons whose lives have been constantly and tremendously disrupted by civil conflict. If detention centres within the framework of the PTA had some form of legality, the new detention centres, by contrast, have no legality of any sort. The internally displaced people are completely outside legal jurisdiction—a fact that even the former chief justice, Sarath Silva, acknowledged in June before a gathering at a new court premises, just prior to his resignation. Meanwhile, the Sri Lankan ambassador to the United Nations in Geneva responded to international concerns, stating that there was absolutely no problem with humanitarian access to the camps. He added that the high commissioner's offer of assistance would be accepted as soon as her office was "regionally a far more representative and transparent body". He further said that Sri Lanka is a sovereign country and would decide the degree of access it grants.

By the chief justice's own declaration, the people in the camps have been held completely outside the domestic law. By the invocation of "sovereignty" they are also being kept outside the purview of international law. After the chief justice spoke, members of a Sri Lankan family who lost their home in the fighting and were among those in a tent camp filed a case with the Supreme Court, asking that their rights as citizens—including the right to freedom of movement—be respected. The petitioner claimed that these people had relatives and friends who were willing to take them into their homes, but the Sri Lankan authorities were holding them by force inside the squalid camps. The court granted leave to proceed with the case and posted it for November.

In another case, the AG's department objected in court to an application by a family divided in four camps to be united. The family moved the court to allow a 13-year-old girl suffering from injuries to be examined by a specialist doctor. Despite the AG's claim that she had already been taken to a hospital, the court allowed the girl to be taken to a specialist.

It is not clear on what legal grounds the department objected to the family's application to be united, but what is clear is that refugees and displaced persons are those who choose to leave their homes due to life-threatening dangers. The decision to leave, and later to seek government help for an alternative place to stay, is their choice, though compelled by circumstances. Anyone in such circumstances has the choice to seek refuge or to live by his or her own resources.

No government has the right to keep people forcibly in refugee camps if they choose to leave and find their own means of living. No government has the right to force people to live under conditions to which they do not consent. Just as all citizens have the right of consent regarding what they do, whom they marry and under whom they work, they have the right of consent regarding their living circumstances. The only exception is people who have violated the law. Internally displaced persons are not criminals and therefore no government is entitled to treat them as such. The Sri Lankan government pledged before the United Nations Human Rights Council that it would resettle internally displaced persons within six months. However, this has not been possible, and nor was it seriously expected to happen, not only because of the lack of means to resettle people but because the government's approach to the people has been to treat them as the enemy. It has continued its militaristic methods, motivated by security fears, even though the security threat that the LTTE formerly posed no longer exists.

More importantly, the chief justice, the highest judicial officer of the sovereign nation of Sri Lanka, stated categorically that the internally displaced people are outside the legal jurisdiction of Sri Lanka. This raises questions on the meaning of the word "sovereignty" as used with regard to these people. The position of the Sri Lankan ambassador to Geneva on sovereignty is problematic, given the chief justice's forthright statement that he and the law he represents have no jurisdiction.

What defines sovereignty is the law. Anything that is outside the purview of law in Sri Lanka and outside the jurisdiction of the courts is outside its sovereignty. The tent people in Sri Lanka have been, by the very declaration of the chief justice himself, held through naked political power that does not subject itself to the law. The high-sounding claims to sovereignty as a defence against international intervention are nothing more than abdications of responsibility for protection. Protection is guaranteed only within a framework of law. When the law does not exist, claims of sovereignty are nothing but rhetoric to justify neglect.

The neglect of citizens also is not an attribute of sovereignty. If a state claims that it has a sovereign right to neglect its people, if it wishes to treat them as zeroes, this is a corruption of the use of the word sovereignty.

Sovereignty does not exist by the mere counting of heads. It is not within the power of a majority of people, for example, to say by raising their hands that murder or rape will cease to be crimes in their country. The decision to starve or deny facilities to one section of the population also cannot be decided in this way. Perhaps under the present conditions the government may even be able to get the majority of people to say that prosecution for crimes committed against the opponents of the government is unnecessary. Would that be considered an exercise of sovereignty?

The Sri Lankan government has extended its disregard of the law to the international sphere. By arguing that human rights and humanitarian assistance should remain within the purview of sovereignty, it has made a mockery of the international process. Not only were international monitors and agencies denied access to the camps, but elected politicians have also encountered difficulty in getting access to them. The People's Liberation Party complained that access to the camps was restricted and that even handing over aid donated for people in the camps was proving difficult. The leading opposition party, the United National Party, also repeatedly had to demand access to the camps and it has condemned the continued restrictions on their populaces.

The government argues that when compared to the risk to national security, the sufferings that internally displaced persons may have to undergo are of no importance. This is unsurprising, as it reflects their zero status as citizens in a country where public institutions also have fallen to zero. Whereas for centuries even the poorest people in Sri Lanka had learned to put up safe roofs over their heads when the rainy season arrived and live comfortably with warm cups of tea and homes arranged with their modest means, now even that much has been deprived to those in the camps. This tragic drama of the camps is also a metaphor for the tragedy of all people in Sri Lanka, living without roof or comfort under a political system that demolishes the institutions that should afford some sort of protection and relentlessly rains down all manner of injustices. Devoid of avenues through which to have genuine complaints genuinely heard, all that Sri Lankans can do is suffer. Abysmal lawlessness is the handmaiden of citizens' zero status; it offers no refuge or relief.

CHAPTER 8

Discussions on the 1978 Constitution

The Sirasa Rupavahini Television Service has conducted a series of discussions on the 1978 Constitution. This series has brought to focus some of the fundamental defects of this constitution.

The actual importance of the discussion on Sirasa TV is that the discussion on the constitution is being brought to the notice of the nation and therefore the discussion on a large scale is possible on this very important issue.

In these discussions the participants were the former Chief Justice Sarath Nanda Silva and Uditha Igalahawa, senior consultant to the Ministry of Constitutional Affairs. They have given clarification on some of the most basic issues relating to this constitution and some background about the evolution of its provisions.

The most important discussion so far has been on the 17th Amendment. In this discussion, the historical evolution of the 17th Amendment was given a prominent place. The significance of the contribution made by the British colonial administration through the introduction of the system of civil administration of Sri Lanka has been the foundation on which these reflections are based.

The British treated Sri Lanka as a model for their other colonies. The British in their own country developed a system of civil administration and they tried to model the administration that was introduced into Sri Lanka on the basis of what they had developed in their own country. The civil administration of Britain is one of its greatest strengths, and this same administration has lasted even up to the present day, with increasing sophistication and adaptation into various circumstances.

What happened in 1972 was basically interference into the basic administrative system that was introduced during colonial times, which had been adopted and incorporated into 1947 Constitution. In 1972 the Public Service Commission was abolished and the functions of the Commission were incorporated into the functions of the cabinet itself. Therefore, in 1972 the cabinet ministers took over the functions of the previous Public service commission.

Among these functions, the most important were the ones relating to appointments, promotions and disciplinary control of all civil servants. These were now undertaken by the cabinet. By this act there was a discontinuity caused to the traditions of the civil service which were introduced by the British.

In the British system, the position of the Permanent Secretary of a ministry was one of the most important functions. There were great examples of permanent secretaries who have played

prominent roles in shaping their ministries and therefore also shaping the traditions of the civil service.

Because of the Cabinet taking over the functions of the Public Service Commission, there came the problem of the politicisation of the civil service. The independence of the civil service was seriously damaged by direct cabinet interference into its workings.

In 1978, the Public Service Commission was restored but the positions of the permanent secretaries were not restored. But, at the same time, by the creation of the executive presidential system the functions of the ministers came under the control of the president. With this the process that began with the cabinet taking over the functions was now pushed further with the Executive President having the capacity to interfere into the appointments, promotions and disciplinary control and all matters relating to the civil service.

1947	**1972**	**1978**
PUBLIC SERVICE COMMISSION	CABINET	EXECUTIVE PRESIDENCY
CIVIL SERVANTS	CIVIL SERVANTS	CIVIL SERVANTS

The 17th Amendment

What was attempted by the 17th Amendment was to do away with this interference by creating commissions by which such appointments, promotions, transfers and disciplinary control could once again be made independent and divorced from the Executive President. In order to ensure the independence of the civil service, five commissions were appointed, and they were to ensure that the system functioned with the level of independence that was required in order to have a proper civil service, unaffected by direct interference from the president. These commissions were to be appointed by an independent Constitutional Council.

CONSTITUTIONAL COUNCIL
FIVE COMMISSIONS
PUBLIC SERVANTS

What the Sirasa Discussion Missed

The discussion thus far on Sirasa TV[26] is instructive in the presentation of the problem that is faced in the public administration in Sri Lanka. However, there was a major absence in this discussion of one fundamental aspect, one that throws a greater light on the problem that exists within the Sri Lankan system now.

The British civil service was grounded on the foundations of the rule of law. The British civil service, like the entirety of the British system, is based on the conception of the rule of law, which is well grounded within that country. In fact, the British, perhaps unlike anyone else in the world, are a nation who have built that nation on the respect for rules. The development for the respect of rules was the basis for the development of the norms of the rule of law.

British justice is based on the fundamentals of the rule of law, with an unsurpassed attachment to the principle of the supremacy of the law. The law is supreme and to establish that principle even a head of the king had to be sacrificed. The supremacy of the law, as against the supremacy of the king or ruler, is deeply entrenched into the system of British justice and therefore also the British administration.

Thus, any discussions on the British administration and whatever the heritage that had been communicated to Sri Lanka should be had within the framework of the fundamentals of the rule of law. The rule of law is the mother culture within which the civil administration functions.

If the whole issue of what was introduced into Sri Lanka by the British and what has been lost of late is discussed within the basic framework of the rule of law, different implications could be drawn into the problems that Sri Lanka is faced with today.

By interference into the system in 1972 and 1978, what happened was not just mere politicisation of the civil service, but, in fact, the abandonment of the supremacy of the law itself. The executive presidential system as envisaged by the 1978 Constitution placed the Executive President above the law. The provision of Article 35, as well as many provisions of the Constitution, should be seen as an attempt to displace the framework of the rule of law and to give power to the president to act without following the basic norms of the rule of law.

Conflict between the Judiciary and the Executive Presidency

[26] During the campaign period for the 2010 Presidential Elections the Sirasa TV channel conducted a series of discussions on the 1978 Constitution

In fact, what has happened since 1978 is interference not only in the civil service, but also in relation to the judiciary. In the discussion on Sirasa TV there was an attempt to give the impression that the interference of the executive presidential system on the judiciary was somewhat overcome by the judges themselves being in charge of the Judicial Service Commission. However, some of the more damaging aspects of the overall system of the rule of law happened through interference that was made by the executive presidential system, which interfered with the norms of the rule of law and the supremacy of the law dealing with the judiciary.

The impact of the presidential system on the judiciary could have been dealt with by the use of the concepts of the rule of law and the insistence on the supremacy of the law as the overall framework within which the 1978 Constitution should be interpreted. If this approach was adopted by the judiciary, Article 35 of the Constitution could have been interpreted within the framework of the rule of law.

What this means is that the absolute prohibition of bringing law suits against the president could have been interpreted by the Supreme Court as a prohibition limited to the extent that those lawsuits do not deal with instances where the presidential system has not interfered with the fundamentals of the rule of law. This means that where the fundamentals of the rule of law have been interfered with by the president, there the court has the power to entertain such cases and to deal with such matters.

For example, when the issue of the non-appointment of the members of the Constitutional Council by the president came before the court, the provision that the president was under the duty to make these appointments immediately should have been interpreted by the Supreme Court on the basis of an issue that is dealing with the supremacy of the law. As the non-appointments were creating a fundamental problem of the law, because they was interfering with the entire system of the rule of law, the court could have made the ruling on the objection that was made by the legal representatives of the Executive President on the issue of article 35.

If that was made, discussions could have gone into the more fundamental issue of the supremacy of the law, which could have brought the Sri Lankan president under the law like everybody else. Without dealing with the fundamental issue of whether the president himself is above the law or not, it is not possible to resolve the problems of the constitution that the country now faces.

This issue is not something that came only regarding the 17th Amendment; this issue came up very early on after the adoption of the 1978 Constitution. In fact, the first appointment of the president without an election could have been challenged on this basis. When the issue of a referendum came before the Supreme Court in 1982, the issue of the rule of law and the supremacy of the law should have been discussed, and the case should have been decided on that issue. Could the Sri Lankan president do away with that election of the members of parliament and postpone it for six years,

even by a referendum? If that is allowed, it is a blow to the supremacy of the parliament, which is the law-making body and which is a fundamental aspect of the rule of law.

There is no way to ignore the fact that there is a fundamental disturbance of the very foundations of constitutionalism, and that it is made by the 1978 Constitution. It is a blow against the supremacy of the law and the rule of law. Therefore, the fundamental issue is not just about the Public Service Commission and independent selection alone, it is about the limits of the executive and the functioning of the entire system within the framework of the rule of law.

Duty of the Judiciary to Protect the Rule of Law

That issue needs to be brought to the very heart of the discussion on 1978 Constitution. If it is not discussed, then even the discussions on Sirasa TV will not touch the fundamental disturbance in the Sri Lankan system of constitutionalism itself and the functioning of the system within the framework of the rule of law.

If our public services cannot function within a rule of law system, there is no future possibility for it to be brought back for the service of people with the respect for their basic rights and entitlements since for that to happen, the precondition is the acceptance of the rule of law and the supremacy of the law as the foundation.

If Sri Lanka's system is based on separation of powers, then it is the duty of judiciary to limit the executive power with the framework of the law. This may create a conflict with the executive, if the executive insists that it is above the law. In such a situation, the judiciary has no basis to avoid the conflict without abandoning the rule of law. If the judiciary dared to face the conflict, then the people themselves would have had the opportunity to intervene to save the rule of law system. However, when the judiciary avoids this conflict, the executive can, in fact, stand above the law. This, in fact, is what happened in Sri Lanka.

Sirasa TV should not avoid dealing with the fundamental problem of the rule of law that the country is posed with by 1978 Constitution. It was not for a joke that Dr. Colvin R. De Silva mentioned that this constitution is an imitation of the one made by Jean-Bedel Bokassa of the Central African Republic.

CHAPTER 9

18th Amendment: The Last Debate on the Constitution
written around the passing of the 18th Amendment

Sri Lanka has turned into a land of many quarrels but no debates. Often quarrels turn into violence, sometimes murder, and even worse. And the violence itself leads to new quarrels, and the cycle repeats. Sadly, hardly anything ever turns into a debate. Debate has become a lost art and no one even seems to remember what it is.

Take, for example, the question of the constitution. Among the debates of any nation, those on the constitution would receive the highest place. Not so in Sri Lanka. No one debates the constitution any longer.

The last debate on the constitution was on the 17th Amendment. There were many who argued for it and they did so for a long time. Interestingly, no one argued against it. The government's argument was that it was a good piece of legislation but that there were some defects in it. To cure the defects, the government killed the amendment itself; very much like cutting off the arm to save a finger.

In fact, in that last debate on the constitution, the government preferred to bluff rather than to debate. The real problem of the 17th Amendment was that it tried to impose limitations on the power of the Executive President. The limitations were on his powers to appoint whomever he wished to important positions in the civil service. The government did not agree to have any such limitations and did not wish to debate it. The government made the decision unilaterally and merely created some pretexts for doing so.

The problem for the government was that it decided that it was not possible to debate on the need to have checks and balances. It was not possible to say that this was a wrong principle. In fact, the government position was that it was a wrong principle as far as the government was concerned. The government believed that having no limits to its power is a better principle for governance, and that it is impossible to govern Sri Lanka with trying to abide by the checks and balances principle. Thus, the government believed that this principle of having checks and balances was wrong, at least for Sri Lanka. It had to be abandoned.

However, this was not something that could be said openly, as there is almost a universal belief that the principle of having 'checks and balances' is right. To say otherwise would be tantamount to saying that the law of gravity is incorrect. To debate the issue of the 17th Amendment was counterproductive. Thus, the only way out was bluff. And that was what the government did.

This example explains the reason as to why there are no longer any debates about the constitution in Sri Lanka. Debates involve principles and there cannot be a debate to reject all the principles on which constitutionalism is based. If one wants to rule in a way that rejects all these principles, then there is no point in debating. Besides, it would be counterproductive to say that our government believes that all principles relating to constitutional law are wrong.

The way out is to create a smokescreen. To have lots of quarrels going on and when you have the monopoly of the media it is easy to do that. The very style of the media in recent years has changed in order to trivialize everything. Trivialization is an essential component of creating quarrels and quarrels are quite an easy way of trivializing any issue.

To have 'no principles' is the very meaning of trivialization. From having shouting matches to some 'jokes' to tickle the audience is what the public get as their daily diet now. There are experts in the job now to keep the show going on.

Soon there will be some major changes in the constitution. However, such changes will not be preceded by any debates. As the proposed amendment is for displacement of limits relating to the president's power a debate will only create problems for the achievement of the government's plans. Indeed the proposed plan cannot be justified on the basis of principles relating to constitutional law. This change will also take place in the midst of some quarrels instead.

This constitutional change will also be introduced as a triviality, though its implications to the country are momentous.

What will this debate-shy society leave as a heritage for future generations?

The fatal night that changed the phantom democracy into a complete dictatorship

On the 9th of September 2010, Sri Lankans woke up to a country which had changed politically in its character and in its legal system. With the passing of the 18th Amendment Sri Lanka abandoned liberal democracy completely and all the debates that the country has had so far will now change in a most significant manner.

There is a Sinhala saying: "It is either Don or Simon, but it cannot be both". The 1978 Constitution which was an authoritarian constitution hid its façade through the use of liberal democratic jargon and maintaining the appearance of being a liberal democracy. This situation was one of being a phantom democracy. Externally, the parliament still existed and some activities went on as they had done in the past. The courts, whose functions had changed substantially, continued to function as if nothing had happened, following the procedures they has used in the past. However, in the delivery of justice things had changed fundamentally. In public life there were still some reference to the law, circulars and other procedures coming down from earlier times. The police, though in an extremely

poor condition, pretended to function with the façade of the rule of law.

As time passed from the beginning of the constitution of 1972, things became clearer and a process known as politicisation took place, which meant that the ruling party virtually obstructed the normal functioning of all of these institutions. However, the country was still referred to as a democracy both locally and internationally. The governments went to international forums claiming the country to be a democracy. In the international discourse, while the international community criticised many aspects of the rule of law system and democracy in Sri Lanka, still the country was recognised as a democracy.

What the 18th Amendment has done is to remove this façade. It has now completely abandoned any claim of having independent institutions. That everything will now be under the direct control of the Executive President is an accepted position. The parliament will serve the interests of the president. The courts cannot go beyond the authority of the president and all the public institutions, the police, the electoral commission and the public service will be ruled directly by the decrees of the president and not according to any set norms that should function within a rule of law system.

It was this change that the people understood well and for this purpose there was not much of a disturbance in the country about the passing of the 18th Amendment. When a person dies from a serious and fatal illness after suffering for a long time it does not come as much of a shock. It is not the same as in the case of a young, robust person dying suddenly. His friends would have known about the illness for a long time and would be aware that the person might die at any time. When the death occurs there is a sense of relief in the knowledge that it was going to happen at some point in time. The reaction of the population to the passing of the 18th Amendment was in many ways similar to this. The people have seen the degeneration of the electoral system and the elections taking place fraudulently. Whether this happens twice in the lifetime of a president or three times or more does not make much of a difference.

The people have seen the growing corruption. If the people see the already bad situation regarding corruption becoming worse, it comes as little surprise. The people have seen the extremely bad policing system incapable of maintaining the rule of law and the becoming subordinated to their political masters. If this situation was to grow worse, that also would not come as any surprise to the people. As for the public servants, if they had tried to follow normal procedures and do their jobs in the manner required according to the law, they had also been subordinated and harassed. Now, having to take orders directly from the political authorities without concerning themselves on the legalities or otherwise, also comes as no surprise to the people.

In all aspects of life the new situation only completes a course of change that has taken place since 1978 and since it is only the façade that has been removed the people are neither surprised nor shocked.

From now on the political and legal system of Sri Lanka will function as if under a dictatorship and there will no longer be any attempt to appear as a democracy.

It is this reality that the liberals in Sri Lanka should now face. It was the liberals that had the illusion about the 1978 Constitution being anything other than that of an authoritarian system. It was they who that tried to give democratic interpretations to this Constitution. It was no surprise that the left wing labour party Members of Parliament also voted for this amendment. One of the persons who voted was the leader of the small Liberal Party of Sri Lanka. Despite having worked extensively against the erosion of democracy brought about by the 1978 Constitution he had no difficulty in voting for the 18th Amendment.

It is the more progressive sections of society that have illusions about Sri Lanka having anything other than an authoritarian political system that has completely suppressed the legal system in the country. They thought it was possible to protect human rights within this authoritarian system. It is all these illusions that have now been exposed.

Any future struggle for democracy and human rights in Sri Lanka must now begin with the understanding of the political reality as it exists now, which is one of a completely authoritarian character. Within this setup there is no place at all for the rule of law. Both the rights of individuals in terms of civil and political rights, as well as property rights, will be challenged in the time to come and the courts will no longer be an effective forum in the protection of these rights.

The sooner this reality is grasped by the more progressive sections of Sri Lanka society the better it will be for themselves as well as for the people of their country.

"Sometimes, I feel that when institutions die, it's even worse than people dying."

Today in an emailed letter I received from a friend there was this sentence: "Sometimes, I feel that when institutions die, it's even worse than people dying."

This is a profound reflection. I showed it to several of my colleagues from different countries; Burma, Pakistan and Bangladesh. They all nodded, agreeing. I am sure if I had shown this to a Cambodian, he too would have understood and agreed with this statement.

The statement was a reaction to the passing of the 18th Amendment to the Constitution (8th September 2010).

A fatal night

My friend has grasped the profound significance of this fatal night and I am certain that many thinking people in the country would have thought the same way. At such events many people lose their normal reactions.

It would be no surprise if many people just remained silent and did not say anything at all about what had happened. Such signs of withdrawal are manifestations of an internal understanding that a great tragedy has taken place. To be just furious does not make very much sense when such things come to pass.

By such silence people demonstrate their understanding that their own lives are now trapped in the tragedy. They have no escape from it. Their first reaction is that they do not even know how to cope with it. Perhaps they begin to see that they will never know how to deal with it at all.

In such times many people come to realise that all their assumptions were wrong and it is always disturbing to realize that one's own assumptions could be so radically wrong.

When one's assumptions go wrong, all of one's dreams also die. What, for example, happens to a person who wanted to be a good lawyer, when he or she sees that law itself is now senseless? What of the person who thought that judicial independence was possible, when the possibility of that no longer exists?

For those who have wanted to believe that the Constitution of 1978 was not all that bad and lived in a state of denial, the 18th Amendment has removed all their doubts.

From now it would be difficult for anyone to continue believing in things they have believed in so far.

To remember September 8th, I extracted this quote, printed it and pasted it on the door of my office. It will remind me of what I share with the people of Cambodia, Burma and other similar places, in terms of the death of institutions.

Written before the passing of the 18th Amendment:

September 8--Black Wednesday to mark the end of liberal democracy

On September 8 the government will move 18th Amendment to the Constitution, which is to be voted on that day itself to remove the constitutional limitation of two terms on the president and to pass several amendments to the 17th Amendment so as to bring all public institutions under the direct control of the president. The 18th Amendment is seen as marking the end of liberal democracy in Sri Lanka.

The opposition has called the people mark September 8 as a day of protest and the Asian Human Rights Commission supports this call. All the freedoms and all the people of Sri Lanka will be suppressed by this constitutional amendment.

There are indications that the government may engage in mass arrests and harassment against the protesters.

The following explanation drafted by a group of Sri Lankan lawyers explains the content of 18th Amendment.

The preamble to the Constitution of the Republic sets out the "**Intangible heritage of the people of Sri Lanka"**-

".... assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA"

A few identified inconsistencies will be highlighted herein in order to establish that the urgent Bill titled 18th Amendment to the Constitution [hereinafter referred to as the Bill] *in toto* would require a special majority of Parliament together with the approval of the people at a referendum if it is to preserve this intangible heritage.

The Proposed Amendments (in brief):

The Bill titled 18th Amendment to the Constitution (the "Bill") envisages, inter alia,

a) the removal of the two-term limit imposed on a person who has held the office of President, by **Article 31(2)**,
b) to abolish the Constitutional Council and set up a Parliamentary Council whose observations would be sought in making appointments to the offices and Commissioners mentioned in the 17th Amendment;
c) to take away certain powers of the Elections Commission;
d) the inclusion of several provisions of a transitional character;
e) to repeal **Chapter VIIA** and amendment to **Article 107** of the Constitution through the

provisions in **Clause 4,** which would greatly damage the independence of the Judiciary;
f) to amend **Article 155G**, which is in conflict with Article 55. This will have an impact of diminishing the independence of the police

1. The Bill is *in toto* undemocratic & thus inconsistent with Article 1:

(a) Having regard to the effect of the proposed Amendment, the norms governing democracy encapsulated in **Article 1** of the Constitution are infringed and therefore the Amendment requires approval by the People at a Referendum for amongst others, the following reasons;

i. By virtue of **Clause 2(2)** of the Bill, the Incumbent President, at the expiry of 4 years of commencement of every term, would come forward as a candidate whilst holding the Presidency and whilst discharging executive powers;
ii. By virtue of **Clause 3(1)** of the Bill, the Executive President can also attend Parliament and enjoy all Parliamentary privileges, but is **not liable for any breach** of the said privileges;
iii. The Civil Service and the Police, which were protected under the 17th Amendment from political interference, have been completely removed, making the entire Civil Service vulnerable to interference by the Executive **at will** and **without safeguards**;
iv. The safeguards that were provided to ensure the integrity of the electoral process have been removed under **Clause 14** of the Amendment, exposing the Public Service and public resources to abuses

2. Tinkering with the 17th Amendment Infringes Article 3 of the Constitution- Clause 5

(a) The Hon. Attorney General was heard to say that the rationale of the present Amendment is to ensure that the Constitutional Council (Now, Parliamentary Council) would consist of only Parliamentarians and not outsiders. However, **Clause 5** therein, inserting the new **Article 41(A)** makes it possible for the President to make all appointments specified in Schedule I and II of **Article 41**(A), without any scrutiny whatsoever. This means that the President would make these appointments at his pleasure and none of these appointments can be challenged in a Court of Law by virtue of **Article 35** of the Constitution;

(b) It is not impractical to assume that the observations of the Parliamentary Council be totally ignored by the President and his powers will also extend to the appointments to Commissions, including the Public Service Commission.

3. Making Electoral Process Unequal –Clause 14 Inconsistent with Article 3

(a) The proposed Amendment to **Article 104** has a chilling effect on the integrity of the election process and franchise. The powers of the Election Commissioner to ensure a suitable environment for a clean election and equal suffrage had been guaranteed under **Article 104B**, whereby the Election Commissioner had authority to give appropriate directions to prevent abuse of State resources, State employees and the abuse of powers by the authorities that has direct and/or indirect effect on the elections;

(b) The conduct of elections is not only a matter of constitutional importance but also a matter of the International Human Rights framework, **Article 25** of the International Covenant on Civil and Political Rights [hereinafter referred to as ICCPR], which requires that every citizen of a State Party should ensure "genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

(c) In order to conduct free and fair elections, the independence of the Commissioner of Elections and the ability of the Elections Commissioner to control the electoral process is of fundamental importance. **(Thavaneethan Vs Dayananda Dissanayake Commissioner of Elections and Others 2001 1 SLR 177)**

(d) As decided by Their Lordships' of the Supreme Court, in ***Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections And Others*** **1999 1 SLR 157 at 188** his Lordship Justice Mark Fernando stated, "*The Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting is free, equal and secret.*"

(e) The suggested Amendment has the effect of curtailing the total powers of the Commissioner, resulting in exposing the Public Service and public assets for abuse during elections. This will not only affect the Public Finance but also makes an election unequal, unfair and partial;

(f) Further, right to vote is recognised as part of the Freedom of Expression as recognised in ***Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections And Others*** **1999 1 SLR 157** and therefore the proposed Amendment has a chilling effect on the total electoral process including the Freedom of Expression as guaranteed by **Article 14(a)** of the Constitution;

(g) Therefore the proposed Amendment in **Clause 14** is inconsistent with **Article 3** of the Constitution requiring the Amendment to be passed by the People at a referendum.

4. Proposed bill abdicates judicial powers

(a) Removal of two terms of the President needs to be understood in the backdrop of the

Presidential powers and immunity given to the President under Article 35.

(b) Immunity has been given to the President from suit, because there is a limitation of Presidential term. Removal of such limitation also extends the effect of Article 35, which deprives the court of its judicial power over the Presidential action.

(c) Thus, we submit that such extension takes away the judicial power of the people enshrined in Article 3 read with Article 4 (c), and substituting judicial power with legislative judgement on litigation. Thus, the bill is inconsistent with Article 3 of the Constitution.

5. An unfettered Presidency – Clause 2 & 5

(a) As per **Article 4(b)** of the Constitution the President exercises the executive power of the people but like every organ of the government exercises power as given by the Constitution. Intrinsic in that exercise of power are the checks which have been built into such exercise by the Constitution itself;

(b) Such limitations are those which are necessary to ensure that the executive acts within boundaries and to ensure that the powers of the executive Presidency do not go unchecked. **In such circumstances the term limit on the Presidency is itself a check imposed on the exercise of executive power; what the Bill seeks to do is to keep the President's powers intact while at the same time removing all perceived obstacles to the exercise of executive power**

(c) **Clause 2 & 5** of the Bill have the effect of removing the limit on the President's term of office as well as removing the restrictions on the exercise of his power would affect the manner in which the executive power of the people is exercised and would therefore impinge on **Article 3** of the Constitution.

6. Amendment of Chapter XVIIA of the Constitution – Clause 21

a) According to **Article 154G (2)** every Bill for the amendment of Chapter XVII must be referred to each of the Provincial Councils;
b) **Clause 21** of the 18th Amendment Bill seeks to amend **Article 154R**, which is part of Chapter XVIIA. The Bill has not been referred to the Provincial Councils.

7. For the above reasons amongst others, the 18th Amendment to the Constitution Bill requires approval by the People at a referendum.

7. Proposed bill abdicates judicial powers

(d) Removal of two terms of the President needs to be understood in the backdrop of the Presidential powers and immunity given to the President under **Article 35**.
(e) Immunity has been given to the President from suit, because there is a limitation of Presidential term. Removal of such limitation also extends the effect of **Article 35**, which deprives the court of its judicial power over the Presidential action.
(f) Thus, we submit that such extension takes away the judicial power of the people enshrined in Article 3 read with **Article 4 (c)**, and substituting judicial power with legislative judgement on litigation. Thus, the bill is inconsistent with **Article 3** of the Constitution.

The 18th Amendment destroying democracy by manipulation of the democratic process itself

A simple way of understanding the 18th Amendment is to compare it to the situation in the United States of America. The president of the United States is elected for a term of four years and is entitled to remain in power for a maximum of two terms. This is an absolute limit. Suppose this limit was removed and a US president could contest the election and remain in power for an indefinite period of time. What difference would that make to the entire system of governance in the country; to understand that we have to go into the principle of this absolute limitation.

The principle is that any person who is vested with extraordinary powers should be subjected to limitations and the principle behind that is that no human being is worthy of absolute trust. No one will be trusted with power absolutely. Entrusting power must be accompanied with the placing of limitations to that power. The limitation of two terms was made on that basis. Behind this is the whole notion of binding power. Power should be bound otherwise power can destroy the very things it is supposed to protect.

A nation can be destroyed by the political power of one person. The idea of checks and balances within a presidential system is connected to the placing of limitations on the terms of the presidency. If in the United States the president can remain in power for an indefinite period of time that would affect every institution within the country. The president is only one component of the power of the state. There are so many components that have to function independently if the state has to function correctly, to provide security for the people in order govern in such a way that a society can be managed for its own benefit.

When the head of a state has the possibility of remaining in power indefinitely he will interfere with all the other units; the Attorney General's Department, the courts, the police, the public service and all other independent components of power. All those components that deliver services will be interfered with when one person has unlimited power.

If the president of the United States of America can be elected indefinitely it would turn the entire system upside down. The system simply cannot function anymore. The ruling individual will become the nation and the nation will be subordinate to this ruling individual rather than this ruling individual serving the nation. This is the whole conception of power that is at stake. The 18th Amendment is challenging one of the most sacred notions that has been developed by civilisation: that power must be bound, power must be limited and that this is the only way to preserve the sovereignty of the people, the independence of the nation and that the power of the individual will not become a destructive force.

The discussion on the 18th Amendment at this stage is simply irrelevant. If there is a president that is able to stay in power indefinitely whether there will be an 18th Amendment or not is simply irrelevant. It will be dealt with by the president in the same way it was dealt with in the past.

The issue at the moment is not so much on the 17th Amendment but rather the issue of the time limits to the power of the president. If this principle is taken away Sri Lanka will be pushed together with those nations where all principles have been abandoned. In 1978 one of the constitutional experts declared that Sri Lanka was going in the same path as the Central African Republic where Jean-Bedel Bokassa introduced a constitution with absolute power. Today it has taken a further step downwards. We cannot remain as a civilised nation if a limit on presidential power is not imposed.

This is not about an individual, this is about a nation. Is the nation more important than a particular individual or not? This is what is at stake. It is a moment of enormous importance and a step taken in the wrong direction can plunge Sri Lanka into political anarchy for many years to come.

Fundamental aspects of democracy cannot be changed even with a two-thirds majority and referendums

One of the lessons that have been learned from history by democratic nations is that under certain historical circumstances democracy itself can be used in order to destroy democracy. The emergence of Adolf Hitler through popular vote and the subsequent developments brought home to the population in Germany that there were limitations in their past understanding of constitutionalism and this led to the leaving of room for persons with tyrannical ambitions to subvert the whole process of democracy and turn it into fascism.

In the post world war period one of the serious concerns of the German people was to find ways to prevent the possibility of the manipulation of democratic forces to destroy democracy itself. The entire constitutional law was rethought and new mechanisms were developed to prevent the recurrence of this possibility.

One of the fundamental notions developed was that there are certain fundamental aspects of democracy which should be written into a constitution and these aspects cannot be changed even by a two thirds majority or a referendum.

A major weakness of the 1978 Constitution was that it created room for the easy manipulation of the constitution by the use of a two thirds majority in parliament and by referendum. As J.R. Jayewardene was moved by authoritarian ambitions it was not to his benefit to incorporate the developments of democratic nations relating to this important aspect. Thus, the 1978 Constitution left room for the destruction of democracy itself by the manipulation of the two thirds majority and the referendum process.

The limitations on the terms of the presidency and provisions for checks and balances against the abuse of power should be kept as an unchallengeable and unchangeable part of a democratic constitution.

A Comment

Dr. J. de Almeida Gunaratne (PC)

Some Reflections on "Gyges' Ring: The 1978 Constitution of Sri Lanka" by Basil Fernando

Preliminary Remarks

Woven around the story of Gyges' Ring as described in Plato's *Republic***,** Basil Fernando (sometimes referred to as "the writer" in these reflections) traces the governance structures in the country, starting from colonial times, moving into the changes that have ensued since gaining independence, which resulted in the first Republican Constitution of 1972 (which claims to have derived its legitimacy from the sovereignty of the people, autochthonous, a claim which the writer demonstrates as being in effect a myth), finally leading to the second Republican Constitution of 1978, which he argues as being the genesis of all the evils that have over the years destroyed the very concept of Constitutionalism and the Rule of Law, in as much as the central concept of the Constitution is the office of the Executive President, who is rendered unanswerable for all intents and practical purposes to the Constitution itself.

Although this is not the first time that such a lament has been expressed, given the fact there were many voices heard even when the Constitution was in its draft stage, the feature that stands out in the writer's critique is the manner in which he has provided insights into the express provisions and workings of the Constitution, with reference to practical events culminating in the 18th Amendment, the final nail that has sealed the coffin.

In these brief reflections, which the writer himself requested me to spare some time for, I have made an effort to comment on some of the specific aspects brought out in the book.

Re: The fact of functioning of the Constitutional Council (C.C.)

The point that the C. C. of Sri Lanka is not a judicial body (in contrast with the French Constitutional Council and/or the Constitutional Court in Germany) is true. Then what was the wisdom in creating this Council for Sri Lanka (Vide: 17th Amendment)? Particularly when its functioning could be brought to a halt as is the case at present?

The problem lies in the fact that under the 1972 Constitution (and its precursor) appointments to the higher judiciary were made by the Executive Head. This was (by convention) on the advice of the PM (who was a member of parliament), while under the 1978 Constitution, the Executive Head who is vested with the duty of making such appointments, is not under obligation to consult anyone. It is this fact, coupled with the Presidential Immunity (Article 35), that has made a fundamental difference.

Thus, the provision in the Constitution which gives the impression that the said Westminster model provision is still present in the 1978 Constitution is another farcical exercise on the part of the framers, "a Constitutional Pretext" as the writer comments.

Re: Checks and Balances

It was thought at the time of the promulgation of the 1978 Constitution that the inbuilt provisions of the Constitution that put the power in the hands of Parliament **to impeach the president** were a sufficient check on the President's office. However, other provisions in regard to the President's power to **prorogue** Parliament (though he/she loses his/her power to **dissolve** parliament when an impeachment motion had been entertained by the Speaker) rendered the so called **check** also to be another farce, which was seen in its practical working in the year 1991, when President Premadasa countered an attempt to impeach him by using the constitutionally granted power of the President to **prorogue Parliament.**

This is another point that may be highlighted, and lends support to the theme pursued by the writer, that the whole design behind the framers of the 1978 Constitution was to create an authoritarian/answerable-to-no-one kind of Presidential rule, indeed, rendering the 1978 Constitution **fundamentally flawed** in the sense that it paved the way (as has been experienced and been from its inception to the present times), for the arbitrary exercise of governmental power, thus in turn going against concepts of good governance, public trust and indeed the Rule of Law and the very notion of "constitutionalism," which the writer pertinently interprets in the words:-

> "Thus, the purpose of this Constitution was not to create a Constitutional government but to liberate the President from a Constitutional form of government".

Indeed, the day may not be far away in which this could be used, if the President is sought to be impeached on some future date on any of the decreed grounds in the Constitution, the argument may well be forwarded that an act on his part is immune from judicial review, going by the argument of counsel opposing the litigation initiated by the former Army General Sarath Fonseka.

Re: Functioning of the Police Authorities (failure to insulate Presidential interference)

The following observations may be made in this context:

With his characteristic ability to say so many things in a few words, the writer demonstrates the very genesis of and the need for the enactment of the 17th Amendment as being the first ever and only strike at the untrammeled powers of an otherwise unchecked exercise of Presidential Power.

But, as he points out, that effort was also inadequate on account of the provisions of that Amendment itself, which left the balance still in the hands of the President, enabling him/her to prevent public authorities from benefiting from the measures per se proposed by the said Amendment and Parliament itself failing to ensure the proper implementation of the law (the said Amendment it created).

However, it must be noted here that Parliament (which had brought in the 17th Amendment), was at the time composed of a majority of members of a political party (The United National Party), and the Prime Minister who being from the said party, was opposed to the political party which the President at the time was representing (The People's Alliance Party). Those events had taken place in the year 2002, and with the President's party regaining once again a Parliamentary majority later in the year 2004, the promised checks and balances (under the 17th Amendment) stood removed once again.

Perhaps, in that regard and context, the writer could or ought to have reflected on the aspect **of the unenlightened franchised population of the island nation.** After all, has it not been said that,

"A country gets a government that it deserves"?

Re: The section on "Distribution of power between the Centre and Public Authorities"

I would like to make the following observation in this context (vide:) the reference to the Centre acting in fact through just one person.

But, in my view, the 1978 Constitution made it possible for another modified version of what the writer has lamented on and that is, one person ultimately to have control, with answerability owed directly to him/her (the President) by those executing administrative power. This is the model President Premadasa conceived of (in my view) which led to the Transfer of Powers of District Secretaries Act in 1992 – the unenviable successor to the government agents during the British Raj to the Divisional Secretaries concept directly being made answerable in practice to the Presidential Secretariat.

In my own view, this approach adopted by the then President which earned him the dubious referential slogan "one man show", worked well. He certainly did not kill "every aspect of rational government" as the writer says but rather saw to it that, the day to day working of the public sector functioned effectively.

But I do concede that, sans such personal and committed (indeed direct) involvement with the functioning of the public service, such a model cannot be worked as was seen after President Premadasa's assassination in the year 1993. This is practically witnessed in litigation, particularly in the context of land alienations (under the Land Development Ordinance, the Land Settlement Ordinance and the State Lands Act (with its amendments) and the Land Acquisition Act compounded by the provisions of the 13th Amendment to the Constitution (with Divisional Secretaries, District Secretaries, Land Commissioner General of the Central Government and Provincial Land Commissioners (vide: the Provincial Government Concept) and "so called" devolution.) (N.B. in the context of which I as a practicing lawyer have had to argue several cases.)

Re: Chapters 3 and 4

Commencing with what the writer refers to as **"Paranoia of the Regime in Power"** then proceeding to discuss **"the Coalition of 1970-75"**, **"the Post 1977 Regime"** and "the other factors" leading to his comments on a resultant **constitutional development based on** districts (in Chapter 4), and Chapter 5 on (whether) the judiciary has been diminished in value, are coruscating pointers, which to my knowledge and awareness, have never been touched upon before, leave alone being academically and/or professionally critiqued, and may warrant some reflection from my own perspective.

The writer poses the question,

"Has the judiciary been diminished in value since 1978 and why?"

In that regard I make the following comments:

The acumen the writer possesses and the respect he wields as a committed person to human rights need not be overstated. I will not hesitate to bear testimony personally to this, if anyone dares to challenge this, by referring to dialogues I have had personally with even members of the higher judiciary (some of whom have retired since and some who are sitting justices).

However, with all due respect to the writer, his focus is solely on Civil and Political Rights. Even in that regard, given all the draconian provisions of the present Constitution, I would have liked/appreciated if the writer had referred to some of the progressive judgments handed down by the Supreme Court under the 1978 Constitution in the context of its fundamental rights jurisdiction, such as, the ***Veeradas*** **decision,** ***the Mahinda Rajapakse*** **decision,** ***CPA v. Dissanayake, Kanapathipillai v. Dissanayake and others***. (Though, I concede, such decisions were few and far and between.)

Given the fact that Human Rights are indivisible (social-political rights being an integral part), has not the Supreme Court addressed such rights? (Vide: land rights of affected persons which the Supreme Court, in ***Heather Mundy v. CEA & Others*** (SC/58/03 -- SC Minutes of 24/01/2004) addressed, going to the extent of establishing a link of its FR jurisdiction with Article 140 of the Constitution (which confers power on the Court of Appeal to grant orders in the nature of Writs) through the conduit of Article 126 (3) of the Constitution, which had been foreshadowed in its earlier decision. ***(W K C Perera v. P. Edirisinghe*** (1995 (1) SLR)

Perhaps the writer could have argued that individual judicial initiatives cannot provide an answer to what he asserts as how the Constitution (1978) has impacted on the Courts (for most of those decisions were handed down by the late Justice Mark Fernando).

(N.B. I reflected on these aspects for I appeared as counsel in the cases referred to above).

(a) Apart from reference to the above (Civil, Political and Socio Economical Rights), in the context of Public Law there remains a large area of litigation that has no reference to those concepts. (NB: In the area of private litigation, land disputes on Partition, Land Lord-Tenant disputes, Divorce actions, Delictual actions, labour disputes and the like). In those contexts, one has yet to hear a cry from the public that the courts are dysfunctional.

(b) Consequently, the 1978 Constitution, with all its shortcomings per se and the designed traps to create an authoritarian one man power regime in favor of an

Executive President, in my view, has not impacted on the ordinary litigating citizenry, which perhaps explains as to why Article 35 of the Constitution also has been a matter of general non-concern to such litigants.

(c) Given the writer's undoubted prowess to address issues, I would request him to address the aforementioned matters.

6. Re: Chapter 6

01. This chapter reflects on the Writ of Habeas Corpus in regard to its working in Sri Lanka from colonial times to the present under the 1978 Constitution.

02. While acknowledging the effort made in the work by the co-writers on the working of the Writ of Habeas Corpus, the writer at the same time expresses further concerns in his observations at pages 59 to 82, in effect saying that, the work ought to have referred to and addressed more on the aspects of:-

(a) "Political understanding of the concept of forced disappearances."

(b) Impact of Article 35 in the Constitution

(c) And, on what he calls "Non-Existence of judicial Power vis a vis the marginalization of judicial power" and then proceeding to comment on their implications on the study on Habeas Corpus in Sri Lanka (vide: pages 80 to 82).

(d) It is indeed a pity that the said work had not been referred to the writer for purposes of review and critiquing.

7. Re: Chapter 7 (Abysmal lawlessness and the zero status of citizens)

01. The writer poses a plethora of question which he develops culminating in "the lost meaning of legality" (as the writer calls it).

02. Subsequently, he proceeds to demonstrate a link between the concept of legality and how it was disappeared through propaganda.

03. Perhaps, in that context, the writer ought to have spoken of Media

responsibility and its failure (which I perceive as an important aspect to be addressed).

04. The writer's passion and intense commitment to human rights and their protection and to voice his protest irrespective of whatever political regime that might be in power at any given time features like a recurring decimal from page 84 right till the end of the book.

His ability to expose and consequently condemn in coruscating style, with the stroke of his pen, social hypocrisy and double standards on the part of self proclaimed elitists is one aspect that struck me most. The writer's conceptualization of "the supreme controller" and events traced through power handling personalities leading to the gradual destruction of public institutions (the Police and Attorney General's Department in particular) are the other aspects.

05. However, I have one reservation in the writer's survey on the destruction of public institutions and that is the non-reference to the Administrative service and its functioning. While conceding that the writer's specific focus is on the gradual decline of public institutions (that are expected to protect Civil and Political Human Rights, vide: the Police and Attorney General's Department), perhaps, ideally, some lines might have been devoted to the functioning of the Administrative service relating the same to the periods referred to at this section of the book.

Although I am not possessed of a pen of a ready writer like Fernando, whenever I have been afforded the opportunity at seminars and workshops as a speaker, or as a teacher at legal institutions or as counsel in Court, I have strived to highlight the other aspect related to human rights (vide: socio-economic aspects) in regard to the positive initiatives (during the period 1988-1993) taken by President Premadasa when he was **"the supreme controller"**.

The administrative service was employed by him to focus on promoting the Socio Economic rights of the underprivileged. Through effective implementation of some of the legislation he had initiated during the period he was Prime Minister (though under the 'supreme controller' at the time J R Jayawardena), such as amendments to the Rent Act 1972, The Debt Conciliation (Amendment) Act of 1983 and the National Environment Authority Act of 1980, to name a few, when he had gone to the extent of

saying that, “Even AR’s and FR’s would not hamper the drive to empower the poor.”

06. True, President Premadasa has gone down in the political annals of Sri Lanka as a man who murdered Sinhala youth (thus, flouting the civil- political aspect of human rights) but then, it was in the context of an insurrection (Southern Sinhalese).

The very “people” (the English speaking and so called “elitists” who had not found him to be acceptable as “the supreme controller”, only because of his social background and caste) had only been interested in the issues which had concerned them investing in the share market and making millions after the JVP (Southern insurrection) was quelled. Yet, on his assassination, I suspect (or should I say, I know as a fact) none of them ever spared a reflective thought of condolence for the man. Fernando talks of the “elitist” concerns and propagandist mind set (vide: Rajiva Wijesinghe on Richard de Soyza’s killing). Taken further, the point I have strived to make is to demonstrate that mind set on a generalized level. Indeed, I reflect at this point on those immortal words of William Shakespeare that,

> ´There are no comets seen when beggars die but the Heavens themselves blaze forth the death of Princes.”

07. On hearing of the assassination of President Premadasa, neither any comets were to be seen nor did the heavens blaze forth. But crackers were lit, (by whoever) celebrating a death per se (by some citizens of this so called ‘Dhammadeepa’ - through the encouragement of propagandists or politically opposed persona), elements employed by Basil Fernando in his book.

08. To my mind, that was the point of time and day that the citizens of this island nation were reduced to zero status.

09. Fernando says thus:

(A) “When all legal entitlements are deprived to citizens their formal rights are insignificant...” I do not agree.

(a) What are all legal entitlements?

(b) What are formal rights?

(B) “Their entitlements are on statute books but have no actual relevance...” (Fernando proceeds)

(a) I presume the reference to the statute book is in re the Criminal Procedure Statute, the Evidence Ordinance and other related legislation. (Political, which have been rendered irrelevant re: Civil-Political rights)

(b) But, what about Socio Economic Rights? (Are those rights not a part of the human rights spectrum?)

(c) Subject to that drawback (as I perceive) in Fernando’s book, (while conceding once again his focus has been on Civil-Political aspects) as per his narrative. I am compelled to suggest that, Fernando take up the challenge in a separate (additional) paper bringing in and addressing the wider (indivisible) concepts of Human Rights (not confining the discussion to Civil-Political issues to accommodate Socio-Economic issues as well).

8. **In conclusion** (in that regard), while I agree with Fernando’s assertion that the present scenario is one, that could be construed as a state of abysmal lawlessness which has led to the zero status of citizens, the said assertion needs to be modified or qualified by reference to the following:- (vide)

(a) The abysmal lawlessness has resulted in the context of Civil-Political Rights of the citizenry.
(b) Whether the same holds good in the context of Socio-Economic Rights/expectations is an aspect that needs a separate analysis.
(c) Whether “the zero status of citizens” is one that has been brought about by the citizenry itself (whether by propagandists' action, the media or in general elitist dominated social attitudes).

9. Re: Chapter 8- Discussion on the 1978 Constitution

01. There is hardly anything to be said in regard to the points made in the said chapter save for the reference to Dr Colvin R De Silva where, the writer seems to acknowledge Dr. de Silva’s lament.

02. However, an aspect, Fernando fails to address is, it was this same Dr de Silva (who was then acknowledged as the prime architect of the 1972 Constitution) who had been responsible for destroying the independent Judicial Service Commission (which had functioned under the Soulbury Constitution) and replacing the same with a Judicial Service Advisory Board and a Judicial Service Disciplinary Board (both of which were brought under the superintendence of the Cabinet of Ministers (the executive) thus destroying the very concept of separation of powers). (N.B. Although Dr. M. J. Anton Cooray interpreted the 1972 Constitution as establishing four pillars in the temple of Justice (going further than the three pillars referred to in the celebrated decision in ***York v. Toronto Corporation per Lord Atkin*** towards ensuing the independence of the judiciary). (Incorporated in the Soulbury Constitution).

03. The same was done in the 1972 Constitution in regard to the Public Service Commission (constitutionally ingrained in the Soulbury Constitution of 1946 by splitting it up into two bodies. vide: the State Service Advisory Board and The State Services Disciplinary Board, both of which were brought under the aegis of the Cabinet of Ministers.)

04. At least, the 1978 Constitution restored some of the values enshrined in the Soulbury Constitution by bringing back an independent Judicial Commission as well as an independent Public Service Commission, only to be undermined by the incorporation of Article 35 (the concept of Presidential Immunity) which therefore stood, properly construed, as the popular saying goes, “The 1978 Constitution took away from what it gave with one hand with the other.”

05. Perhaps, these are some aspects Fernando might and/or ought to have addressed.

10. Re: Chapter 9 - 18th Amendment - The last debate on the Constitution

Adopting a dramatic approach he opines how in one fatal night democracy was changed into a complete dictatorship.

I could not agree more. Indeed, “Sometimes, I feel that when institutions die, it's even worse than people dying.”

I might add, while agreeing with Fernando, that the said 18th amendment tolled the death knell on whatever remnants that may have still remained, notwithstanding the efforts made by the "Supreme Controller" prior to counter them.

Worse was the fact that, the Supreme Court sanctioned the said Amendment. So, in constitutional terms, the watchdog of people's rights (in whom sovereignty is supposed to reside, (Article 3) and on whose behalf the courts (including the Supreme Court) are supposed to exercise judicial power (Article 4 (c) and (d) of the Constitution) had done the exact opposite.

The legal and/or constitutional effect of the said 18th Amendment is commented upon by Fernando. I have little to add to his well analyzed effort in that regard, save as to say that,

> In addition to the comments made by him re: making the electoral process unequal, the principles enunciated in ***CPA v. Dayananda Dissanayaka*** (2003 (1) SLR 277(SC) per Mark Fernando j. perhaps could have been commented upon. (N.B. in which case I appeared as senior Counsel.)
>
> The very passage of the 17th Amendment itself might have been reflected upon re:
>
> (a) The establishment of the Constitutional Council and consequential steps,
> (b) A National Police Commission,
> (c) A Public Service Commission, etc.
> (d) But could the existing powers in the hands of the President to make appointments to the higher judiciary (Court of Appeal/Supreme Court) have been taken away by the said 17th Amendment? (In regard to Article 4(b) of the Constitution read with the provisions in the Constitution relating to the said powers, without a Referendum as decreed by Article 81 of the Constitution?)
> (e) Consequently was the passage of the 17th Amendment a collusive act on the part of a parliamentary government (UNP) supported/sanctioned by the judiciary, to subvert Article 4(b)?
> (f) (See my article in the Kamalasabesan Commemoration (inaugural) Volume on this aspect.)

11. My Final Assessment of the book by the writer

01. I emphasize that the book must surely rank as a commendable effort in commenting on the negative direction the island nation is leaning towards, negative in the sense of the gradual

deterioration of the values ingrained in the concepts of the Rule of Law, good governance, and public trust related as they are to people's rights and their legitimate expectations.

02. Subject to some comments contained in this reflection, perhaps echoing some reservations in regard to some views and stands taken by Fernando in the book under review, which review I was requested to undertake by Fernando himself, knowing very well that some of my views would not altogether be in consonance with his, these perspectives are ones that should/ought to be made a reference source in the Sri Lanka Law College and University curricula. I certainly would be taking initiatives, being a current resource person (teacher) in the said institutions.

03. Coming finally to "Glaucon's story about the Ring of Invisibility and J.R. Jayawardena's legacy", indeed, the man who had found the ring not only used his powers to enter the palace, rape the queen, kill the king and take over the throne, but he also paved the way for others who succeeded him in putting the ring on their finger to go even beyond what the ring itself might have not envisaged initially as possessing within its power.

Dr. J. de Almeida Gunaratne (PC)

Commencing with what the writer refers to as "Paranoia of the Regime in Power" then proceeding to discuss "the Coalition of 1970-75", "the Post 1977 Regime" and "the other factors" leading to his comments on a resultant constitutional development based on districts in Chapter 4 and Chapter 5 on (whether) the judiciary has been diminished in value, are coruscating pointers, which to my knowledge and awareness, have never been touched upon before, leave alone being academically and/or professionally critiqued, may warrant some reflection from my own perspective. …..His ability to expose and consequently condemn in coruscating style, with the stroke of his pen, social hypocrisy and double standards on the part of self proclaimed elitists is one aspect that struck me most…… I might add, while agreeing with Fernando, the said 18th amendment tolled the death knell on whatever remnants that may have still remained, notwithstanding the efforts made by the "Supreme Controller" prior to counter them. Worse was the fact that, the Supreme Court sanctioned the said Amendment….. Coming finally to "Glaucon's story" about the Ring of Invisibility and J.R. Jayawardena's legacy" indeed, the man who had found the ring not only used his powers to enter the palace, rape the queen, kill the king and take over the throne, but he also paved the way for others who succeeded him in putting the ring on their finger to go even beyond what the ring itself might have not envisaged initially as possessing within its power.

- Dr. J. de Almeida Gunaratne (P.C.)

Anyone who would want to replace a constitutional court by appointing the head of the executive branch as the 'Guardian of the Constitution' - as Carl Schmitt wanted to do in his day with the German president - twists the meaning of the separation of powers in the constitutional state into its very opposite. (*Between Facts & Norms, pp. 242-243*).

The placing of the executive president outside the constitution itself, in that he alone can violate its terms and be beyond punishment, which Fernando in chapter five describes as a feature of the 1978 charter, is exactly as Schmitt would have had it, since the guardian cannot be bound by the constitution but must always stand beyond it.

- Nick Cheesman
A Ph.d candidate at the Australian National University

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