Wasted Years

Short Essays on the 1978 Constitution of Sri Lanka

(Published on the occasion of the 73rd Independence Day – 2021)

ASIAN HUMAN RIGHTS COMMISSION

Wasted Years

Short Essays on the 1978 Constitution of Sri Lanka

(Published on the occasion of the 73rd Independence Day -2021)

By Basil Fernando

Asian Human Rights Commission (AHRC)

The AHRC is a non-profit making organization primarily committed to promotion of sustainable development in less developed countries in Asia. AHRC particularly is interested in implementation of Goal No.16 of the UN Sustainable Goals (SDG) 2030, in pursuing institutional reforms to enable access to justice, particularly for the poor.

Contact Details:

Asian Human Rights Commission

G/F, 52 Princess Margaret Road, Ho Man Tin, Kowloon,

Hong Kong

Tel: +(852) 2698 6339

Fax: +(852) 2698 6367

Web: www.humanrights.asia

Email: info@ahrc.asia

Facebook: https://www.facebook.com/asianhumanrightscommission

Twitter: @humanrightsasia

AHRC has published extensively on Democracy, Rule of Law and Human Rights in Sri Lanka. Following are some references.

Narrative of Justice in Sri Lanka

Gyges' Ring – The 1978 Constitution of Sri Lanka

TORTURE: AN ENTRENCHED PART OF CRUEL, INHUMAN & DEGRADING LEGAL SYSTEM

Deterioration of the Legal Intellect in Sri Lanka – A Miraculous Cure is Possible

නීතිය සහ විනය

අලුත් ව්‍යාවස්ථාවක් කුමටද

Acknowledgements

This book consists of articles and reflections published in several publications. We particularly acknowledge with thanks, Colombo Telegraph, Ground- Views and AHRC List Server. We also express our thanks to Marya Zaborowski for help with editing.

Contents

Sri Lanka

Introduction

In the book *Hold Me in Contempt*, Dr. Shirani Bandaranayake provides an individual narrative illustrating the undermining of the independence of the Judiciary and the Rule of Law in Sri Lanka. In this response, the attempt is to show that this individual instance is a manifestation of a much more serious sickness affecting the whole of Sri Lanka. It has spread into all vital aspects of its systems of governance. They are the administration of justice and the people's security. They are all areas of social life – the very moral and ethical foundation of society, and all aspects of social psychology. The basic premise on which all the ideas expressed in this work are based, is the notion that the Constitution and legal system is the base and foundation on which all the health of social institutions rest. Any serious deterioration of that foundation adversely affects public institutions and also the individual psychology of every person living under those circumstances. Psychologically and spiritually, such a situation causes demoralization and depression, which, in turn, generates reckless patterns of behavior in politics, economics, social and cultural spheres. The first step towards overcoming this sickness is to come to a collective understanding and awareness of this condition. All religious and cultural traditions acknowledge that self-awareness about what has gone wrong is the unavoidable first step in seeking ways to correct these wrongs.

This response is seminal in nature. Its aim is to contribute to a discussion on very difficult conditions that Sri Lankan people have fallen into. The aim is to of provoke thought on solutions to these problems. The condemnation of individuals or even political parties may be symbolic in relation to how deep the desperation of people is under the present conditions. However, there is a need to transcend and rise above such downward expressions. A collective understanding on the basis of in-depth studies, reflections and education seems to be the only way to arrive at a cure.

A submission on the making of a new constitution

1.This submission is made on the assumption that the attempt to make a new constitution is an act done in good faith, motivated solely by the attempt to address what has gone wrong with the system of governance in Sri Lanka and with a view to provide for the basic legal structure for sustainable form of governance that will serve the best interest of everyone in the nation. If that were not the case, if the attempt to make a constitution would merely be a means of entrenching methods for the abuse of power, further limiting the people's right to participate in governance, then these submissions would be of no use.

2. Without a sustainable legal order to achieve the objectives of the nation in overcoming the tremendous economic crisis, the result is a deepening social crisis and the descent into lawlessness and anarchy. A well-functioning transparent system encourages investment and provides both justice and stability to a nation, facilitating its development. Therefore, constitution-making must be made with a free and frank discussion and an open acknowledgement of where the existing constitutional order has failed. If, instead, the purpose of the constitution-making is an attempt to further strengthen the existing constitutional system on the basis of 1978 Constitution and the principles on which it is based, then such a new constitution will continue the harm that has already been done to all areas of life in society, and therefore would be further harmful to the nation and its people.

3. If the attempt is to undo the damage that has been done by the 1978 Constitution, the first principle on which the entire constitutional structure should be built is the principle of rule of law. The essence of this principle can be summed up in the following words from Tom Bingham:

"The core of the existing principle [of the rule of law] is… that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of law publicly made, taking effect (generally) in the future and publicly administered in the courts."

Further to this, he articulated eight principles:

1) The law must be accessible, intelligible, clear and predictable.

2) Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.

3) Laws should apply equally to all.

4) Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.

5) The law must afford adequate protection of fundamental Human Rights.

6) The state must provide a way of resolving disputes which the parties cannot themselves resolve.

7) The adjudicative procedures provided by the state should be fair.

8) The rule of law requires compliance by the state with its obligations in international as well as national laws.

4. The existing constitutional order under the 1978 Constitution is based on rejection of the principles of rule of law, and this has led to the common consensus existing now in the whole country as well as abroad that Sri Lanka is a lawless nation. If that situation is to be changed, the constitution must provide for the principles which enable the principle of legality to be the primary concern in all the actions within the state, whether it be actions of the state or of private parties. Any law that allows the principle of legality to be undermined will only result in further continuing the situation of lawlessness, which acts against every aspect of life, including economic development, social stability, protection of all citizens and the overall functioning of public institutions.

5. The issue of the dysfunctional nature of all public institutions in Sri Lanka should be one of the major areas of concern for study, discussion and deliberations relating to the making of a new constitution. If the public institutions are not resuscitated again in a manner that they could perform the functions they are expected to perform, the whole exercise of constitution making will not serve a positive purpose for the nation.

6. While the collapse or dysfunctionality of the public institutions is a matter that requires a serious and nationwide discussion, one major reason for this collapse could be pointed out at this stage. It is the executive presidential system as introduced by the 1978 Constitution. The proper functioning of independent public institutions are incompatible with it. The executive presidential system has undermined public institutions. This dangerously dysfunctionality has manifested through almost every incident that happened in the country and in major events such as the event of 21st April 2019, the Easter Sunday bomb attack.

7. Among the public institutions that has fallen into disrepute is the Parliament itself. However, it can be said that the reason for this is not merely the corruption of the individuals who constitute the Parliament, but also in the relegation of the Parliament to an insignificant

and unimportant institution through the creation of the executive presidential system as expressed in the 1978 Constitution, which in fact undermines the sovereignty of the Parliament itself. The attempt to make a rubber-stamping Parliament resulted in the degradation of the Parliament and its functions, allowing avenues for corruption and other forms of abuse of power. A balance must be established between the executive and legislature, which has been lost due to the circumstances described above, as well as with the judiciary, in accordance with the separation of powers and the rule of law.

8. The attack on the independence of the judiciary has been an ongoing process since the 1978 Constitution. Attempts to develop a type of court that merely serves the interest of the executive president reduced the judiciary to the position that it is in today. The removal of the power of judicial review, interference (in direct and more subtle forms) into appointments and promotions of judges has created a kind of situation where the courts are finding it difficult to be the sole administrators of all matters relating to the rule of law, which is a requirement of the rule of law itself. Thus, the lost balance between the executive, legislature and the judiciary should be restored in a manner that it becomes possible for all these three branches of government to contribute to the betterment of the nation and keep an ethos that is considered conducive to human well-being in all areas of life, including economic development.

9. Among the public institutions that have undergone serious collapse is the institution of the police. While there is consensus that something has radically gone wrong with the policing system, there is no serious discussion of how to develop a functional legal system, which is the cornerstone for stability within a country, including creation of ethos for investment – local as well as foreign – where people feel that there is a fair playing field within which they could function. If, a new constitution is unable to provide a legal framework within which to resuscitate Sri Lanka's policing system to a rationally functioning, efficient system committed to the values of the rule of law, democracy and human rights, then this whole exercise of trying to make a new constitution will prove to be greatly disastrous to the future of the country.

10. Amongst the policing institutions, it is the investigative function relating to crime that collapsed most seriously. Selectivity and lack of oversight have virtually undermined the faith in the investigative system. The more serious crimes, particularly those done by the more affluent sections of society, including those who hold power, are not within the purview of criminal investigations in practice. The exclusion of many crimes from being properly investigated and prosecuted virtually makes the nation dysfunctional. The development of the

relative independence these institutions need in order to function could only happen if the constitution provides a legal framework for the protection of their functions and their independence within the framework of law. A lawless criminal investigative system is a danger not only to every citizen but also to the state itself. Addressing this matter within the framework of rule of law remains one of the major tasks of developing a sustainable system of social stability, which will provide the environment necessary for all activities, including those related to economic development.

11. Among the institutions that also need to be rescued from what is known as the process of politicization is also the Attorney General's department. An independent, impartial and competent prosecution service is an essential part of development of a functioning nation. Any form of arbitrariness manifested in these institutions will deeply disturb the entire balance of the state itself. Therefore, in the making of a new constitution, the review of all that has gone wrong in the past, particularly after the 1978 Constitution, within the institution of the attorney general's department needs public debate. A consensus has to be reached on how to resituate it within the framework of the rule of law itself.

12. All other public institutions, such as the civil service, also suffer from the pressures generated by arbitrary interventions, which are a result of the overpowering executive presidential system introduced through the 1978 Constitution. That dysfunctionality has manifested through a deep neglect that prevails through all these institutions. The head of the state itself in recent times has complained that these institutions are failing to perform their functions. However, this is not just a matter of neglect by the individual, but an institutional question, which is based on the correlation between the excessive power of the executive, which has paralysed the other institutions. The fears of being victimized for taking initiative and doing their functions in a manner that is required by their professions has become major preoccupation, affecting the command responsibility principle, where the leaders of the institutions are unable or unwilling to exercise the functions that they need to exercise if these public institutions are to function in a manner that is required in the best interests of the nation.

13. While lip service is being paid to accountability, all the institutional safeguards that prevailed previous to 1978 Constitution have gradually been undermined or deliberately displaced. This has resulted in the most unprecedented levels of corruption ever known in Sri Lankan history. However, again, this is not purely a question of individual weaknesses, but of institutional weakness; of having destroyed the balances that need to exist within the structure in order to ensure that it functions within the framework of law alone. Again, the solution to

this problem cannot be found without overall assertion of the principle of rule of law as a guiding principle of the nation.

14. The constitution should clearly state whether the constitution is going to be one of a liberal democracy. If mere words are being thrown here and there, such as independence of judiciary, rule of law and the like, when in fact the whole institutional structure is geared towards an authoritarian form of governance, then there could be no role for a constitution at all. If the purpose of the new constitution is to further legitimize the authoritarian tendencies that have entered and developed over a period of 42 years now, then it is not a new constitution; it is a rejection of what is known in the civilized world as a constitution. Using the pretext of constitution-making in order to undo the very idea of a liberal democratic constitution was what was started by the 1978 Constitution, and it has advanced to a very high degree, thereby causing the degeneration of the whole state structure to where it is today. If the continuity of that process and worsening it is what is meant by this exercise of making a new constitution, then that is a deception and not a constitution-making process at all.

15. It is not within the power of anyone, including the Executive President or Parliament or anyone else, to make a new constitution alone. The legislature has only legislative power, it does not have the power to make a constitution. This principle, which has been upheld in all civilised systems based on liberal democratic constitutions, cannot be rejected in the same way a cornerstone cannot be rejected. In India, this principle has been very clearly stated through the Basic Structure Doctrine, and thereby attempts by some politicians to acquire greater power for themselves at the expense of the nation have been thwarted by asserting that the legislature has only legislative power. The power of making constitutions belongs to the people and using the pretext that the representatives of the people can represent the people in making a constitution is a fallacy. People have not given a mandate and cannot give a mandate of that nature to the legislature. It belongs to the people themselves and therefore the constitution-making process must be a national process, where people are vibrantly involved. It is a process which can bring about deeper national understanding and agreements that could become the basis of stability of a nation. If a new constitution is imposed on the people, then it is an abuse of language to call it a new constitution.

16. At this early stage, I believe that these submissions would suffice, and if the genuine process of constitution-making is opened up, then the citizens, including myself, will participate more actively and creatively to achieve a successful process of making of a constitution that Sri Lanka can call its own genuine constitution.

INDEPENDENCE DAY 2021 Sri Lanka:
From an Independent to a Kafkaesque

On the 4th of February 2021, the granting of independence to the formal British colony in 1948 will be commemorated. However, for many years now, the day has become one of recounting of failures and the loss of some of the achievements made during the colonial period.

Sri Lanka as a whole became a British colony in 1815. The entirety of the 19th century was a period in which there were as many as five notable changes. They include the economy, the administrative structure, the basic infrastructure of the country (through building roads), the introduction of the railway and finally entering into a period of large-scale commercial activities with the outside world.

The following are the major changes which occurred in the 19th Century:

A Dramatic Improvement in Social Mobility:

Previously, for over 10 centuries, Sri Lanka remained a stagnant society where social mobility was prevented by draconian rules related to the Caste System. That the son should follow the father's employment was the basic principle on which society operated. Any transgression of this principle was seriously punished. There was disproportionate punishment. The poor would be disciplined severely. But, meanwhile the landlords working in close connection with the various loyalties were mostly exempted from punishment-except in the case of treason. This situation of social immobility changed significantly, with the opening of roads and possibilities of job avenues in the capital and in town areas, where they have developed many forms of new economic activities, trade and commercial opportunities. Places like Colombo Harbour and several other mills attracted large numbers of workers. With this, the possibilities of changing once traditionally-given social positions, became a possibility.

Civil Administration:

Also during the 19th Century, there developed an island-wide administrative structure controlled by the Government. It was called the CIVIL SERVICE. The civil service was modeled in terms of modern principles where public institutions were created to perform various functions and deliver various services. Within the civil service, there was a hierarchical structure based on the principle of command responsibility. There were opportunities for promotions within the civil service. And each public institution had the duty to conduct its affairs independently within the framework of the Law. This way an efficient system of service delivery. An administration was established with internal

capacities for improvement of the ways they would serve the interests of the State and the people. This virtually altered the pattern of administration which was established in Sri Lanka.

The Rule of Law:

During the 19th Century, for the first time in Sri Lankan history, the principle of the Rule of Law was introduced. It became the basis of all the organizational framework within the country. The principle, that everyone was equally bound by the Law, and was entitled to derive the benefits provided by the Law, became the guiding principle of the State. The recognition of equality before the Law and the recognition that the same Laws apply to everyone in the country, virtually revolutionized the manner in which society was to be organized and function in the future.

A Comprehensive System of Justice; Also during the 19th Century, a comprehensive System of Administration of Justice was developed. By a gradual process, this Court System spread to all parts of the country. The way of solving disputes by legal means, where necessary avenues were opened through the Courts, was created. Both civil and criminal administration was developed on the basis of legal principles laid down in statues.

Development of the administration of justice required development of personnel to manage and run these institutions. Thus, the 19th Century was also a period of training various Officers of the State. Judges had to be trained. This happened first of all through the British Judges who worked in Sri Lanka. Then the local recruits gradually learned from the manner in which the first batches of the British Judges functioned. Besides, there were other means by which education could be acquired in the legal profession. Slowly, local lawyers found their way to become Judges. A similar process followed about Court Organization. Lastly, other Officers assisting the functioning of the Courts, began to emerge. The method of record-keeping was also introduced into all litigations.

Training of Officers; A similar process of development of Officers took place in the Police Department. As has been well documented, the task of building a Police Force in Sri Lanka, working within the framework of the Rule of Law, was an extremely difficult task. It took many decades to train Officers who could function within a strict regime of rules. Establishing principles of accountability within the framework of the Law itself was a formidable undertaking. The Court for disciplinary deportments has to be developed and enforced. Once again the organization functioned under the principle of command responsibility.

The Introduction of Criminal Investigation Function; One of the hardest everyday jobs was to train Officers to exercise crime investigation functions. For the first time in Sri Lanka, punishment for the crime was based on proof of guilt by strict evidence of the charges. What was considered evidence was laid-down in the Evidence Ordinance. The proof had to be on the basis of scientific principles relating to the evidence of truth and

the application of logic. The Crime Investigator had to be prepared to conduct investigations, later tested at the trial stage, where a Judge or jury would decide on the proof of facts.

The 19th Century thus witnessed the emergence of the idea of a Fair Trial. This concept did not exist within the Sri Lankan context before. Perhaps, the most revolutionary steps towards protecting the individual against arbitrary punishment was the introduction of the practice of the fair trial. All serious crimes, which carried heavy sentences, have to be proved beyond a reasonable doubt before transference to higher Courts where more experienced Judges presided. Thus, the 19th Century made the first great commitment to the protection of individual rights in Sri Lanka.

Introduction of a Professions; The 19th Century also saw the beginning of the development of various professions. They included the western medical profession and other professions such an engineers, accountants, and the like. Thus the modern state introduced in the 19th Century depended heavily on competent professionals. Persons, committed to Courts of Conduct in terms of their professions, held accountable within a framework of the Law. This professional development started in the 19th Century, continued into the 20th Century, altered the nature of Sri Lankan **society permanently.**

The Flow from 19th to 20th century- A New World View;;The 20th Century development was seen as paving the way for many other innovations in the years to come. This would mean the widespread use of electricity, various forms of communication technologies and fast communication systems. All these were built on the infrastructures built during the 19 Century.

Freedom of Association and Expression;

In the area of freedom of assembly and association, the 19th Century introduced a completely new, world-view opening up of the means to achieving that world view. Freedom of assembly and association became an integral part of the economy as well as social development. On the one hand it paved the way for companies and entrepreneurship, while on the other, the principle of contract became a key component which was capable of enforcement through the Law.

At the same time, freedom of assembly and association recognized the legitimacy of trade unions. That the worker was not a slave but a person having rights which could be exercised through their associations was recognized by the British. In their own country they were aware of the right to the existence of trade unions as a part of a civilized way of life, and the development of political parties as other forms of associations. Thus, the conceptual framework came to be the modern Sri Lanka started in the 19th Century and continued through the first half of the 20th Century.

The building of a vigorous Nation was possible within the framework of these and others basic infrastructures developed during the 19th Century and the early part of the 20th Century.

New Rulers After the Independence;

However, the new local rulers, who came to be in-charge of this vast State machine, did not have the competence and the will to push the State to a higher level of sophisticated administration. In fact, gradually, most basic aspects of these developments were undermined by the newly elected rulers. They often lacked experience and the lack of a larger vision for the Nation. Petty interests began to dominate, undermining the Infrastructure Eon upon which modern Sri Lankan was built. It is this worst transformation that remains the source of many lamentations and bewilderments that exist in Sri Lanka today.

What is meant by Kafkaesque is a characteristic reminiscent of the oppressive or nightmarish qualities of Franz Kafka's fictional world. This is what exists in Sri Lanka today. It is this rapid downfall in the organizational structure of the State that needs to be understood. Some light has to be thrown on six areas. 1. the deep economic crisis, 2. the tragic Rule of Law crisis, 3. the collapse of the Policing System, 4. The criminal investigation systems, 5. The denial of fair trials, 6. The legal rights of citizens. These are just to mention a few of the aspects of Sri Lankan Kafkaesque. Besides the Sri Lankans, the international community, including the United Nations, have begun to realize the nature of the crisis faced in Sri Lanka. The following statement reflects this concern…..

The High Commissioner is deeply concerned by the trends emerging over the past year, which have fundamentally changed the environment for advancing reconciliation, accountability and human rights in Sri Lanka, eroded democratic checks and balances and civic space, and repeated a dangerous exclusionary and majoritarian discourse. These trends threaten to reverse the limited but important gains made in recent years and risk the recurrence of the policies and practices that gave rise to the grave violations of the past.

Apples and Oranges: The Need To Stop Playing the Late H.L De Silva's Game.

Did Neville Samakoon and Dr. Shirani Bandaranayake understand the 1978 Constitution of Sri Lanka? This is question that has bothered me for many years.

I can clarify what I mean by referring to an incident that happened when I was a young lawyer. Sometime after the adoption of the 1978 Constitution, I attended a meeting of lawyers organized by the Bar Association of Sri Lanka. The purpose of the meeting was to discuss a public statement made by President Jayawardene. It was to the effect that, H.L. De Silva PC, then a prominent lawyer, did not understand "his" Constitution. The late S.L Gunasekara, moved a resolution condemning the President's statement and affirming confidence in the ability of Mr. De Silva.

What had irritated J.R. Jayawardene and prompted him to make that statement? It was the attempt by lawyers like H.L. De Silva, to interpret J.R.'s Constitution within the framework of liberal democratic constitutional principles. What J.R stated was--do not compare apples with oranges.

What was the meaning of this 'Constitution'? Hermeneutics is a theory of interpretation that aims to elicit the meaning of a text. The text may be a sentence, a paragraph, or a whole document, like a Constitution.

The basic assumption behind any attempt to find meaning is that the author was trying to convey a meaning by writing the text. There are principles and techniques followed in trying to uncover the meaning.

It is quite another matter when the text is written purposefully to confuse or deceive. In this situation the text has been concocted with the aim of defeating all rational attempts at interpretation or attempt to grasp a logical meaning. In short, what this 1978 Constitution says to us is this: the only person who knows the meaning of this document is its author. He can interpret it in any way he likes and use it to justify whatever he does. He is not bound by any rules. This Constitution has liberated him from all rules.

Thus, the 1978 Constitution was created to 'de-constitutionalize' the state of Sri Lanka.

In this way, not only the Rule of Law but law itself was displaced. Even a Chief Justice can be dismissed without any regard to established rules. Those who heard the case against her knew they were playing a practical joke on her. Although Dr. Banadaranayake and her legal team tried to play H.L De Silva's game of trying to treat the issues as being within conventional legal rules, they only received rude treatment. A list of such devastating practical jokes played on the System of Law and justice is a long one, including an extension of a parliamentary term by way of a referendum.

Examining the text of this Constitution with the view to find its meaning is like examining the prescription of a doctor who uses a term that sounds like a medical drug but in fact is poison. The poison this time was administered on the Constitutional System and the nation itself.

Two others who sat as Chief Justices, S.N. De Silva and Mohan Peiris, understood the 'Constitution' quite well and acted accordingly.

Another rule of hermeneutical interpretation is the rational link of parts with the whole. That means different articles of the Constitution must be logically linked to each other. If some articles which seemed to convey a meaning of a liberal democratic concept is contradicted by several other articles which convey an authoritarian frame work, then no rational meaning can be derived out of these articles. Practically no institution can function rationally, if that institution has to work under self-contradictory principles. Every important principle contained in the different articles of the Constitution is contradicted by one or many other articles. This is usually called, what is given by one hand is being taken away by the other.

A suitable Sinhalese translation for the word, manipulation is KAPATIKAMA. This in the hermeneutical sense means, to manipulate a text in such way as to prevent the possibility of eliciting any rational meaning out of it. Examples of those who tried to rationalize this Kapati document learned a bitter lesson, including Mr. Samarakoon and Dr. Bandaranayake. This spider net has proved its deadly nature over and over again. And the worst is not over yet.

The result of living with an absurdity, is gradual disintegration. Disintegration simply means the inability to hold things together rationally.

Things begin to fall apart. That also has been happening for many years and that will not stop.

The ultimate destiny of the disintegration of rationality, is insanity. In terms of the Law and the Constitution Sri Lanka is an insane nation. At the time when the new court complex was being made, something that a senior lawyer said was quoted by the late S.L Gunesekara. It was that when the new Parliament was built we lost our parliamentary democracy. By the time we have the new court complex, we will also lose our justice system.

Only way out of this pathetic and pitiable situation, is to call a spade a spade, a spider a spider, absurdity an absurdity, lunacy as lunacy. And not confer respectability to a fraudulent document by acting as if it is a Constitution of a democracy. The real aim was to transform a Democracy into an Authoritarian System.

‘Homegrown’ Constitutions and Laws

A homegrown rose has the same features as any such rose found anywhere in the world. There may be some adaptations to the particular environment, but, as far as the basic features are concerned, it doesn’t make any difference. A homegrown parrot has the same features as others of its species in other parts of the world. A homegrown crocodile may have some adaptations to the particular environment it’s in, but the main features are the same. A leopard that is born and bred at the Yaala conservation, likewise, has the same basic features as any leopard living in the Indian jungles or elsewhere.

This list could go on indefinitely. For example, a man wearing national dress or a woman wearing a sari has the same features of human beings living anywhere else in the world.

We cannot call a water lizard a homegrown crocodile or a mynah bird a homegrown parrot.

In the same way, a democracy has to have the same basic features as any other democracy.

The same can be said of the Rule of Law and other legal concepts. An authoritarian/tyrannical system cannot be called a democracy, as the basic features of such systems are different to a democracy.

Where do the basic features of democracy come from? They come from the struggles of humanity throughout its long history. They sought to find ways to protect themselves from abuses of power by the rulers, meaning those that exercised power and control over them. From their struggles, people developed ways to protect themselves from these abuses of power by their rulers. These lessons were incorporated into a System of Governance that came to be called ‘Democracy’.

Any system of governance that removes or negates these basic features that protect the people is not a democracy. It is something else. While a rose by any other name remains a rose, a non-rose cannot be transformed into a rose merely by calling it a rose.

What are those basic features of protection? The concentration of power in the hands of one person or one position came to be understood to be dangerous for the people. This gave rise to various practices that limit and restrict power. The separation of powers principle was developed in that way. The basic idea was that power should be bound. Long years of experimentation resulted in the conviction that the separation of powers is the cornerstone of ensuring the protection of the people. On this basis, power was divided into three separate branches of governance: the Executive, the Legislature and the Judiciary.

This separation was recognized as indispensable to the protection of the people. The three branches are dependent on each other as part of the same State. However, they are independent from each other in terms of their functioning. Each branch developed various

practices to maintain checks and balances for themselves and each other in order to prevent abuses of power by any of the branches.

The independence of the Judiciary is an indispensable part of these checks and balances. The independent judiciary plays a massive role in the running of the entire system. It is the judicial branch that ensures that everything that happens within the State is done in a legitimate manner. To undo or undermine the independence of the judiciary means to allow the State to act in a manner that is contrary to the Law.

Not everything that is passed by the legislature could claim to be legal. There have been instances throughout the world where the legislature has abused power. The judiciary's task is to prevent this from happening. The practice of judicial review had its origins in the need to prevent what is essentially illegal from being presented as legal. A 'homegrown' Constitution of a democracy cannot claim that the judiciary has no function to declare laws illegal (and therefore null and void). Indeed, such a claim in any Constitution is an attack on democracy itself.

Thus, there is more to democracy that the mere exercise of adult franchise and voting a government into power. The basic premise on which adult franchise itself is based is that an elected government will make laws for the protection of everyone and obey those laws, and will not take away such protections.

Through the 1972 and 1978 Constitutions, the separation of powers principle was deliberately abandoned. In fact, what was called a 'homegrown' Constitution was one in which the separation of powers was not an essential feature and this was explicitly stated at the time. The result was that judicial power itself was reduced, meaning that it was not an equal partner. At the constitutional assembly for the 1972 Constitution, this rejection of the separation of powers was openly announced. The same approach was adopted in the 1978 Constitution.

In fact, there was nothing 'homegrown' about this rejection either. Every form of dictatorship has done it to some degree.

The Rule of Law is also a central feature of a democracy. It is the rule of law that restricts the actions of the State and also the people within strict limits. They are recognized as necessary for creating and maintaining the social environment where laws are obeyed and rights are protected. It allows for the existence of a decent and civilized way of life.

Lord Tom Bingham in his famous book "The Rule of Law", defines the core elements of the rule of law: "The core of the existing principle is, I suggest, that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made. It takes effect (generally) in the future and publicly administered in the Courts."

Then he goes on to state the results of ignoring the Rule of Law.

"The hallmarks of a regime which flouts the Rule of Law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide, ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric Judges and greedy lawyers."

What has happened in Sri Lanka is much worse than the British judge could have imagined. By rejecting the Rule of Law, Sri Lanka has created a situation of complete lawlessness. It is also impossible to imagine how it can come out of this situation except by way of some kind of a miracle.

It cannot be claimed that it is a feature of a "home grown" Constitution that everyone acting on behalf of the State need not be bound by the Law. This, however, is what has been taking place in almost every aspect of public life in Sri Lanka since the adoption of this Constitution. With time, everything has become worse and virtually no one thinks it is necessary to follow the Law when acting on behalf of the State.

The removal of the Chief Justice illustrates this. Clearly, everything was done contrary to established legal principles, as her defense team asserted before the Parliamentary Select Committee. There has, in fact, been a complete rejection of the idea of acting only within legal bounds. Nowhere is this rejection more visible than in the failure of the criminal justice system in Sri Lanka. The whole system and every component has become politicized. One government may undertake some serious criminal investigation and file a few cases before the Courts. These cases may even involve some leading politicians and their family members who may be suspected of having committed or conspired to commit serious crimes, such as murder and crimes relating to corruption. Then the next government comes in, and removes the Chief Investigators into these crimes, thus creating major obstacles to carrying out these prosecutions. It is no surprise when the files relating to these investigations disappear and the witnesses are seriously threatened. In the end, the Courts may have no option but to release the alleged suspects for lack of evidence.

It is this kind of situation that made the policing system so ineffective that even information received about an extremely serious crime – the bomb blasts targeting innocent people on Easter Sunday – was not acted on. On April 21, 2019, in the bomb blasts, innocent churchgoers and tourists became victims this paralyzed Policing System.

Without a policing system in which everyone who does any action does so within the bounds of the law, public security cannot be guaranteed. Maintenance of the public peace is the work of the Police and not of the military. The neglect of the Rule of Law in Sri Lanka has come to a point that the policing system is unable to carry out its own functions with professional independence and integrity. That is how the "homegrown" Constitutions and laws have deprived the people of the benefit of the rule of law.

When a Rose is not a Rose: Change of the Normative Framework

What took place as a result of the 1972 and 1978 Constitutions was the change of the normative framework of the legal system of Sri Lanka.

One aspect of the explanation lies in how language affects understanding. Words derive their meaning from what exists in the outside world, whether it will be nature or social realities. However, when it comes to abstract ideas, when a word is used to express an idea that is outside of reality, the word itself acquires a fixed meaning that must be learned (but often is not). Whenever the same word is used, it is expected that a similar meaning is being expressed.

Then, by way of deductive logic, various conclusions can be reached, based on the fixed meanings of words. Let us illustrate this.

Example 1

All judges reject bribes.

X is a judge.

Therefore X rejects bribes.

Example 2

All prosecutors are impartial.

X is a prosecutor.

Therefore X is impartial

Example 3

All policemen protect the law.

X is a policemen.

Therefore X Protects the Law.

All these three words are derived from a normative framework that exists in a particular context. In real life situations that adhere to that normative framework, judges do not take bribes, prosecutors are impartial, and policemen protect the law. It is assumed that that is how people in those roles see themselves.

When that particular framework is universalized, there is an expectation that in all societies, judges, prosecutors and policemen behave in the manner described above.

That conclusion is based on the assumption that all societies and cultures have a similar normative framework for the administration of justice. When a person looks into the world with that perspective, they assume that justice systems that say they have Judges, Prosecutors and Policemen mean the following. Those Judges in justice systems desist from bribe-taking, prosecutors reject bias and partiality, and Police reject illegality.

The result of that perspective is that if such a person learns about a Judge taking bribes, a Prosecutor who is not impartial or a Policeman that does not attempt to protect the law, this person will treat this behaviour as an exception the rule. Such individual exceptions do not contradict the assumed normative framework. The normative framework merely sets out the ideals, and exceptional violations do not contradict the ideal. A person with this perspective would expect that, in instances of such exceptions, sanctions would be imposed, and that the normative framework would be strengthened in that way.

However, when the normative framework itself is different, words such as 'judge', 'prosecutor' and 'policeman' do not carry the same meaning. In that normative framework, those words may in fact carry the opposite meaning.

Every normative framework is based on ideals. A different normative framework means one that is following a different sets of ideals. To understand the meaning of words used in a particular framework, it is necessary to understand the ideal framework of a particular country or a society. For example, meanings given to behaviour of judges, prosecutors and policemen in the original examples apply to an ideal framework of justice in a particular legal and social context. In the three examples, a judge a prosecutor and a policeman are expected to behave in the ideal manner described above. The concept behind the ideal framework of justice in the original example is: there is a separation of powers established as an essential aspect of the system of governance, and that justice - meaning fairness – is an inseparable part of that ideal.

Ideally speaking, the Soulbury Constitution of Sri Lanka was based on this normative framework. All the laws, court judgements and the behaviour of the operators of various institutions had to be within that normative framework.

However, the very ideals of that normative framework were changed by the 1972 and 1978 Constitutions. These constitutions rejected the separation of powers principle, where all the three branches of the state enjoy similar status and none is subordinate to the other. BUT an independent Judiciary is the final arbiter of the Law and the protection of individuals.

The core of the 1972 and 1978 Constitutions was to relegate the Judiciary to a lesser status within the separation of the powers conception. The judicial review of legislation was removed and various avenues were opened in order to interfere with the independence of the judiciary.

The ideal expressed particularly by the 1978 Constitution was to introduce a new constitution and thus reject the ideals based on the original Constitution. The new ideal was that all power should be in the hand of the Executive President. The fact that later the Executive President's position was mostly taken over by the Prime Minister did not alter this fact in any way. The ideal of the executive being outside the separation of powers principle became the foundation of the normative framework.

Within this framework, words like 'judge', 'prosecutor', 'policeman', 'civil servant', 'cabinet minister' or 'legislator' does not have the same meaning as they had under the original normative framework.

The attempt to interpret the new Constitutions on the basis of the original conceptions of the Soulbury Constitution lies in another way. Rather, the new 'ideals' are at the heart of all the conflicts relating to political life, constitutional interpretation, the functioning of public institutions and all aspects of the functioning of Sri Lankan society.

This contradiction was already felt at the time the 17th Amendment was almost unanimously passed. However, instead of changing the normative framework of the 1978 Constitution, the amendment only tried to modify the powers of the President. It did not touch the ideal based on the rejection of the separation of powers principle.

Later amendments led to other amendments; it goes on and on, but the normative framework of separation-of-powers-based political system remained rejected and abandoned.

This led to a tragi-comic situation of trying to operate a system that pretended to adhere to the original conception. However, in fact it was actually working under a new set of ideals that reject the separation of powers principle.

When words are used that would have one meaning in a normative framework that adhered to the separation of powers principle but have a different meaning in terms of the ideals of absolute power, no real or meaningful discourse is possible. That is the situation that exists now.

‘What Happens to the People Happens also to Judges, Lawyers, and others.’

A comment on the memoir of Former Chief Justice Dr. Shiranee Bandaranayke entitled “Hold Me in Contempt”.

This memoir by former Chief Justice Dr. Shirani Bandaranayke on the (now nullified) impeachment is a significant contribution to the cause of promoting the independence of the Judiciary in Sri Lanka. Its significance lies in the fact that it exposes the truth about what really has happened to the Judiciary as an institution within the context of changes brought about by way of the 1972 and 1978 Constitutions together with the practices that have developed as a result of these constitutional changes. The memoir makes it plainly clear that the separation of powers, independence of the judiciary and respect for rules of natural justice are no longer a part of the Sri Lankan legal system. This situation, although many are involved in the administration of justice, may proclaim it prominent as part of their credo. The contrast between truth and illusion is very vibrant when looking at the actual narrative of what took place by way of pressures exerted on the Chief Justice, and the ‘so-called-impeachment’ story.

She speaks touchingly about the relationship she had with her parents. They created a deep impression on her that a person needs to be faithful to one’s conscience and be truthful. She clearly demonstrates that she was faithful to her belief in acting on the basis of her conscience. Judge from these three examples; First her resistance to having anything other than a strictly professional relationship with the Executive; second her resistance to various pressures that came about related to the conduct of Judicial Services Commission; third, perhaps above all, the manner in which she resisted all attempts to pressurize her to voluntarily quit her job. She saved embarrassing the Executive for dismissing her. She WAS faithful to her belief in acting on the basis of her conscience.

Personal Conscience and Social Conscience

The fundamental issue that arises here is as to whether, particularly in moments of national and a social crisis, is it enough for a judge (or, indeed, for anyone engaged in public life) to merely do their particular job within the framework of faithfulness to one’s conscience, while not addressing the structural framework within which they conduct their affairs, when that framework opposes the very principles that they are trying to defend. For example, the issues related to the separation of powers, the independence of the Judiciary, the need to follow the principles of natural justice in giving a proper hearing to person whose conduct is being examined, and even the very notion of a fair trial, need to be addressed. When these necessities are structurally removed, is it possible for one to carry out one’s duties on the basis of one’s personal conscience? Are not the issues of the absence of the structural

recognition of the very notions on which one is trying to conduct one's affairs a relevant factor in assessing how to function under these circumstances, and important to being faithful to one's conscience?

The 1972 and 1978 CONSTITUTIONS

The structural removal of the idea of separation of powers took place when the 1972 Constitution was adopted. At the debate, all the prominent spokesmen for the Government of the time quite categorically stated that the separation of powers principle had displaced the removal of the possibility of the Judiciary to challenge any of the decisions by the legislature. This they called the supremacy of the parliament. It removed the basic structural framework of the Soulbury Constitution, which was made on the basis of the general principles of liberal democracy.

The following two quotations are illustrative:

"In our view, the doctrine of Separation of Powers has no place in our Constitution. The National State Assembly is the supreme instrument of State Power and exercises the legislative power of the people, the executive power of the people, and also the judicial power of the people."

[The Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill Decision (*Decisions of the Constitutional Court of Sri Lanka,* Vol. 1 (1973), at p. 53; affirmed in the Administration of Justice Bill Decision (*Decisions of the Constitutional Court of Sri Lanka*, Vol. 1 (1973), and *"We are trying to reject the theory of Separation of Powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you saying that a Judge once appointed should have the right to declare that Parliament is wrong? That you must have Judges do the job of judging is true. We do not want to be Judges."*

[Mr. Felix R.D. Bandaranayke, the Minister of Public Administration and Local Government, as quoted in MRA Cooray, *Judicial Role under the Constitution of Sri Lanka An Historical and Comparative Study* (Lake House Investments Ltd. 1982) p. 224]

In 1978, the Executive President's position was created and their role was meant to be higher than that of the legislature. This enormously significant transformation was created after Government MP's had been made to give undated resignation letters. This created a rather ridiculous situation in the country regarding the operation of the Constitutional Law. Within that transformation, the Supreme Court lost the position it had under the Soulbury Constitution. When studying for postgraduate degrees abroad, and when teaching law, Dr. Bandaranayake may have acted on the belief that all the principles of liberal democracy were also part of the legal tradition in Sri Lanka. She may have also attempted to practice such beliefs in her time as a Supreme Court Judge and a Chief Justice. But doing that was to ignore the actual transformation of the legal framework in the country, which had been

brought about not only through constitutional changes, but also by widespread and deliberate practices.

Neville Samarakoon, Sarath Nanda Silva and Mohan Peiris

The struggle between J. R. Jayawardena as President and Neville Samarakoon as the Chief Justice was basically on that issue. Neville Samarakoon, who had been a Senior Counsel for many years within the framework of law introduced by the British, seemed to have thought that he could function within that same framework after the adoption of the 1978 Constitution too. He had to pay a heavy price for believing in that illusion

The Chief Justice that was appointed under Chandrika Kumarathunge's government had no such illusions. He went all the way, not only adapting to the new situation but also doing everything possible to protect the executive president and the presidential system. It was for that reason that he virtually undermined all the procedural laws and the legal profession. Thus, there was no conflict between the Executive President and Chief Justice Sarath Nanda Silva. They both knew they were dealing with a completely new set of 'principles' and not on the foundation of the basic norms of a liberal democratic system.

Judicial Power, Judicial Role and Killings of Persons after Arrest

Besides those changes happening within the Judiciary itself, there were other changes of even greater importance. They clearly showed that the judicial function had been removed even in decisions involving the life and death of citizens. The killing of arrested persons in their tens of thousands happened under emergency laws.

The greatest privilege of the Judiciary is that it alone can decide on the life and the liberty of the individual. This is particularly so when the issue is one of life and death. What came to be known as enforced disappearances is the usurpation of judicial power by the executive. He then hands that power to anybody he wishes, including the lowest ranking officers of the police or the military. All applicable legal requirements, including the need to hold postmortems for suspicious deaths, were removed. Certain ranks of Police Officers were given the power to order burials but they had no obligation to keep a record of what they did.

Leaving other matters aside, this issue alone is sufficient to prove that Sri Lanka lost the ability to claim the existence of an independent judiciary. This, by allowing arrested persons to be killed and disposed of by the Executive, with no access to judicial protection via fair trials, due process or rights. Judicial power was thus challenged in a far more fundamental way than by arbitrary impeachment through the practice of the authorized killings of persons who had been arrested and were in custody.

These are a few things that show that it was not only by constitutional changes but also through widespread practices that the role of the judiciary and judicial power were enormously undermined in Sri Lanka. Furthermore, there was no attempt at all to undo that situation.

What we saw during that period was not judicial resistance to the undermining of their role and of judicial power itself. It was the cases of Sarath Nanda Silva and Mohan Peiris that clearly demonstrated there was an adaptation to whatever the Executive President wished to do.

Judicial Impeachment Treated as a Practical Joke

It is within such a background that the impeachment story should be looked at. The demand of the Chief Justice and her lawyers was for due process and the observance of the normal procedures that would be followed in a matter as serious as the removal of a Chief Justice. The reality was that, in Sri Lanka, such a situation did not exist. The Mahinda Rajapakse government treated the whole affair of the removal of the Chief Justice simply as a practical joke!

This practical joke consisted of arbitrarily getting the required number of members of Parliament to sign a petition with charges that they hardly knew anything about. They then gave the highest possible publicity to these charges. A group of politicians was appointed - the majority of whom were of the same governing party. They were to be judges on the alleged misconduct of the Chief Justice. And then engaged in amateur dramatics to make it impossible for the Chief Justice and her lawyers to perform any useful function during the inquiry. After getting their resolution passed, all objections made by the opposition were ignored.

The intention in behaving as though it was all a practical joke was unambiguously clear: it was to pressurize the Chief Justice to resign on her own. It was made quite clear to her, that the justice she expected was not going to take place. The Executive will do whatever he/she wants. All attempts to insist on innocence was a futile exercise. It was to her enormous credit that she did not play her part in that game. The public impression was therefore that what was being done was illegal, void and completely unjust.

Injustice is not an abnormal affair in Sri Lanka anymore. It is what the people are facing throughout the country in every instance, whether they belong to a majority or minority community. Even the killings of over 250 people on Easter Sunday did not lead to any form of justice to take place. Thus, it appears that justice is simply an irrelevant matter in Sri Lanka.

What the impeachment story brings to the notice of the public and the international community is this blunt fact. Will the people, and even the Judges, acknowledge this reality? Or, would it be more convenient to believe in the following three areas? The illusions of there being a separation of powers, the independence of the Judiciary, the possibility of fair trial in Sri Lanka (on any matter of significance to the Executive?) These illusions are from a past in which there were possibilities of such practices based on liberal democratic norms. So long as these illusions persist, they will only lead to greater catastrophes.

Former Chief Justice, Dr. Shirani Bandaranayake, has done a great service in producing this memoir. It is to be hoped that in the years to come she may undertake two additional realms. First, examine the history of the loss of the independence of the Judiciary in Sri Lanka. Second, what are the historical developments that have led to the possibility of turning the whole impeachment procedure into a farce? She has made a good beginning. However, if this work is to create possibilities for change, much more needs to be done. It is a deep self-searching by those had the opportunity to see things with their own eyes.

This is the way to be faithful to her father's calling to be truthful to one's conscience. This is not only for those who supported her throughout the impeachment, but also for all Sri Lankans, who are condemned to live without liberty and who have lost their precious institutions.

Dignity and Decorum

The lead counsel for Dr. Shirani A. Bandaranayake strongly asserted before the Parliamentary Inquiry Committee that the Chief Justice must be treated with due dignity and the inquiry should be conducted with decorum.

It was only Mr. Sambandan MP who represented a minority party that had the courage to support this very simple request.

> *Mr. Chairman, if I might intervene. I think you, as the Chairman of this Select Committee, have to safeguard the dignity and the decorum of Parliament, because we are functioning as a Select Committee on behalf of the Parliament. The Chief Justice of the country is here before us and we are conducting an investigation in regard to certain matters with Counsels appearing on her behalf. I also believe that we should conduct ourselves with a sense of decorum and dignity. Ensure that the prestige of Parliament is preserved. It will be unfortunate if we cannot do that.*
> *Let us not forget that the whole world is watching what is going on here- not only the people in this country. If the whole world is watching what is going on here and if this is the way that we are going to conduct our proceedings, it will be a poor reflection on the institution of Parliament and on these proceedings themselves. . . . I have been told, we are dealing with the Chief Justice of the country. We must remember that.*

The committee however ignored even this demand.

That is not a matter of surprise. Disrespect for the dignity of the people and loss of decorum, even in the conduct of the Parliament itself, are commonly known facts.

Where Does Respect for Dignity and Observance of Decorum Come From?

In a feudal society, the idea of dignity is derived from the notions of status. In a caste-based, social tradition, it comes from the notions of hierarchy. In a democracy, the idea of dignity is rooted on the basis of philosophy. In fact, it is the foundational norm of a democracy that all human beings are entitled as a birth right to be treated with dignity. It is not given by a State or any other authority. If any real, or purported authority, fails to respect the dignity of anyone, it is guilty of the violation of the most important notion of a democracy.

The Greeks and the Romans recognized only the dignity of the citizens. The slaves were treated as things and not persons.

To ask who has dignity, is to ask who is human. To violate dignity is to treat a person as a non-human. In a tyranny, the dignity is an entitlement of the ruler, be he king, or dictator. The rest have relative dignity that the ruler may wish to grant an individual or a group. In that

context what exists is a grading of humans, some having more dignity and others none of it. The notions of dignity are derived from these differing institutions and systems. If we assume that Sri Lanka is a democracy then the failure to observe proper rules relating to the dignity is an unpardonable wrong. However, if Sri Lanka is a tyranny, then ignoring rules of dignity and decorum is the ruler's own choice. The same is true if Sri Lanka is still crippled by feudal norms and caste-based notions.

What Is Sri Lanka Then?

Judging by the impeachment episode, it is not a democracy. This is not merely in the way they conducted the inquiry but in all matters that led to the inquiry, including what followed thereafter. Dr. Shirani Banadaranayaka has reflected on this matter…..

Let us take the issue beyond the impeachment affair, or the way the Chief Justice was treated, to how everyone is being treated. Let us go back to the issue of those killed in custody after arrest. Did they have any dignity or were they treated with any decorum when they were investigated, killed without even a trial and buried without any funeral rights? And many other similar issues can be raised on almost every issue affecting the people. It is impossible to avoid the conclusion, that other persons, except the Executive President (and now executive Prime Minister), are treated with dignity and with decorum. It means that CJ was treated in the way any other person would be treated, except those who are favored by the powers that be. Such favored ones can be exonerated, even when serious criminal charges are made against them by lawful Authorities. That is the reality of Sri Lanka.

Democracy in Our Minds and
Absence of Democracy in Our State Structures

In our minds we may still imagine that Sri Lanka is a democracy because it is too disturbing to think otherwise. However, in reality it does not exist in the land or in the socio-political situation.

The Distinction between Democracy and Liberty:

It has become common-place to believe that if there are elections to choose a Government then such a place is a democracy. However, there are examples world-wide to show that despite elections, a tyrannical government can come into existence and rule a country. Judging by the experience of many countries in Asia alone, we find that the electoral processes can be so designed to enable the emergence of a tyrannical form of government.

One of the most effective means of doing this is to prevent the emergence of the possibility of the existence of political parties that are completely controlled by one or two persons. When the political rights of effective participation are denied to the people at large, Governance can be consequently divorced from the people. A ruler can do whatever he/she wants--even those things which normally would be considered illegal and even criminal.

When people who enjoy liberty take part in elections, they make real choices.

Liberty, Dignity and Decorum:

It is liberty that gives meaning to the notions of dignity and decorum. To recognize dignity is to recognize the free will of the people and their right to exercise it. The decorum means that all affairs are conducted in an environment where liberty is fully respected.

Judged from that standpoint, Sri Lanka is not a democracy. It is based on the liberty of the people and therefore the Government can become an instrument of repression of the people. The process by which it has happened, particularly since the 1972 and 1978 Constitutions is quite well researched and recorded.

Why is it Necessary to Distinguish between what we Wish to Have from what Really Exists?

Recognizing this distinction is important because the decisions on what we need to do in changing the present style of governance will depend on our grasp of this distinction. For example, IF Dr. Shirani Bandaranayke reviews all her decisions regarding the acceptance of a position in the Supreme Court and later a position of Chief Justice, she will understand her experience more profoundly, in the context of these considerations. She may have made a far more powerful impact on Sri Lanka and on her own life too, if the distinction was made between what we want to believe and what we really grasp.

The development of our critical capacity depends much on our ability to distinguish illusion from reality. This of course is not a new principle. Throughout the entirety of human history this tension between illusion and reality has manifested itself in million different ways. The development of Science itself is based on the understanding that what we may believe may not be true. Various methodologies have been established to approximate truth as against illusion.

Holding on to illusions helps those who rule under tyrannical or semi-tyrannical systems of governance. They could justify the denial of even the basic rights to dignity and treatment with due decorum even to the Chief Justice of a country. It would appear as if it is done for the benefit of the people themselves.

‘Were These the Guardians of the Judiciary’ ?

I told them that the whole fiasco, in the form of an impeachment, is unlawful. I have been and will be fighting against this tyranny as I desire to see that we protect the dignity and the liberty of every individual through an independent Judiciary. At the same time I explained what they could do, (not personally for myself) but for the stability and the independence of the Judiciary. For me to move ahead to achieve this objective, I requested they assist and support me. The assistance I needed, was not to accept any other person, who would be appointed illegally, by declining to sit when Benches are constituted. I reiterated that the Benches could be constituted only by the Chief Justice and that position cannot be held by a person who is illegally appointed. I also mentioned the fact that a Chief Justice could be appointed only at a time when there is a vacancy of the position. And, when my removal is illegal, there cannot be any vacancy to be filled. I still vividly remember those faces and the eyes that linked with mine, sans any feeling. I repeated my request and waited for assurances. There was none. And the meeting was over. I felt sad and dejected; not for myself, but for the country and it's Judiciary. Were these the guardians of an independent Judiciary?

Before I spoke to the Judges of the Supreme Court, Bijo Francis, the Executive Director of the Asian Human Rights Commission, had issued a Statement in the form of a letter to all the Judges in Sri Lanka. In that letter he reminded the Judges, especially in the Supreme Court, that their duty was spelt out by Sir Sydney Abrahams CJ in the decision of ***Bracegirdle.*** *The decision called forth the exclusive prerogative of the Judiciary and the duty of the Judges to protect the dignity and the liberty of every individual. Bijo Francis was echoing the thoughts which were reverberating in my mind since November 2012. He was addressing all the Judges in the country.*

"In the very vocation of being a Judge, is the duty to be courageous, even at the expense of great personal sacrifice at crucial moments when the integrity of one's position is challenged.

The Sri Lankan Judiciary is facing one such crucial situation at this moment in 2020. Perhaps this time in history is so important, that if it is lost, the very independence of the Judiciary will suffer a set-back so devastating, that it would be difficult to recover.

The independence of the Chief Justice's Office is being challenged. The Chief Justice is deprived of the basic right, which every citizen of Sri Lanka is entitled to--defending one's self within a framework of a fair trial--observing standards that are universally recognized. If the Chief Justice falls, the entire Judiciary will fall with her. It is within the powers of the Judiciary in Sri Lanka to prevent this by demanding justice for the Chief Justice, who is also a colleague. It is not a mere act

of solidarity or friendship, but a step vital to the survival of an independent profession.

Pages 204-205

Lord Macaulay's Experiment Failed

Lord Thomas Babington Macaulay and John Stuart Mill played a very prominent role in creating the legal system of India, and this model also spread into other British colonies.

Based on utilitarian philosophy, they shared the view that allowing the Law to develop in the manner that it did in Britain was not suitable. A more effective way was to introduce laws through written codes. Lord Macaulay is considered to be the mover behind the penal code and criminal procedure code of India. Similar codes were adopted in other colonies.

Lord Macaulay is also the architect of the policy regarding education in colonial India. In his 1835 Minute on Indian Education, he explained his theory that English should be the official language of instruction in all schools. He also stated that, "[I]t is impossible for us, without limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions whom we govern …"."

These two policies were: one relating to the introduction of the law through written texts and the other relating to the education of a small minority in the English language. They were partly responsible for many of the contradictions that led to the gradual undermining of the legal system itself and the consequent crises in all areas of social life.

A stark illustration of this can be seen in terms of what took place in Sri Lanka, which pursued both of these policies during the period of British rule, from 1802 (complete control by 1815) to 1948.

The creation of a small minority educated in English resulted in the emergence of this group as the most powerful and influential in Sri Lanka. By a gradual process, they separated themselves from the rest of the people. While many things can be said about this development, in this article we confine ourselves to the impact it had on the legal system. On the one hand, law was introduced as written texts and gradually the administration of the law passed into this English-speaking group's hands. In fact, the Law became one of the tools by which the ruling group entrenched and increased their own power.

From this came the concept of the CLUB. It meant that the Law and the operators of the law in different branches, such as the Police, the Prosecutorial Branch (the Attorney General's Department) and the Judiciary all belonged to 'the club'. After 1956, when priority was given to local languages, the people who considered themselves as belonging to this club resented it. They would cynically remark that all the problems of the system came from the entrance of people who did belong to the club getting into the law-related professions.

The introduction of law from above by way of imposing written texts, in the making of which the local people and their experience played no part, made the law something very distant from the people. This was very different from the way the common law was developed.

Added to this, when the small elite that administered the law were also people who had separated themselves from the population at large, this alienation became much sharper.

Those who belonged to the club did not want any expansion of the club. They did not make any effort to improve the understanding of legal concepts among the people. In fact, purely to protect their positions, they exploited the ignorance of the law among the people to their own advantage.

An anecdote involving a president of the Bar Association illustrates this: when this Bar Association head was representing a client in Court, some of the young members asked him why was the Bar Association did not encourage the greater use of local languages in court. His reply was, "If you do that, and if the people understood what you were saying, they would know that they do not need to be represented by you. They could say these things by themselves."

Every law is a product of the development of many concepts and these concepts developed over a long period of time. Let us take the case of fair trial: It developed after a long period of struggle against monarchical as well as religious authorities. In almost all systems, a confession obtained through whatever means was sufficient to find a person guilty of a crime. The development of the rules, relating to admissibility of admissions against interest by the accused, developed over many years of debates that took place in society. They were based on the reaction to various injustices. There had to be a debate on moral issues and then these concepts were introduced into the law.

The development of a legal concept is a very complex process. This applies not only to criminal law but also to constitutional law and civil law.

When these principles were debated within society, they becoming binding concepts and enter into the collective memory of a people. This memory gets transmitted over generations. In the process of such transmissions of memory, further questions arise: each generation, in the attempt to solve their contemporary problems, enrich the ideas that they have inherited and that have become part of their memory. It is on that basis that they call this their own law. This sense of ownership is a very essential element in terms of loyalty and obedience people feel is owed to the law. People do not merely obey the law because it is imposed from the top. When people have been involved in the development of the law throughout various generations, they claim ownership of that law.

That is how the collective mind absorbs a set of principles as having a binding effect on everyone in that society. A certain consensus develops that such laws help to prevent harm and to enhance good for the society as a whole. When a transgressor violates a law that is done in opposition to the collective understanding of that society. The society tries to reassert the accepted principles by adopting various types of punishment against the transgressor.

If the transgressor is the State itself, then people recognize that what they have developed as their collective legal codes are being violated by the State itself. That leads to the

development of a critical mind against all the violations by the State. There is a common on ground on which such criticisms are made. Thus, in the process of criticism, solidarity in society gets expressed. In such a society, breaking any of the major principles enshrined in the law provokes retaliation. People in authority know this. They are therefore careful not to violate the basic principles that are written not merely in texts but in the hearts and minds of the people. When such a development has taken place, the imposition of tyranny becomes almost impossible.

If we go deeper, we will find that the basis on which the laws emerged are the moral principles that had also taken long periods of time to develop. Much blood has been shed in the process of fighting for the establishment of these moral principles. Further, the development of moral principles has taken much longer periods than the development of legal principles. In fact, the development of moral principles has facilitated the creation of the legal principles.

What happened in the colonies that followed the utilitarian approach proposed by Lord Macaulay and others was that their came into being a set of laws that have not been grasped by the people and that have not become a part of the collective conscience of the people.

When, by written laws, draconian security was introduced, things became even worse. Even up to now, in all these colonies, when there are difficult situations, the laws invoked are those that were introduced as security laws during colonial times, or are modelled on those laws.

In a developed jurisdiction, limits to such laws have also developed. In the former colonies, both the laws that operate in normal times and those that are brought into operation on particular occasions are treated in the same way: if there is a prolonged period of social unrest, the normal law is almost forgotten and national security laws become the norm.

Issues relating to the law are directly related to the functioning of the public institutions that administer justice. In particular, this applies to the institutions of policing, prosecutions and judicial institutions. When the laws under which these institutions operate are merely written laws that have not arisen as a result of local experiences and debates on such experiences, these can easily be ignored. For example, let us take the case of a dismissal of a Chief Justice: where the strict rules for the protection of the independence of the judiciary have not been understood, then a dismissal can take place in the same manner that even a minor employee is dismissed. This is exactly what happened in the case of the (now nullified) dismissal of the Chief Justice Dr. Shirani Bandaranayake in Sri Lanka. She was dismissed on fake charges without there being an independent inquiry by competent persons following the procedures as required in the law.

Take, for example, the case of the abolition of *sathi* (the bride having to jump into the funeral pyre of her husband). There was a great opposition to this practice long before the British finally abolished it. Thus, the law abolishing that practice could be argued to be a law that arises from local debates and consensus. This can also be seen in the abolishment of British-era laws against homosexuality in India, which were widely considered to not have arisen out

of the Indian tradition. In fact, the very adoption of the Indian constitution of 1950 was a local product. The common law principles were debated in a constitutional assembly, where all Indian interests were represented and even the chief drafter, Dr. B.R. Ambedkar, was a representative of a minority group. For this reason, this Constitution has lasted, and, when the basic structure was challenged, the Supreme Court defended its basic tenets. The Court developed the Basic Structure Doctrine, which has been reasserted many times, and influenced other jurisdictions.

However, Sri Lanka abandoned the basic principles that underlay its initial post-independence constitution, which led to the entrenchment of tyranny into the 1972 and 1978 Constitutions themselves.

The two principles pursued by Lord Macaulay and others, representing the utilitarian point of view, resulted in virtually creating an ignorance of the Law among the masses of people. As a result, when tyrannies arose and displaced even the most basic constitutional and criminal laws, people did not see the threat this posed to them. They left the fight for the law to those who represented the club. However, without mass backing, there was little that even liberal-minded persons in the club could do to resist the repression unleashed from the top. Gradually, national security laws replaced the normal law in many parts of these colonies. While Sri Lanka remains a contemporary example of this, the same thing has happened in Myanmar and parts of India.

There is a lack of understanding and appreciation among people of the role played by the law and the legal system in protecting the rights of the individual. This is a major obstacle to resisting tyranny and promoting democracy in these former colonies. This allows shrewd tyrants to make the whole legal system dysfunctional without much resistance from the people as a whole. Only a few voices will rise to oppose such moves but there is no common understanding amongst the people of the principles and issues involved. In this way, military regimes could displace the legal system and create a completely different system that would support the military. The same thing can happen in different ways under non-military dictatorships, where the dictators can even utilize adult franchise and get voted into power. One party systems can arise, with no room for opposition. Large-scale disappearances, which often mean the killings of people after arrest, can take place as if that, too, is a legitimate way of dealing with the opposition. Lives of ordinary people in such societies can be a nightmare.

In short, there is lawlessness achieved without much difficulty.

While all these things can be traced, to a great extent, to the manner in which laws were introduced to colonies, and the creation of a kind of an elite that came to consider themselves and exclusive club, the problem now faced is as to how to get out of this trap.

As those who represent oppressive forces make full use of people's inability to understand and defend the Law, those who fight against such oppression have not yet given adequate thought to developing a discourse on how to deal with these problems.

The Absence of the Capacity to Reflect

In the evolution of the world and of human beings, the development of the capacity to reflect has been the driving passion that has led to dynamism and creativity. This is true about everything, including the development of institutions. The failure of the Sri Lankan political and legal institutions demonstrates their lack of this passion for self-reflection. The result is a very low level of critical and creative capacity. The impeachment story provides a vantage point from which to view this social reality. In fact, the backwardness of the entire legal system shows the lack of this capacity.

Let us begin with the constitutional developments themselves. The justification for the 1972 and 1978 Constitutions was the idea of the need for an 'indigenous' (that is, 'home grown') constitution. The Governments of the time used their 2/3 majority in Parliament to pass these constitutions – the supreme law of the country – without serious critical or creative thought as to how these laws would affect the nation in the future.

Let us compare this to the constitutional assembly that produced the Indian Constitution of 1950, three years after independence.

The constitutional assembly provided ample opportunity for the representation of every social group in India, and the debate went on for a long time. The chairperson of the drafting committee was Dr. B.R. Ambedkar, who represented the most disadvantaged minority group in India, the Dalits. This constitutional assembly went into the issue of the preservation of liberty of all Indians, and the ways of ensuring that the institutions the constitution relied on would be protected in the future.

The independence of the Judiciary was given special attention. The selection of higher court judges by the judiciary itself was seen as a safeguard against interference by the executive. When, decades later, there were attempts to undermine judicial independence, the Indian supreme court reasserted the position laid down in the constitution on the appointment of superior court judges. They went on to develop the Basic Structure doctrine, which meant that the basic structure laid down in the 1950 Constitution could not be altered by the legislature, even by an absolute majority, or by a referendum approving such an amendment.

In contrast to this, the constitutional assembly of Sri Lanka consisted only of members of Parliament under another name. The constitutional assembly therefore had the 2/3 parliamentary majority available to the government.

There was a similar situation in 1978. The difference--the Constitution was changed to suit the Executive President. He had demanded the resignation letters of members of Parliament, thus ensuring they would not express any views on any matter regarding the constitution. They could only express the views approved by their leader, whose intention was only to enhance his own position. Neither constitution was a product of the free expression of views

about what was good for the country. The MPs from the governing party acted like political slaves.

This was an illustrative example about the things that have happened in the past decades when it comes to the law and legal institutions in Sri Lanka.

The failure to develop reflective capacity

Here a distinction must be made between views expressed privately and publicly. There has in fact been an improvement in people's reflections made in the private sphere. People everywhere express discontent about almost everything, including the way justice is administered in the country. What is lacking is the public expression of these views and convictions held privately. Not publicly expressing reflections on public issues prevents informed policy-making and debates. The consequences are detrimental of the country as a whole.

The nature of 'the club'

'The club', as referenced in earlier chapters, was created during colonial times. Those who belonged to this club were only loyal to themselves. They did not see themselves as a part of a nation. They were internally opposed to the development of the nation to include those who did not belong to the club.

This opposition was expressed through the attempted coup of 1962. Several years after the coup attempt, some of the leaders were put on trial. Those leaders told an American researcher that they did it because their children had been prevented from enjoying the privileges they had. The idea that the nation should include everyone was seen by the club as a threat to themselves. They did not want to improve the law or practices of the legal institutions because that would undermine their own position. Expressions of reflective capacity, criticism and creativity were all seen as threats. Until recently, members of the club and those who crept into it by various means dominated the legal profession and judiciary.

It was due to this that these institutions remained in stagnation.

In a public discussion with a Senior Counsel, a younger lawyer remarked, "Sir, you are like a *nuga* [Banyan] tree. You give shelter to many but nothing grows under you." This eloquently expressed the relationship between those from the club and those who they considered outsiders.

Lack of opportunities and avenues for informed public discussions

Most public discussions that take place in Sri Lanka are of a propagandist character, either politically or religiously. Even in the universities or other academic forums, in depth discussions are nearly absent. This deprives the younger generation of a cultural milieu in which discussions on ideas are appreciated. This also applies to writing. Journals and even

newspapers that provide space for critical thought is almost absent. Discussions often degenerate into petty matters and often result in insults and threats.

The manner in which the impeachment-related issues took place and were later discussed show the low depths to which Sri Lanka has reached in terms of the rational expression of critical views. The details about what happened show that the whole affair descended almost into vulgarity.

The metaphysical tradition that has little interest in facts

The development of scientific empiricism brought about cultural changes relating to an appreciation of proving facts. The struggle to approximate the truth of all things investigated by following valid methodologies is at the heart of this tradition. In metaphysics, which is valid in other worldly matters, proof is not required even when it comes to beliefs about material things. In empiricism, matter is perceived through the senses, and these sense perceptions must be tested and proved. Matters relating to politics and the law, including the development of public institutions, are materialistic in nature. They are developed in terms of historical experiences on what is best suited for the protection of the principles to which a system is committed. A discussion on these matters should be ongoing and become a part of the education of everyone if democracy is to be preserved.

Impeachment Book

The armed struggles paved the way for undermining law and justice in Sri Lanka. In 1971 the first attempt at an armed struggle was attempted as a way of capturing State power and for solving the problems facing in the country by the JVP. From around early 1980 to 2009 LTTE carried on an armed struggle with the view to obtain a separate State for Tamil people in the North and the East. From 1987 to 1991, once again in the South, the JVP engaged in an armed struggle against the then government.

In the pretext of countering these armed struggles (which were labeled as terrorist attacks) all the Governments in power during these times virtually abandoned all the fundamentals on which the Sri Lanka's legal system was based. Most of such changes was achieved though gazette notifications which were not in fact properly constituted Law. Based that the violence was by armed attack, a society as well as those who were considered the guardians of the Law, took a rather flexible attitude towards even the most fundamental of legal principles. The gradual outcome of all that was a descent into a lawless situation.

The undermining of the Law and justice worked in favor of establishing an authoritarian system in Sri Lanka. It was in place of the democratic framework within which it obtained its independence. For those who were craving for absolute power for various reasons, these armed struggles provided excuses. They were needed in order to do away with compliance with the Law in dealing with every matter required by the Rule of Law.

Of all legal principles what are most important are those which are there for the protection of life and liberty. Morally speaking murder is considered the worst of crimes in all civilizations. There is a whole legal structure created in order to ensure that there would be prevention of murder. Under no circumstances no Law authorize murder. The same way the basic laws regarding lawful arrest and lawful detention and the absolute prohibition against torture are meant to preserve the most sacred of values for a human being which is his or her liberty.

In countering armed struggles the Sri Lankan government violated the most sacred of these principles. They were constructed over centuries of experimentation on protection of human life under all circumstances. The practice of protection given to persons who have being arrested is one among those sacred principles. In numbers which could only be countered in the tens of thousands, large numbers of people were killed after arrest. Killing of people after arrest came to be known later as enforced disappearances. Sometimes a technical word like enforced disappearances hides the enormous cruelty and violation of most sacred principles by killing people after securing their arrest.

Illegality 1: Under the normal law of Sri Lanka, an arrest must be done according to the due process of law. Making any arrest in violation of the due process of law is prohibited by the Constitution itself, under Article 13(1). Illegal arrest is also a crime. However, in most instances of enforced disappearance, the perpetrators make a deliberate attempt to secure arrests without following any of the steps required by the due process of law. The rationale is

that, if the due process of law is to be followed, the result would be to leave traces of evidence about the arrest as well as those who did the arrest. When we look at how disappearances have been carried out in the past, we see that the officers who came to make arrests did not come in uniform. Often they even wore hoods or other disguises to ensure that they would not be identified.

Illegality 2: The law requires that a person who has been arrested should be told the reason for his arrest. This is also a right guaranteed under Article 13(1) of the Constitution: "…Any person arrested shall be informed of the reason for his arrest." However, when a person is taken in the course of an enforced disappearance, no such reason is given; if the actual reason was to be given, the officers would have to say that the person is being taken for the purpose of making him or her disappear.

Illegality 3: The lawful bases for securing an arrest are "on two grounds only. That is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand trial, or because he has been duly convicted of some offence and must suffer punishment for it." The purpose of arresting a person for an enforced disappearance is to make him or her disappear, which, going by the past experiences in Sri Lanka, means to kill someone and to dispose of their body in secret. Thus, the very arrest is illegal as the purpose for which it is done is illegal.

Illegality 4: The law requires that officers engaged in the arrest of a person should keep notes of every event relating to the arrest in as minute detail as possible. The purpose of such a provision is to protect the arresting officers. As in the case of any inquiry into a complaint. It demonstrates that the officers have acted in the proper manner under the given circumstances as revealed by the notes taken by them at the time of the arrest. When a person is being arrested for the purpose of causing an enforced disappearance, the relevant officers are exempted from maintaining any records about the arrest. In fact, keeping any records may amount to an admission of the arrest. By such admission the officers become answerable for the subsequent disappearance. The purpose of not keeping any records is a precautionary measure to avoid liability by denying the arrest itself. Thus the officers who engage in such activities are aware that they will be under an obligation to deny the very acts that they are now engaged in. In this manner these officers get entrapped in a pit of deception. They behave very much like criminals, who also take precautions. Then they may be able to deny that they engaged in any act connected to any crime with which they may be charged.

Illegality 5: Under the law, arrested persons can only be detained in places that are authorized to be used for detention. Such places of detention are gazetted and known to the public. Keeping a person in detention in a place which is not authorized is illegal. However, in the case of arrests made for the purpose of causing an enforced disappearance, they are not usually kept in authorized places of detention. Even when they are taken to an authorized place of detention, they will be kept there secretly. And they will not be registered in the usual forms on which all the names of persons who are detained are supposed to be recorded.

Thus, again, the officers who engage in such activities are well aware that they are detaining the person in an illegal manner and in an illegal place.

Illegality 6: Officers engaged in arrests are under an obligation to inform the families of persons they have arrested of the arrests and also to inform them of the places of detention.

This information allows the relatives of arrested persons to attend to their needs by way of visits and to provide them with whatever they need. It also provides an opportunity for relatives to be aware of what is happening to a particular prisoner. However, in the detentions of persons who are to be forcibly disappeared, no such information is provided to the relatives. In fact, every measure is taken to deny these relatives knowledge about where the detainee will be kept. The officers engaged in the activity are aware that if the place of detention is revealed to the relatives of the prisoner, they will become aware of the detention itself (as relatives may not know what has happened, only that someone is missing) and about those who are responsible for the detention. One of the main preoccupations of the arresting officers is concealing any such information from relatives. Thus, not only the rights of the prisoner, but also the rights of everyone else who may have a reason to be concerned about the prisoner, are denied.

Illegality 7: The law stipulates that interrogations should be conducted according to the procedures prescribed by the Law. It specifically prohibits the use of torture and ill-treatment during the course of interrogations. This is guaranteed under Article 11 of the Constitution. However, when a person is arrested for the purpose of causing an enforced disappearance, the interrogations are not conducted according to any legal procedure. From the evidence recorded by the Commissions appointed to inquire into involuntary disappearances and through the many other sources that are available, mountains of evidence exist. They demonstrate that all kinds of humiliations and the cruelest forms of torture and ill-treatment take place under these circumstances. The officers, who are well aware of the ultimate outcome of what they are doing, know for certain that the victim will not be alive to tell about what happened to them. Assured of this, they engage in whatever brutality they feel like doing. The main purpose of such interrogations and torture is to secure the names of any others who may be linked to the suspect. Naturally, most persons subjected to such torture divulge any name that comes to their minds. They hope that by divulging names, real or fictitious, they may bring an end to their suffering.

Illegality 8: The law strictly lays down the principle that it is only an official member of the Judiciary who can pronounce a verdict of guilty on any accused. Even Judges can only do so after the subject receives a fair trial. This principle goes to the very heart of the idea of separation of powers where even the President or the Parliament cannot declare a death sentence on anyone. This is strictly a judicial function. Centuries of development of jurisprudence are there to back this principle. However, in the case of enforced disappearances such a decision may be made by police officers, military officers, even paramilitary or purely hired criminals. Such delegation of power is the lowest depth to which any legal system can descend.

Illegality 9: If there is a suspicious death – such as a death of someone in the custody of the Police – the Law requires Magistrates to conduct an inquiry and record all relevant evidence before the body is given for interment. In the case of a suspicious death, a magistrate would usually order an autopsy. However, in the case of enforced disappearances, this most fundamental legal requirement is ignored. Where emergency regulations are drafted in a manner that allows for enforced disappearances, provisions are made to empower a Police Officer of some rank to make orders to dispose of bodies. Where no such emergency regulations are operative, those who engage in enforced disappearances give themselves the right to dispose of the body.

Illegality 10: Even when death sentences were carried out according to the Law (though in fact the practice of carrying out death sentences has been suspended now for a long period) there were procedures to be followed after a person was killed. The family of the deceased had the right to conduct funeral rites according to their religious or other customs. However, when enforced disappearances take place, even this basic final act of human decency is done away with. Secret burials are allowed, and either not keeping details or keeping the details secret is also part of the package. Even many years after such deaths, one of the great lamentations of the family members of the disappeared is that they are unable to pay their last respects to their loved ones.

Illegality 11: The Law invented the principle that a case should be established beyond reasonable doubt before a Court can pronounce a guilty verdict. The evolution of this principle shows that the Jurors wanted to be absolutely certain that they pronounced a verdict, only when they were absolutely certain of what they were deciding. This was a matter of conscience for each of the Jurors or, in cases where no Juries were engaged, for the presiding Judge. This issue of conscience is completely overlooked in the case of enforced disappearances. The issue of guilt or innocence is a matter which is lightly disposed. Sometimes, according to narratives which are now being published, the sole evidence against many who were disposed, was some verbal information given by some anonymous person.

Paying with Service to the People's Sovereignty

The 1972 and 1978 Constitutions made a practical joke of the notion of the sovereignty of the people. In the 1972 Constitution, the notion of people's sovereignty was used to legitimize what they called the supremacy of the Parliament by which the independence of the Judiciary was undermined. The 1978 Constitution used the same notion to create the absolute power of the Executive President. The ultimate aim of both constitutions was to undermine the Law itself.

Thomas Paine summed up the essence of the people's sovereignty in the following words. In England the King is the Law but in the United States the Law is the king.

Where the king or the head of the government is above the law all the talk of people's sovereignty is nothing. It is a phrase "doing a past what" that the first executive president was fond of using. With that shift of supremacy to the Executive President, the idea of the legality or otherwise of laws and actions of the executive, became an irrelevant act in deciding the legitimacy of such acts. When the validity of distinguishing legality as against illegality was no longer the ultimate test of actions of the Government's people sovereignty, it became a very deceptive word. With that, the public Law virtually disappeared as an important branch of the Law. The capacity of Judges to hold legislation as illegal and therefore null and void, was limited to just a short period before the passing of the legislation. The following statement made at the Constitutional Assembly in 1972 sums up the situation.

> *No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any L aw of the National State Assembly.*
>
> *Section 48(2) of the 1972 Constitution*

With that, the sovereign people of Sri Lanka were deprived of the capacity to withdraw consent to illegal acts of legislation and to get them declared as null and void. Even Laws, that enabled blatant violations of law such as arbitrary positions of imposing an impeachment without any regards to law or legal procedures, became possible.

With the undermining of the Peoples' sovereignty, the Rule of Law also lost its ability to follow the Rule of Law.

In her submissions against impeachment to the parliamentary select committee the lawyers for Dr. Shirani Bandaranayake relied on the Rule of Law.

RULE OF LAW

Sri Lanka is governed by the Rule of Law.

7he gravamen/foundation/basis of the legal system of Sri Lanka is the Rule of Law.

7he sovereign People have determined that all judicial power be exercised based on the principle of Rule of Law.

It is on that premise that Lord Hewart C.J. in the celebrated case of ***R v Sussex justices, ex parte McCarthy*** *([1924) 1 KB 256, [1923) All E.R 233) laid down the maxim that "not only must justice be done; it must also be seen to be done".*

7he Rule of Law mandates that every person gets a fair and impartialed hearing.

7his maxim has been recognized by all civilized legal systems throughout the world and has been recognized and adopted without exception by the Courts in Sri Lanka.

The public Law and the Rule of Law are those in which the idea of the people's sovereignty rests. People's sovereignty is not merely a sentimental idea. It is the legal concept giving validity to all other legal concepts.

Fake charges and fake inquiries as a threat to a system of justice

It is well known that fake charges and fake inquiries are a threat to individuals. However, what is not often realized is the damage it does to the justice and social systems overall.

Fake inquiries violate the following important principles:

a) Respect for the truth.
b) Respect for reason.
c) Respect for the individual.
d) Respect for the social order.

Respect for the truth

Accusing a person of committing wrongdoing is a serious exercise of power. The only reason for doing it is when the accusations are based on truthful findings. Finding the truth is a very difficult exercise. The work of any scientist demonstrates that the path to coming to a finding that is closer to the truth is difficult.

The way to find the truth is through evidence that would lead to a sound conclusion that the charges can be linked to a particular individual. Facts can only be based on evidence.

Respect for reason

Thus, the path to seeking truth is following the way of reason. The use of reason requires adherence to valid philosophical notions and rules of logic. People know how to distinguish truth from falsehood when the process that led to those conclusions is laid before them.

When people see that the truth is valued and respected, they develop a respect for the institutions that carry out these inquiries and the society that provides for such institutions. Where truth and reason is respected, it results in the development of confidence in the institutions as well as in the society as a whole.

Respect for the individual

Rulers and those who are favored by them are not the majority in a society. Society consists of individuals and all individuals are equal before the Law. If this principle is not respected, a rational system of justice simply cannot exist.

Respect for the social order

Society can only function without undue stress and violence if the people have a firm belief that system of governance and society are managed rationally and for the benefit of the people themselves.

When individuals are charged without valid reasons, that confidence begins to shatter. If such fake accusations and inquiries become too common, people lose their trust in the system altogether. Such a loss of confidence itself becomes a major problem for the functioning of society itself. When respect for truth and reason is lost, chaos emerges.

The rulers, faced with chaos, and having no rational approach to resolving it, are compelled to use excessive force to suppress the people. Through gradual expansion, such excessive force can lead to serious violations of rights by acts such as enforced disappearances, extrajudicial killings, torture and other forms of violence.

Governments trying to justify such actions locally and internationally are often driven to making false claims about crimes. Further, as a Government acquires these habits, it will use them against many of its opponents. These governments will also target people in high positions who may object to carrying out arbitrary orders or policies. The impeachment of former Chief Justice Dr. Shirani Bandaranayake is one more manifestation of how fake charges and false inquiries are used to suppress such persons.

The 1978 Neanderthal Stage of Constitution Making

With to the 20th Amendment, once again Sri Lanka will return to the 1978's Constitution in its original form. From the making of that Constitution up to now has been a wasted time for Sri Lanka. This is from the point of view of the development of an organized society capable of meeting the demands of modern times. A short list of catastrophes, which resulted from the 1978 Constitution for 42 years, is as follows:

Ever increasing debt has become the major obstacle to economic development. This comes in the following fourteen (14) areas. 1. The near annihilation of local entrepreneurship and the development of local enterprises. 2. The uncontrolled and uncontrollable corruption. 3. The unimaginable levels of collapse of the system of the administration of justice. 4. The ever increasing unemployment. 5. The constant decreasing of the real value of wages accompanied by increase of prices. 6. No significant improvements in health, education, transport, and other facilities. 7. An increase of crimes, particularly child abuse and sexual abuse. 8. The harassment of women. 9. The general increase of public insecurity. 10. The loss of morale of all those who are engaged in public services due to increasing politicization. 11. The displacement of the Rule of Law with the direct rule of politicians in power. 12. Ever-increasing impunity. 13. An absence of accountability. IN SHORT, the spread of a situation of disorder and lawlessness. 14. An impact on the morale ethos of the country. It has led to a general agreement that the country is living through a period of degeneration and decadence.

With the full reinforcement of the 1978's Constitution, all these factors will continue and get worse. What kind of **crises** and **catastrophes** will emerge is hard to predict.

What all these bring into focus is the fact that the Sri Lankans have not yet agreed on what type of society they want. A lack of collective understanding on the goals the country should pursue, in order to create an orderly and a peaceful society. Those which guarantee opportunities for all to better their living conditions, is at the root of the Constitutional crisis.

When the British declared independence for India, the Indian leaders representing various divergent views and representing conflicting causes sat together for almost two years to discuss: what type of society did they want to have in the future? What they really wanted was enshrined in the preamble of the Constitution. The rest of the Constitution merely worked out what they proposed as the ways to achieve the goals upon which they had agreed. This Constitution has survived despite serious threats posed against it by some powerful political leaders. For example, take Indira Gandhi who wanted to remove the judicial review powers of the Supreme Court relating to the power of the Legislature to amend any laws. However, the Supreme Court relying on the Indian Constitution was able to prevent this attempt by developing what is now famously known as the Basic Structure Doctrine.

What this basis structure means is: the basic agreement of the people represented by a non-partisan constituent assembly as to what the people want as a permanent part of their social organization. The Indian leadership showed the capacity to understand what should be the permanent part of their way of governance. This includes those that can be changed to meet the requirements of time.

Sri Lanka has not arrived at this stage of constitutional wisdom. In evolutionary terms, the stage in which Sri Lanka is, in terms of organizing the society from the point of view of constitutions and laws, could be called the Neanderthal stage. For Homo Sapiens to separate themselves completely from the Neanderthals took many millions of years. How long Sri Lanka will take to develop a Constitution that is not tailor made to any particular individual or part--but one that really represents the basic interest of the people? It appears it will take a long time.

The blame for the delay cannot be placed merely on politicians. The development of a consensus on what is best for themselves can only be with a collective agreement. Such collective agreements do not come from above or by whatever this or that politician thinks is best for the people. This does not also come from mere electoral majorities.

Such a collective understanding and a will has to be worked out from within the society itself. In this, the more articulate sections of society play a significant role. The unwritten Constitution of Britain was a product of work over a long period of time by many persons. There were political thinkers, Judges, political movements and intellectuals at every level of society. These movements represent the poorest section of society as well as those articulating the views of specific groups such as women and minorities et al. The people who come under the influence of these debates gradually learn to think for themselves and to make the demands that will best protect everyone's interests.

In Sri Lanka, the society has not reached this stage nor has it been trying to reach such a stage of consensus.

The last 42 years has been spent not on finding ways to displace the 1978 Constitution, but to make various minor amendments to it. As a result, the last 42 years can be considered time lost. Obviously, the years that immediately followed the 20th Amendment, will be an addition to these wasted years.

We may ask with Peter Seeger 'when will we ever learn?'

How a Bad Constitution Can Cause a Break Down of Rules against Murder

To be able to think clearly on whatever issue whether it be related to economic or social development or justice and law and order it is essential to have certain basic premises which can be taken for granted. A legal system based on the rule of law provides these basic premises. On that basis various issues as they arise could be addresses clearly and with the assumption that at the end the end result would be one which is consistent with the overall framework of the legal system and thereby ensuring a basic system of order within a society in terms of what people have accepted as desirable.

Allowing a basic legal principles underlying the legal system to be undermined is virtually to remove such premises which could be taken as the starting point in trying to address theoretical and practical issues as they arise day to do.

The result of abandoning these principles is to bring about a chaos in the thinking process of everyone in the society. By everyone we mean those who are ruling, government, those who carry out the policies of the government through various institutions such as civil service, the security services, the systems of administration of justice and various systems which are designed to provide for services that are essential for the healthy existence of people within society.

When these underlined premises are undermined then as a result the thinking process in every area begins to be confused first and later if the situation is not corrected it is bound to become even worse and from then on the thinking further in a rational way becomes next to impossible.

When a society is unable to think clearly into various issues, it means a situation of confusion, a situation which is described biblically like the tower of the Bable. Different people, different groups, different sectors talk in logically speaking different languages. There is no way to correlate the thinking of one group with the other. The general result of all this is the loss of the capacity to predict what would be the result under the normal circumstance of a particular way of acting if one comes to a certain conclusion on the basis of certain premises which are taken as the foundation.

The best way perhaps to illustrate this is to explain it with a practical examples.

Societal Attitudes Regarding Murder

When the basics of the societies' legal system can be taken for granted then in that society murder would be something that is condemned at all times and regarded as the most unwelcome forms of behavior. Out of that a basic premise that can be taken for granted arises many responses to murder. First of all, the country's education system will impart a very deep revulsion against murder. This will be followed by education directing everyone to avoid murder not only because it is morally bad , but also it could lead to worst kind of consequences .From this it follows that the state has to undertake the obligation of doing everything possible to prevent people from committing murder. Whole system of the criminal law both in terms of definition of crimes as well as procedures developed in order to investigate and prosecute crime are based on that assumption regarding the murder.

Now if in the overall arrangement of legal system, the interest in prevention of murder loses its absolute value ,then the result of it flows into all areas of life. Morally, people may give a lesser importance to this crime and thus at the moral education level there would be deeply disturbing trends which could pave way to dilute the rules that are established over a long period of time for the preservation of life at all costs. That undermining of the law and morality will lead to behavioral patterns where murder will not be seen as always an abominable act that everyone is supposed to avoid. The consequence would be interpretations given by various people creating excuses as to why murder is permissible under certain circumstances. Criminals may interpret it in terms of protecting their criminal enterprises and regard killing each other in the process of maintaining their illegal activities is an unavoidable necessity. It could also spread in the law enforcement agencies. The Law Enforcement Agencies could look at murder as a necessary evil and therefore resort to murder when they are faced with diffiult problems. The killing of people who have been arrested is one such possible deviation. Extrajudicial killings including enforced disappearances being seen as legitimate undermines the whole fabric of principles and laws which were developed over centuries in order to create an absolute prohibition against murder. That way of legitimizing murder would spread into the criminal investigating units which would not invariably investigate every murder as thoroughly as possible in order to ensure that no murderer goes unnoticed.Instead they will develop attitude of ignoring many cases of murder or developing various methods of circumventing the obligation to find such murderers or various methods by which some murders are investigated and others or not based on the political or other considerations and the like. The result therefore of this process of undermining the thought processes and interrelated practical strategies is that widespread insecurity into the country and into all activities. For example, a person entering into a business may fear for his life because of other competitors who instead of competing in a legitimate way will resort to murder and other such activities in order to use that to get advantages in competition.

Result of all this is a deep confusion within the society as to what to do under these circumstances. An individual may find impossible to think out a way as the basic premises on which society used to think about these ways have been altered. Despite of individual desire for the protection of his life as well as of others it would be found that there is no way to

guarantee such a protection by way of any societal agreements .When a society reaches that state then it is no longer possible to think clearly even an issue like murder.

The same principle applies to everything else. You remove certain basic premises on which certain ways of acting and thinking have been developed and if that is abandoned what might happen in terms of thinking processes is no longer predictable.

That is the state that has been reached in many of the countries which have abandoned for various reasons some historical and others due to new circumstances ,where the principle of legality based on certain fundamental assumptions has been abandoned.