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Rethinking the Attorney General's Department in Sri Lanka: Ideas for Reform

Centre for Policy Alternatives

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1. Introduction

The Attorney General of Sri Lanka is the Chief Law Officer of the State and considered to be the Head of the legal profession. The Attorney General is accorded a unique constitutional position with regards to his duties, privileges and responsibilities, which are defined by both constitutional and statutory provisions, as well as, through convention. However, the importation of the Commonwealth model of the Attorney General, the evolution of the Office of the Attorney General in Sri Lanka, and the increasing complexity and expansion of the legal system, have all resulted in the Attorney General's Department carrying out various roles and functions, which are served by separate or designated offices in more advanced jurisdictions. That being said, reforms to the Attorney General's Department have been studied by even the most advanced jurisdictions for decades, due to the complexity of the nature of the Office. It is in such a context that the Office of the Attorney General has been referred to as the "most difficult lawyer's job"¹ in British common law countries.

Different Roles: The Attorney General's Department performs multiple roles, which as demonstrated in this paper, are at cross purposes from each other and as such leads to situations of conflict. These contradictions are inherent to the Office of the Attorney General, and arise as a result of the various tasks that the Attorney General is constitutionally mandated to perform. This paper argues that the Attorney General cannot impart all of his duties in an impartial, independent and efficient manner, due to the conflict and incoherence between and among such duties. For instance, while expected to act as the legal officer of the State, State Agencies, and Departments, the Attorney General is simultaneously the chief prosecutor and also in several instances acts as the defender of the official positions of government in Court. Additionally, the Attorney General has a constitutional right to be heard by the Supreme Court during determinations of constitutionality of Bills², while having previously advised the government on the constitutionality of the said Bill³. This inherent duality in

¹ Powles G., "Why So Complicated: The Role and Status of Attorney General in Pacific Island States, and the Case of Tonga" (2015) 21 New Zealand Association for Comparative Law Yearbook 13

² Article 134 (1) of the Constitution of Sri Lanka states that, "The Attorney-General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction under Articles 120, 96[121, 125], 126, 129(1) and 131."

³ Article 77 of the Constitution of Sri Lanka states that, "(1) It shall be the duty of the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82 and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution; and the Attorney-General or any officer assisting the Attorney-General in the performance of his duties under this Article shall be afforded all facilities necessary for the performance of such duties.

(2) If the Attorney-General is of the opinion that a Bill contravenes any of the requirements of paragraphs (1) and (2) of Article 82 or that any provision in a Bill cannot be validly passed except by the special majority prescribed by the Constitution, he shall communicate such opinion to the President:

Provided that in the case of an amendment proposed to a Bill in Parliament, the Attorney-General shall

the Office of the Attorney General has over the years resulted in its politicization and an overall inability to dispense all of its functions in an independent and coherent manner expected of the Office. This paper advances the position that the multiple roles played by the Attorney General could be distinguished and re-assigned to new offices to ensure efficiency and greater clarity and coherence in the different tasks. Further, the paper makes the case for renewed accountability and thus for the need for robust oversight. Finally, the paper recommends institutional reforms within the existing model of the Attorney General's Department to ensure the tasks that remain in a reformed office is implemented in an impartial and efficient manner.

The duality inherent to the role of the Attorney General and the manner in which this has led to the politicization of the Office of the Attorney General has long been a bone of contention in most jurisdictions. In many of these jurisdictions, studies have proposed models or attitudes that the Attorney General could adopt to dispense his duties in a satisfactory and consistent manner.⁴ Often, a distinction is made in relation to the 'divided loyalties' of an Attorney General in his roles as a public officer and legal advisor to the Executive apparatus.

Ideas for Reform: This paper first discusses the below roles played by the Attorney General at present and highlights certain structural and conceptual issues, in each of them.

- Role played in prosecuting crimes
- Role played in the passage of legislation
- Role played as legal adviser to the government

It then proceeds to emphasize the independence and impartiality required to execute certain functions, particularly prosecution, and proposes alternative offices to carry out these functions, namely, a Public Prosecutor's Office and a Parliamentary Research Unit. This paper, however, maintains that the role of advisor to the government and/or Executive branch is best served by the Attorney General and that therefore, this arm of his role be retained with necessary reforms implemented.

communicate his opinion to the Speaker at the stage when the Bill is ready to be put to Parliament for its acceptance."

⁴ Dailey W.R., "Who is the Attorney General's Client" (2012) 87 Notre Dame Law Review 1113; Spalding N.W., "Professional Independence in the Office of the Attorney General" (2008) 60 Stanford Law Review 1931; Prakash S., "The Chief Prosecutor" (2005) University of San Diego Public Law and Legal Theory Research Paper Series 30

In 2010, a paper presented on reforms to the Office of the Attorney General in Commonwealth jurisdictions, pertinently observed regarding the nature of the Office,

“The fact that this “unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutors, the State and the citizenry at large” has led to frequent complaints of bias and appearance of bias which are reflected in recent attempts to enshrine the independence of the Office in Commonwealth constitutions and in the current UK proposals for reform.”⁵

A differentiation must be made between structural changes effected to the Attorney General’s Department, in terms of cadre, internal procedures and systems, and changes in terms of institutional infrastructure. The focus of this paper is primarily on improving the institutional coherence of the Attorney General’s Department, through the proposal of alternative offices for certain functions played by the Attorney General’s Department at present. That being said, the need for changes in terms of internal structure has been pointed out time and again, in order to improve the efficiency of the existing framework of the Attorney General’s Department⁶. However, the focus of this paper is on studying and making and recommendations in terms of making the existing Attorney General’s Department a more conceptually coherent organization, while making recommendations for the introduction of alternative offices for specific functions.

This paper by the Centre for Policy Alternatives (CPA) is meant to inform structural reforms that are likely to span several decades and thus, this paper is meant to initiate a discussion across a range of stakeholders. It must also be acknowledged that the Attorney General’s role (especially with regards to prosecution) sits within a larger framework of the justice system, and in order to be meaningful and effective any reforms to the Attorney General’s Department must be supplemented with overall reforms to other agencies, like the Ministry of Justice and law enforcement agencies. The present government contested the 2020 Parliamentary elections on the same policy set out in the President’s manifesto for the November 2019 Presidential elections, which highlighted the need for justice sector

⁵ as cited in Powles G., *“Why So Complicated: The Role and Status of Attorney General in Pacific Island States, and the Case of Tonga”* (2015) 21 New Zealand Association for Comparative Law Yearbook 13, at p. 17

⁶ Pinto-Jayawardena K., *“‘Justicising’ the Law: Public Accountability of the Legal Profession during the Past 50 Years”* (2005) Law and Society Trust ‘Aspects of 50 Years of Law Justice and Governance in Sri Lanka’ p.152 <https://lslanka.org/wp-content/uploads/2017/11/Aspect-of-50-Years.pdf>, Saliya Peiris P.C. *“The Department’ Under Siege; the future of the Attorney General”* (Colombo Telegraph, 25th October 2015) <https://www.colombotelegraph.com/index.php/the-department-under-siege-the-future-of-the-attorney-general/>

reforms.⁷ Reference is made to *inter alia* “a legal system that is suitable for the future”; “infrastructure development in the judicial sector”; “steps shall be taken to eliminate delays in the dispensation of justice”; “increase the efficiency of law enforcement procedures and mechanisms”; “restructure law enforcement agencies without any delay.”⁸ At the outset it must be noted that while the sentiments are welcome, such statements are broad and details are absent in terms as to how and when such promises will be implemented. It must also be noted that the 20th Amendment to the Constitution removes meaningful checks that were in place in the appointment to key institutions, including the Attorney General.⁹ In such a context, the present paper is meant to serve as a point of reference when discussing reforms with the overall goal of furthering the goals of an independent and efficient justice system.

⁷ Manifesto of President Gotabaya Rajapakse, “*Vistas of Prosperity and Splendour*”, accessible at <https://gota.lk/sri-lanka-podujana-peramuna-manifesto-english.pdf>

⁸ *Ibid*, pp. 69 – 70

⁹ The Centre for Policy Alternatives commenting on the 20th Amendment Bill issued a statement and analysis of the provisions proposed in the then Bill. Accessible at <https://www.cpalanka.org/statement-on-the-twentieth-amendment-2/>

2. The History of the Office of the Attorney General in Sri Lanka

Since its inception the Office of the Attorney General has evolved with the roles and tasks assigned to the Attorney General, procedures for appointment and removal, and reporting and oversight mechanisms. These factors have also weighed in heavily on the degree of political interference in the execution of the Attorney General's duties and thus impacting its independence and also the perception among the public of its standing.

It is evident that since the inception of the office, the Attorney General has been considered to be the 'government's lawyer', who would represent the government, in actions brought against the government.¹⁰

*"The present Attorney General is the lineal successor of the old Advocate Fiscal and just as in the old days, actions against the Government were brought against the Advocate Fiscal as representing the local 'Fisc' or Treasury, so they may now be brought against the Attorney General."*¹¹

At the time the formal title of the 'Attorney General'¹² was introduced in 1884, the office was part of the inner Cabinet. The Donoughmore Commission's proposals for reform envisaged the Attorney General as an advisor to the government, and state agencies and departments, while enjoying the status of a Minister. The Donoughmore Constitution of 1931 went on to extricate the Office of the Attorney General out of the ambit of political association, and tasked the Attorney General with representing the State in civil and criminal suit.¹³ The Soulbury Commission, however, while acknowledging the political association inherent to the Office of the Attorney General, maintained that it is a public office, and that the advice it provides remains apolitical.¹⁴ The 1972 and 1978 Constitutions, however, are seen as having paved the way for reducing the independence of the

¹⁰ See website of the Attorney General's Department

<<http://www.attorneygeneral.gov.lk/index.php/history>>

¹¹ as per Bonser CJ in *Le Mesurier v Layard* (1898) 3 NLR 227

¹² previously "Advocaat Fiscal", "King's Advocate" and "Queen's Advocate"

¹³ Pinto-Jayawardena K., " 'Justicising' the Law: Public Accountability of the Legal Profession during the Past 50 Years" (2005) Law and Society Trust 'Aspects of 50 Years of Law Justice and Governance in Sri Lanka' p.152
<https://lslanka.org/wp-content/uploads/2017/11/Aspect-of-50-Years.pdf>

¹⁴ See s. 33 and 34 of Soulbury Constitution

Attorney General's office.¹⁵ It is widely acknowledged that political interference with the office generally increased from the eighties¹⁶.

The precise nature of the role of the Attorney General and the constitutional status accorded to the office under the present Constitution has been discussed exhaustively in two judgments, one of the Court of Appeal and the other in the Supreme Court¹⁷.

It is evident then, that political connotations have been inherent to the Office of the Attorney General since its inception, and the task of removing any real or perceived bias in favour of political considerations from the Office of the Attorney General is an arduous one. In the following chapters, this paper carries out a detailed, albeit by no means exhaustive, analysis of the Attorney General's different roles, the manner in which they have become contentious, and makes recommendations to resolve such issues, where appropriate.

¹⁵ Pinto-Jayawardena K., " 'Justicising' the Law: Public Accountability of the Legal Profession during the Past 50 Years" (2005) Law and Society Trust 'Aspects of 50 Years of Law Justice and Governance in Sri Lanka' p.152 <https://lstlanka.org/wp-content/uploads/2017/11/Aspect-of-50-Years.pdf>

¹⁶ *Ibid* p.154

¹⁷ *Ibid* p.151

Land Reform Commission v Grand Central Limited (1981) 2 Sri Lanka Law Reports 147

Land Reform Commission v Grand Central Limited (1981) 1 Sri Lanka Law Reports 250

In the Supreme Court case it was held per Samarakoon CJ that the

"Attorney General is the Chief Legal Officer and adviser to the State and then to the sovereign and is in that sense an officer of the public. The Attorney- General of this country is the Leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole objective to establish the truth"

3. The Attorney General as Chief Prosecutor

The Attorney General is the Chief Prosecutor of the Republic, and plays an autonomous and conclusive role in relation to initiating, maintaining and withdrawing prosecutions, as discussed in detail below. The wide discretion enjoyed by the Attorney General in these respects, side by side, with the close political association inherent to the nature of his office, has resulted in the real or perceived issues of politicization, conflict of interest, and in addition, issues relating to the administration of justice. This chapter examines firstly, the prosecutorial role played by the Attorney General, and the wide discretion afforded to him in this regard. Secondly, the chapter examines several instances of politicization, conflict of interest, and issues pertaining to the administration of justice that require urgent attention. Finally, a case is made for the establishment of a Public Prosecutor's Office, discussing how this can remedy many of the shortcomings with the prosecutorial function of the Attorney General at present.

3.1. Prosecutorial Discretion of the Attorney General and Judicial Oversight

Statutory Powers of the Attorney General in Sri Lanka

Section 393 (1) of the Criminal Procedure Code states that the Attorney General may exhibit information, present indictments and to institute, undertake or carry on criminal proceedings in the following cases:

- a) In the case of any offence under Chapter XV where a preliminary inquiry by a Magistrate is imperative,
- b) In any case where the offence is not bailable,
- c) In any case which is referred to him by a State Department in which he considers that criminal proceedings should be instituted
- d) In any case other than one filed under Section 136 1 (a) of this Code
- e) In any case where an indictment is presented or information exhibited in the High Court by him.

Furthermore Section 393 (2) states that 'The Attorney General shall give advice, whether on application, or on his own initiative to State Departments, public officers, officers of the police and officers in corporations in any criminal matter of importance or difficulty.'

The Attorney General exercises a number of statutory powers in relation to criminal matters, which may be listed out as follows, in terms of the Criminal Procedure Code:

- “the power to determine whether a trial in the High Court shall be by jury or otherwise (Section 161 as amended by Act No. 11 of 1988); the power in respect of summary offences to either forward an indictment directly to the High Court or to direct the Magistrate to hold a preliminary inquiry under
- Chapter XV (Section 393 (7) as introduced by Act No. 52 of 1980); the power to exhibit information for a Trial-at-Bar by three judges of the High
- Court sitting without a jury (section 450 (4) as amended by Act No. 21 of 1988 and Section 393);
- power to grant sanction to institute certain prosecutions (Section 135(i)); power to decide the Magistrate’s Court having jurisdiction to try a case in case of doubt (Section 135);
- power to transfer criminal proceedings by fiat in writing from one Court or place to another at his discretion (Section 47(i) of the Judicature Act);
- power to prosecute offenders in both the High Courts and the Magistrate’s Courts except in the case of purely private cases instituted under Section 136(i)(e) (Section 193, Section 191(I) and Section 400(I));
- power to tender pardon to an accomplice (Section 256(1) and Section 257);
- power to call for the record from the High Court or the Magistrate’s Court in any case whether pending or concluded (Section 398(1));
- power in the case of concluded non-summary inquiries (Sections 395(1), Section 396, Section 399 and Section 397(1));
- power to terminate proceedings in the High Court by entering a ‘nolle prosequi’, (Section 194(I));
- power to sanction an appeal from an acquittal in the Magistrate’s Court (Section 318);
- power to appear for the State in all criminal appeals (section 360); and
- power to direct and assist investigations.”

The wide power exercised by the Attorney General, specifically in relation to criminal matters, was elucidated by former Attorney General, Palitha Fernando P.C. at the C.R. De Silva Memorial Oration.¹⁸ Accordingly, the Attorney General has the sole power to decide whether or not to issue indictments against individuals, other than of course the limited power exercised by the Commission to Investigate Allegations of Bribery and Corruption. The Attorney General cannot be directed to file indictment against any person, it is at his sole discretion. It is said that the Attorney General exercises

¹⁸ Palitha Fernando P.C., Former Attorney General “*The Role Of The Attorney General Of Sri Lanka And The Rule Of Law; With Special Reference To The Criminal Justice System*”, (2016) Oration Delivered at the 3rd Death Anniversary of the Late Mr. C. R. de Silva, accessible at http://www.sundaytimes.lk/161113/palitha_orations.pdf

'quasi -judicial' powers in this respect.¹⁹ The Attorney General is expected to take the decision to indict a person on a careful and objective analysis of the facts and law, free from any external 'prejudices or influences'.²⁰

The Attorney General's powers to indict have been challenged by way of a fundamental rights application.²¹ This was in the case of *Victor Ivan v. the Attorney General*²² where Fernando J. stated that "it is clear that the Attorney General has a statutory discretion, which involves several aspects. He has to decide whether to give or refuse sanction, and whether to exclude a summary trial, and, in that event, whether to order non summary proceedings or to file an indictment. The exercise of that discretion is neither legislative nor judicial action, but constitutes 'executive or administrative action.'"²³ Justice Fernando went on to state that the Attorney General's power to file, or not to file, an indictment is a discretionary power, which is "neither absolute nor unfettered. It is similar to other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purposes for which they have been conferred, and not otherwise. Where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126."²⁴

The other inherent power of the Attorney General is the *nolle prosequi* or the decision to discontinue criminal proceedings before a High Court in respect of a suspect. This is a non-delegable power enjoyed exclusively by the Attorney General, and should not be confused with a prosecuting officer's right to withdraw an indictment²⁵. It is the only way in which the Attorney General can decide to discontinue criminal proceedings without the permission of the Court and without recording any reasons for the discontinuance of the prosecution. The *nolle prosequi* is entered as a matter of policy, although in the Attorney General's opinion, the material against the accused justifies a criminal prosecution.²⁶

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Palitha Fernando P.C., Former Attorney General "*The Role Of The Attorney General Of Sri Lanka And The Rule Of Law; With Special Reference To The Criminal Justice System*", (2016) Oration Delivered at the 3rd Death Anniversary of the Late Mr. C. R. de Silva, accessible at http://www.sundaytimes.lk/161113/palitha_orations.pdf

²² 1998 1 SLR 340

²³ *Ibid.* at p. 343

²⁴ *Ibid.* at p. 346

²⁵ Palitha Fernando P.C., Former Attorney General "*The Role Of The Attorney General Of Sri Lanka And The Rule Of Law; With Special Reference To The Criminal Justice System*", (2016) Oration Delivered at the 3rd Death Anniversary of the Late Mr. C. R. de Silva, accessible at http://www.sundaytimes.lk/161113/palitha_orations.pdf

²⁶ *Ibid.*

In the case of *Gouriet v. Union of Post Office Workers* Viscount Dilhorne stated²⁷ that the Attorney General “may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers, he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”²⁸

In Israel, where the Attorney General’s powers are very similar to that of Sri Lanka, judicial intervention on the decision of the Attorney General to not prosecute, would be exercised only when such decision was clearly contrary to the benefit of the public and *mala fide*.²⁹ In the two cases of *Tzorfan & Others v. Chief Military Attorney and Others*³⁰ and *Ganor & Others v. Attorney General and Others*³¹ the Supreme Court reversed the decision of the Attorney General to not prosecute and ordered that prosecution commence in the first instance, and directed that the case be sent back to the Attorney General for review in the second.³²

In the case of *Victor Ivan v. Sarath N. Silva*³³, the question of whether the Attorney General’s decision to not prosecute could be reviewed, was answered in the affirmative³⁴. Such a power of review of the exercise of the Attorney General existed where the evidence was, for instance, plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors.³⁵

The dualistic role of the Attorney General in both prosecuting and simultaneously defending the government was discussed as far back in 1969. Sir Elwyn Jones in “The Office of the Attorney General” observed that the Attorney General should, however much of a political animal he may be when dealing with political matters, must not allow political considerations to affect his actions in those

²⁷ House of Lords (1978) A.C. at 453

²⁸ Pinto-Jayawardena, K. (2005) ‘Public Accountability of the Attorney- General- To What Extent Should The Exercise Of His Statutory Powers Be Reviewed By Court?’ p.47 *LST Review*, Vol.15, Issue-211.

²⁹ *Ibid*

³⁰ (1990) 43 (3) P.D. 718

³¹ (1990) 44 (2) P.D. 485

³² *Ibid*.

³³ (1998) 1 SLR 340

³⁴ Pinto-Jayawardena, K., “Public Accountability of the Attorney- General – To What Extent Should The Exercise Of His Statutory Powers Be Reviewed By Court?” (2005)15 *Law and Society Trust Review* 50

³⁵ *Ibid*, p.51

matters in which he has to act impartially and even in a quasi-judicial way.³⁶ Sri Lanka, too, has inherited the 'hybrid' nature of the role of the Attorney General, and therefore, the question as to whether the Attorney General should wield an absolute discretion in his or her decision making, the nature of which cannot be questioned by the Courts, becomes relevant.

3.2. Politicization of the Office of the Attorney General and Political Interferences in the Execution of Duties

Given the vitality of the functions of the Attorney General's role, it is of critical importance that the office not only actually operates in an apolitical and independent manner but that it is also seen to function in such manner. As has been pointed out throughout this paper, the Attorney General is constitutionally tasked with performing roles that are at variance with one another. This is of particular importance considering the wide discretion afforded to the Attorney General when exercising these contradictory functions, compounded by the fact that there is no objective mechanism to be used to decide whether each and every decision was arrived at independent of any possible political considerations. In a context where the existing framework places the Attorney General in constant contact with political actors, the functioning of the office will always be open to criticisms of political bias, no matter the character or integrity of individual holders of the office. Thus, reforms are essential considering the critical role of the office and the various factors highlighted in the paper that may result in possible bias and a miscarriage of justice.

The Attorney General's Department has long been seen as a means by which the incumbent government has exerted pressure on the justice system. This is mainly due to the fact that the Attorney General's Department comes within the direct control of the Executive. Between 2005 and 2015, the Department came within the purview of the Presidential Secretariat³⁷ and abandoned many of its historic traditional policies such as independence of the Department and non-appearance for officers who were Respondents in fundamental rights applications relating to torture and ill-treatment before the Supreme Court³⁸. This move severely impacted the independence of the Department, and its status within the public eye.³⁹

³⁶ *Ibid.* p. 42

³⁷ 'Attorney General's Department Comes Under Serious Public Scrutiny' (Colombo Telegraph, 23rd May 2016) <https://www.colombotelegraph.com/index.php/attorney-generals-department-comes-under-serious-public-scrutiny/>

³⁸ *Ibid.*

³⁹ Fernando, B. (2016) 'Sri Lanka/World –Attorney General's Department Comes Under Severe Public Scrutiny' (Asian Human Rights Commission) <http://www.ahrchk.org/ruleoflawasia.net/news.php?id=AHRC-FAT-023-2016>

The very appointment of the Attorney General can give rise to a number of conflict of interest issues, unless a transparent process is adopted in the appointment procedure. This was evident with the appointment of Mr. Mohan Pieris P.C. as the Attorney General and later Chief Justice, while also having functioned as the legal advisor to the Cabinet of Ministers in the meantime, which drew the ire of civil society at large⁴⁰. With the recent enactment of the 20th Amendment which provides broad power for the President to make appointments to key institutions with no meaningful check or consultation, serious concerns are raised regarding the future appointments to these institutions.

In his Report of the Special Rapporteur on torture or other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, during his visit to Sri Lanka in 2016 states that the discretionary power given to the Attorney General to decide whether to indict the perpetrators or not represents a weakness in the system, as although a number of indictments were filed by the Attorney General under the Convention against Torture Act, very few resulted in convictions.⁴¹ However, it should also be noted that certain breakthroughs within the system have also occurred resulting in successful convictions of perpetrators, due to the sheer dedication of certain committed prosecutors. A prime example would be the case of Krishanthi Kumaraswamy⁴².

Although the 19th Amendment sought to bring about a level of independence with reference to institutions such as the police and the judiciary, political interference with investigation processes as a whole cannot be ruled out as amply evidenced in several criminal cases.⁴³ Such interferences in the

⁴⁰ The Centre for Policy Alternatives challenged the appointment of Mohan Peiris as Attorney General *via* a Fundamental Rights application filed in SC/FR/578/2008 (see <https://www.cpalanka.org/the-centre-for-policy-alternatives-vs-attorney-general-sc-fr-5782008/>), and later as Chief Justice in SC/FR/23/2013 (see <https://www.cpalanka.org/centre-for-policy-alternatives-and-another-vs-d-m-jayaratne-and-others-sc-fr-232013/>)

'Mohan Peiris is new Attorney General' (the SundayTimes, 21st December 2008)

http://www.sundaytimes.lk/081221/News/sundaytimesnews_05.html

⁴¹ Human Rights Council (2016) 'Report of the Special Rapporteur on torture or other cruel inhuman or degrading forms of treatment or punishment on his mission to Sri Lanka' p.15 <https://www.mfa.gov.lk/wp-content/uploads/2018/03/34-5.pdf>

⁴² *Somarathne Rajapakse and Others v. Hon. Attorney General 2010 2 SLR 113*

<http://www.lawlanka.com/lal/slrDetailReportView?caseId=2010SLR2V113&searchPage=true>

⁴³ For more information, refer to *The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases*, CPA, March 2019 Accessible at <https://www.cpalanka.org/wp-content/uploads/2019/03/FINAL-A-Glance-at-Seven-Emblematic-cases-.pdf>

process may range from transferring investigating⁴⁴ or prosecuting officers⁴⁵. This, in effect, can be seen as one of the major drawbacks of the criminal justice system as a whole.

The role played by the Attorney General in terms of prosecution has been found to be wanting in recent years where politically sensitive matters were concerned. For example, events leading up to and the aftermath of the Aluthgama Riots are an unfortunate example of the delays by the Attorney General, where early action could have proven preventative. It has been noted that immediately prior to the inflammatory incidents in Aluthgama in 2014, the Bar Association of Sri Lanka had written to the then Attorney General requesting action be taken against the Bodu Bala Sena, for its active propagation of anti - Muslim sentiments.⁴⁶ In the aftermath of the violence, there was a need for legal advice and assistance in terms of personal and proprietary damage, a challenge that the Attorney General had notably failed to address.⁴⁷

Incidents like the above can, nonetheless, be contrasted against positive developments such as the role played by the Attorney General's department with the conviction of Sunil Ratnayake in the Mirusuvil massacre and subsequently affirmation of the conviction in the Supreme Court.⁴⁸ Such examples of successful prosecutions are rare, raising the question whether reforms as suggested in this paper can lead to a more focused prosecution strategy.

The wide prosecutorial discretion vested with the Attorney General's Office can easily become subject to political interferences, due to the nature of its close political association. It is in this light, that it is proposed that such discretion is structured and exercised subject to pre-determined and established criteria. The structuring of the prosecutorial discretion of the Attorney General through clearly established guidelines regarding the institution, maintaining and withdrawing of cases can resolve many of the issues highlighted in this paper, mainly political interferences and issues pertaining to the administration of justice. The Crown Prosecution Service of the United Kingdom,

⁴⁴ "CID's IP Nishantha Silva transferred" (*Daily Mirror*, 19 November 2018) accessible at <http://www.dailymirror.lk/article/CID-s-IP-Nishantha-Silva-transferred-158572.html>

⁴⁵ Confusion over "transfer" of Senior State Counsel on Ekmaligoda case" (*DailyFT*, 9 February 2016) accessible at <http://www.ft.lk/article/524035/Confusion-over-%E2%80%9Ctransfer%E2%80%9D-of-Senior-State-Counsel-on-Ekmaligoda-case>

⁴⁶ Haniffa F., Amarasuriya H., Wijenayake V., Gunatilleke G., "Where have all the Neighbours Gone? Aluthgama Riots and its Aftermath" (2014, Law and Society Trust), at p. 13 Accessible at <https://lstlanka.org/wp-content/uploads/2017/11/aluthgama-report-final-english.pdf>

⁴⁷ *Ibid* at p. 67

⁴⁸ <https://www.cpalanka.org/the-pardon-in-the-mirusuvil-massacre-sri-lankas-elusive-quest-for-justice/>. In April 2020, Ratnayake received a presidential pardon. Several have challenged the pardon in the Supreme Court- <http://www.ft.lk/news/SC-lists-24-Sep-for-support-of-FR-petition-challenging-Presidential-pardon-of-Sunil-Ratnayake/56-703402>

while looking into cases that have been investigated by the police and other investigative mechanisms, remains independent of the police and government. It functions through the establishment of detailed guidelines on a wide variety of aspects related to prosecution, chiefly captured in the “Code for Crown Prosecutors.”⁴⁹ The guidelines attempt to provide objective criteria, focusing on independence and fairness. For example, the Code prescribes the “Full Code Test” or in the alternative the “Threshold Test” for the prosecution of crimes by the Crown. The manner and criteria for the disposals of cases are also clearly identified and defined, ensuring the independence and impartiality of the Service.

One of the primary methods by which any public office can become politicized is the manner in which its holder is appointed and removed from office. Prior to the 20th Amendment, the Attorney General was appointed by the President with the approval of the Constitutional Council⁵⁰, a safeguard that has now been removed under the 20th Amendment, and replaced by a less independent Parliamentary Council⁵¹. Although there is a stricter criterion established for the removal of the Attorney General from office, little is known regarding the criteria adopted for appointment.

Section 2 of the Removal of Officers (Procedure) Act No.2 of 2002 stipulates that the Attorney General may not be removed from office unless the procedure given in the Act is followed. Section 3 of the Act provides the grounds on which the Attorney General may be removed from office. The Act envisages two forms of removal. Firstly removal by the President, where the President is of the opinion that there is adequate evidence to show that the person holding the office of Attorney-General has been adjudged an insolvent by a court of competent jurisdiction or is unable to continue in office due to reason of ill health or physical or mental infirmity or has been convicted of an offence involving moral turpitude, treason or bribery or has ceased to be a citizen of Sri Lanka.⁵²

Secondly, if the person holding the office of Attorney General is accused of a matter falling within the scope of the other grounds of removal mentioned in Section 3 of the Removal of Officers (Procedure) Act⁵³, then the Attorney General can be removed from office by the President only if a resolution is

⁴⁹ Accessible at <https://www.cps.gov.uk/publication/code-crown-prosecutors>

A detailed list of guidelines pertaining to individual subject matters can be found at <https://www.cps.gov.uk/prosecution-guidance>

⁵⁰ See Section 14 of the 19th Amendment to the 1978 Constitution

⁵¹ Section 6 of the 20th Amendment, amending Chapter VIIA of the Constitution. For a fuller analysis see <https://www.cpalanka.org/wp-content/uploads/2020/09/Final-doc-Summary-of-Changes-Under-the-Proposed-20th-Amendment.pdf>

⁵² See. S 4 of Removal of Officers (Procedure) Act No.2 of 2002

⁵³ These include being found guilty of misconduct or corruption, being found guilty of gross abuse of power of his office, being found guilty of gross neglect of duty, being found guilty of gross partiality in office.

passed by a majority of Members of Parliament (present and voting) calling for his/ her removal.⁵⁴ However, such a resolution can only be considered by Members of Parliament if the Committee of Inquiry appointed in terms of the act⁵⁵ returns a finding that the individual concern is in fact guilty of the accusations made against them.⁵⁶

***How does a Conflict of Interest arise out of the Attorney General
being both advisor to the government and public prosecutor?***

The roles played by the Attorney General in his capacity as advisor to the government, role of public prosecutor and role of advisor to state officers have come under criticism for lacking independence. The Special Rapporteur on the Independence of Judges and Lawyers, Monica Pinto, on her mission to Sri Lanka in 2016 studied the role of the Attorney General's Department in her Preliminary Observations and Recommendations. She expressed her concern over the dual role played by the Attorney General as the chief legal adviser of the Government and the head public prosecutor. Commenting on the role of the Attorney General she states that 'the Attorney General is also the Chief Legal Prosecutor and, as such replaced the position of the Independent Prosecutor which existed in the past. In such a capacity, the Attorney General should issue clear and proper guidelines for the investigation and prosecution of crimes, and specific guidelines could be developed for the investigation and prosecution of serious human rights violations, including torture, and violations of international humanitarian law.'⁵⁷ She further noted the fact that the Attorney General acting as representative of the State, creates the impression that the Attorney General represents the Government's interests foremost and not the public interests.⁵⁸ This in turn undermines the independence and credibility of the prosecution, particularly in politically sensitive cases.

⁵⁴ S. 18 read with S. 5 of Removal of Officers (Procedure) Act No.2 of 2002

⁵⁵ In terms of section 5 of the Removal of Officers (Procedure) Act, Members of Parliament have to pass a resolution supported by a majority of the total number of Members of Parliament (including those not present) for the appointment of a Committee of Inquiry. In terms of section 56(a) of the Removal of Officers (Procedure) Act, where the inquiry is in relation to the Attorney-General, the Committee will consist of three persons of which the Chairman shall be the Chief Justice and two other persons appointed from among persons who have previously held the office of Attorney-General or persons who have reached eminence in the field of law. These appointments are made by the Speaker with the concurrence of the Prime Minister and the Leader of the Opposition.

⁵⁶ S. 17 read with S. 5 of Removal of Officers (Procedure) Act No.2 of 2002

⁵⁷ Report of the Special Rapporteur on the Independence of Judges and Lawyers on her Mission to Sri Lanka, Human Rights Council, Thirty-fifth session, 6-23 June 2017. Accessible at <<https://www.refworld.org/docid/593945584.html>>

⁵⁸ Human Rights Council (2016) 'Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka' p.11 <https://www.refworld.org/docid/593945584.html>

3.3. Issues pertaining to the Administration of Justice

CPA in a publication examining emblematic cases highlighted several issues with regard to the administration of justice.⁵⁹ The report points to recurrent concerns including a culture of impunity and the lack of independent investigations which have caused impediments to the effective administration of justice. Although a Victim and Witness Protection Act was introduced in 2015, it remains to be fully operationalized. In addition, the procedure relating to the filing of indictments, too, poses significant delays and impediments to the effective administration of justice.

What is the Procedure relating to the Filing of Indictments?

In cases of murder, attempted murder or rape, it is mandatory that the trial takes place by way of indictment in the High Court. The indictments are filed by the Attorney General. Copies of the preliminary investigation proceedings together with other relevant documents are sent to the Attorney General's Department by the relevant Magistrate. In other grave crimes such as robberies, the notes of the preliminary investigations along with the statements of witnesses and suspects are sent to the Attorney General's Department for advice.

Once a file is sent to the Attorney General's Department, it is registered and sent to an allocating officer who is a senior officer of the Department, who then sends it to a State Counsel for necessary action. The State Counsel studies the file and sends a report to his or her supervising officer who is generally a Senior State Counsel. The said report would discuss the facts of the case, analyse the available evidence and thereafter make one of the following recommendations: In the case of committal by a Magistrate:

- 1. To forward the indictment to the High Court if there is sufficient evidence.*
 - 2. In the absence of prima facie evidence to quash the committal and direct the Magistrate to discharge the accused.*
 - 3. To direct the Magistrate to record further evidence.*
- In the case of police submitting files:*
 - 1. To indict the suspects if there is sufficient evidence*
 - 2. To discharge the suspects if the evidence is insufficient or*
 - 3. To order further investigation if the police have not done a proper investigation.*

Further course of action will be at the discretion of the Senior State Counsel after having studied the file.

⁵⁹ Centre for Policy Alternatives (2019) 'The Need for Accountability in Sri Lanka's Justice System' <https://www.cpalanka.org/wp-content/uploads/2019/03/FINAL-A-Glance-at-Seven-Emblematic-cases-.pdf>

It is apparent that the above procedure leading to indictment is indeed a lengthy one. This is one of main reasons why files which are sent to the Attorney General's department are often laid by without any due course of action.

In a welcome move to combat this inordinate delay, the former Minister of Justice and Prison Reforms, Mrs. Thalatha Athukorale, stated that the Police Department has been advised to send samples within one week of a Court Order, to the Government Analyst's Department, which is a main delay which causes prolonging in the entire legal procedure.⁶⁰ She further stated that it was imperative that all government institutions (for example, the Police Department) should resort to resolving their legal matters through their respective legal divisions, leaving resorting to the Attorney General's department only in cases of utmost importance.⁶¹

Furthermore, the absence of checks and balances has also proven challenging, as the powers and discretion vested with the Attorney General have been described as "uncontrolled by any authority"⁶², within the Sri Lankan legal system. This heightens the need to not merely ensure the absence of actual bias, but remove any perceptions of bias, in order to improve the public faith in the legal system.

3.4. Proposal for the Introduction of an Office of the Public Prosecutor

At the very outset of the issue on whether Sri Lanka needs to have an independent Public Prosecutor's Office through which criminal matters handled by the Attorney General may be delegated, it is important to note that Sri Lanka had an office of a Director of Public Prosecutions (DPP), created under the Criminal Procedure Code (Amendment) Bill in 1972. However, this was not an 'independent authority' but was functioning as a delegated entity under the Attorney General.⁶³ The Bill passed with overwhelming majority on 09th November 1972. Among the powers of the DPP were:⁶⁴

⁶⁰ Dissanayake, M. 'Thalatha in all-out move to combat law's delays' (*Ceylon Today*, 13th March 2019) <http://www.ceylontoday.lk/print-edition/2/print-more/26217>

⁶¹ Hansard-12th March 2019, p.1039

<https://www.parliament.lk/uploads/documents/hansard/1552739539039076.pdf>

⁶² Palitha Fernando P.C., Former Attorney General "*The Role Of The Attorney General Of Sri Lanka And The Rule Of Law; With Special Reference To The Criminal Justice System*", (2016) Oration Delivered at the 3rd Death Anniversary of Late Mr. C. R. de Silva, accessible at http://www.sundaytimes.lk/161113/palitha_oration.pdf

⁶³ International Commission of Jurists (2012) 'Authority without Accountability': The Crisis of Impunity in Sri Lanka' p. 72 <http://www.refworld.org/pdfid/50ae365b2.pdf>

⁶⁴ *Ibid*, p.73

1. The sanction over certain types of prosecution.
2. Power to apply to the High Court for remanding suspects in custody.
3. The power to take over private prosecutions.
4. Directing the police on investigations and providing advice in difficult cases.
5. Power to be informed of any withdrawals or decisions not to proceed with cases before the Magistrate's Court.

The DPP was accountable to both the Attorney General and Ministry of Justice. The Supreme Court was also empowered by writ to direct the Director of Public Prosecutions to take action. However, the said office was abolished in 1978. It is to be noted that the office of DPP came under direct political pressure, which led to the office being abolished under the 1977 government⁶⁵.

Both the 1994 Western, Southern and Sabaragamuwa Disappearances Commission and the 1998 All Island Disappearances Commission put forward the recommendation for an 'Office of Independent Prosecutor' with their observations highlighting the serious lack of prosecutorial independence.⁶⁶

More recent studies that have been carried out into the need to introduce a Public Prosecutor's Office to Sri Lanka have highlighted the fact that the establishment of such an office would result in a stronger perception of independence in prosecution⁶⁷. The establishment of a Public Prosecutor's Office is especially relevant in dealing with conflict related crimes, in order to ensure that no Executive action hinders their hearing, and also to win the trust of victims.⁶⁸ Certain studies on the topic also point out that there need only be a legislative amendment, but not a constitutional amendment to introduce the office of a Public Prosecutor⁶⁹.

It has been proposed time and again to establish a Public Prosecutor's Office as an alternative to the prosecutorial arm of the Attorney General's Department, especially where questions of grave human rights violations or crimes that purportedly involve the State or agents of the State are concerned. A Public Prosecutor's Office is seen as an alternative in order to not merely remedy any perceived lack

⁶⁵ Pinto- Jayawardena, K. (2010) '*Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*' p.135

http://humanitariansrilanka.org/newchapdf/IHR/Sri%20Lanka_final_3.pdf

⁶⁶ *Ibid*.

⁶⁷ Fonseka, B. & Linstrum-Newman, M. (2019) 'Prosecuting International Crimes in Sri Lanka: The Need for a Public Prosecutor's Office' p.180 in *Sri Lanka's Time to Try: Prosecuting Conflict Related Abuses* by Dr. Isabelle Lassée (2019) (eds.) South Asian Centre for Legal Studies.

⁶⁸ *Ibid*, p.181

⁶⁹ Jayasinghe, U & Lassée, I. 'Establishing an Office of the Public Prosecutor in Sri Lanka' p. 195 in *Sri Lanka's Time to Try: Prosecuting Conflict Related Abuses* by Dr. Isabelle Lassée (2019) (eds.) South Asian Centre for Legal Studies.

of independence or conflicts of interest, but also in order to build the trust of victims of crimes in the criminal justice system. This is important because apart from the prosecutorial function acting with independence and impartiality, it is important that it is perceived to function independently. In other words, the perceived independence and impartiality of the criminal justice mechanism enhances access to justice for victims of crimes.

The establishment of a Public Prosecutor's Office has received support particularly in relation to conflict – related crimes, due to the technical expertise that could be availed through a Public Prosecutor's Office, the ethnic nature of the Sri Lankan conflict, and the absence of possible political interference with such an office.⁷⁰

The dichotomy in the role of the Attorney General as political advisor and criminal prosecutor has been recognized and resolved in certain other jurisdictions.⁷¹ In the United Kingdom there has been a bifurcation between the Attorney General and the Crown Prosecution Service. The latter handles criminal prosecutions, whereas the former's office is held as a cabinet portfolio, and is considered a political appointment. In the United States of America, the Attorney General is a member of the Cabinet, and presides over the Department of Justice which oversees criminal prosecutions. However, matters involving political leverage or which are sensitive in nature, are assigned to either independent or Public Prosecutors.

⁷⁰ Fonseka, B. & Linstrum-Newman, M. (2019) 'Prosecuting International Crimes in Sri Lanka: The Need for a Public Prosecutor's Office' p.180 in *Sri Lanka's Time to Try: Prosecuting Conflict Related Abuses* by Dr. Isabelle Lassée (2019) (eds.) South Asian Centre for Legal Studies.

⁷¹ Saliya Peiris P.C. "*The Department' Under Siege; the future of the Attorney General*" (Colombo Telegraph, 25th October 2015) <https://www.colombotelegraph.com/index.php/the-department-under-siege-the-future-of-the-attorney-general/>

4. The Attorney General's Role in the Legislative Process

The Attorney General is constitutionally mandated to perform certain roles in relation to the process of legislative drafting and the passage of Bills. However, these different roles are not necessarily congruent with one another. These are briefly flagged below-

- The Constitution outlines the duties of the Attorney General with regard to the passing of Bills in Article 77.⁷² Accordingly, the Attorney General has to examine every Bill for any contravention of the requirements in Article 82 (1) and (2)⁷³ and for any provision which requires a special majority in Parliament. If the Attorney General is of the opinion that a Bill cannot be passed unless it is passed by special majority, he shall communicate such fact to the President. In case of an Amendment to a proposed Bill, he shall communicate his opinion to the Speaker.
- In case of Private Members Bills, Section 52 of the Standing Orders stipulates that the Secretary General of Parliament shall refer the Bill to the Attorney General to seek his opinion whether the Bill is inconsistent with the Constitution, and whether it attracts any impediment in respect of the Thirteenth Amendment to the Constitution. The Attorney General shall communicate his observations to the Parliament within six weeks.
- Further, in terms of Article 134 (1) of the Constitution, the Attorney General also has the right to be heard by the Supreme Court in relation to the determination on Parliamentary Bills, interpretation of the Constitution, Fundamental Rights matters, consultative matters

⁷² "77. (1) It shall be the duty of the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82 and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution; and the Attorney-General or any officer assisting the Attorney-General in the performance of his duties under this Article shall be afforded all facilities necessary for the performance of such duties.

(2) If the Attorney-General is of the opinion that a Bill contravenes any of the requirements of paragraphs (1) and (2) of Article 82 or that any provision in a Bill cannot be validly passed except by the special majority prescribed by the Constitution, he shall communicate such opinion to the President:

Provided that in the case of an amendment proposed to a Bill in Parliament, the Attorney-General shall communicate his opinion to the Speaker at the stage when the Bill is ready to be put to Parliament for its acceptance."

⁷³ "82. (1) No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution. (2) No Bill for the repeal of the Constitution shall be placed on the Order Paper of Parliament unless the Bill contains provisions replacing the Constitution and is described in the long title thereof as being an Act for the repeal and replacement of the Constitution."

referred to by the President or Speaker, and in relation to Parliamentary privileges. It has long been the practice of the Attorney General to take the same stance as the Executive, by and large. As has been pointed out in this paper, it is important not merely that the Attorney General performs his role in an impartial manner, but is perceived to do so. An apparent conflict of interest or overlap in his tasks impinges upon such real or perceived neutrality.

Commenting on the Attorney General's role in legislative process, Samarakoon C.J., remarked in the landmark judgment of *Land Reform Commissioner v Grand Central Limited*⁷⁴,

*“What is the effect of these? They expose the Attorney-General to the charge that he was partisan and biased when he tendered his advice on the Bill and when he made submissions on the Bill to the Supreme Court. There is an appearance of conflict between his duty to Court, his duty to the State and the legislature, and his duty to the client. The age-old concept that the Attorney-General is impartial and decides equally between State and subject would have been suspect. The eventual sufferer must necessarily be the administration of justice and justice itself.”*⁷⁵

4.1. Proposal for the Establishment of Parliamentary Research Unit

A Parliamentary Research Unit that provides non-partisan research to policy makers is envisaged as an alternative to the Attorney General's role played in relation to assisting the legislative drafting process. This is proposed with the aim of preventing a conflict of interest between the Attorney General's roles played during the different stages of legislative drafting, and the Determination of Bills.

The research services provided to Parliamentarians in relation to the policy implications of Bills tabled before Parliament could inform legislative debates. This would also ensure that the debates carried out are informed and policy-based, and would hence lift the process of legislative debates out of the limiting terrain of political partisanship. The research wing's strong suit is in its independence from the Executive or the ruling Parliamentary majority.

The Inter Parliamentary Union together with the International Federation of Library Associations and Institutions has made detailed recommendations for the setting up of parliamentary research units, for example, on the questions of mandate and oversight,

⁷⁴ (1981) 1 SLR 250

⁷⁵ *Ibid*, at page 260

- *“A senior parliamentary official (e.g., a presiding officer, secretary general, parliamentary librarian or chief information officer) could be made responsible for ensuring that the research service is available to all parliamentarians and made accountable for its day-to-day non-partisan operations.*
- *Rights to access specific information could be enshrined in legislation or parliamentary motions. These can also be worded to include requests for parliamentary research staff to conduct analytical work.*
- *A parliamentary oversight committee representing parliamentarians both from governing and opposition parties could be mandated to review the overall operation of the research service annually. Care should be taken, however, to limit the mandate of the committee to expressing its views on the general direction of the research service, not on the specific content of the analysis conducted for the benefit of parliamentarians. The latter would essentially politicize the content of the analysis produced.”⁷⁶*

Several exemplary models can be studied when implementing an arm for Parliamentary research services. All these models, however, appear to bear the core features of impartiality, expertise and timeliness when imparting research services to law makers. The United Kingdom Parliamentary Handbook, for instance, recommends following the fundamental principles of “AORTA” or Authoritative, Objective, Relevant, Timely and Relevant, when establishing a parliamentary research unit.⁷⁷

In the United Kingdom, a number of institutions provide research services for Parliamentarians, for different purposes and in varying contexts. ‘Parliamentary Research Services,’ as provided by the House of Commons and House of Lords libraries, provide research services to Parliamentarians to assist their duties in policy making. This includes subject-based research as well as answers to questions raised by individual Parliamentarians. The briefings on larger policy questions are made publicly available, as well. Committee Teams, on the other hand, assist Committees on their specific mandate, for instance, by studying and analyzing evidence in the preparation of its reports. These teams usually consist of subject-matter specialists and the research assistance provided is confidential. Thirdly, Specialist Research Centres provide research services in relation to areas of

⁷⁶ *Guidelines for Parliamentary Research Services*, Inter Parliamentary Union & International Federation of Library Associations and Institutions (IPU, 2015)

⁷⁷ *Parliamentary Research Handbook, Houses of Parliament* (UK Parliament, 2017) Accessible at <<https://www.parliament.uk/globalassets/documents/commons-library/hoc-library-parliamentary-research-handbook.pdf>>

high expertise, technicality or complexity. Examples include the Parliamentary Office of Science and Technology and the House of Commons Scrutiny Unit, which provides research where legal and financial expertise are concerned.⁷⁸

A report studying 'Parliamentary Research and Information Services' in 11 Central European and Balkan jurisdictions finds that parliamentary research services enhance the "legitimacy of the legislature", in providing fact-based, impartial and authoritative research that is hard to come by from incumbent governments, especially in relation to proposed bills.⁷⁹ The "Bridge" publications which are part of the research services provided in Hungary, for example, assist the law making process by studying the extant national law, comparative laws and jurisprudence on the point, and statistical and academic data on the relevant subject. The Polish Bureau of Research is exemplary in terms of the extensive range of subject matters it covers, in addition to carrying out research on its own initiative.⁸⁰ All 11 research units studied in this report went further than their national mandate at the time of their inception, and played a central role in the integration of the European Union and development of EU Law. In terms of organization and placement, the research units would follow one of three models, that is, where the research unit was placed under the parliamentary library services, or where the two components were counterparts without subordination, or where the parliamentary library services was placed under the research unit.

⁷⁸ *Ibid*

⁷⁹ *Development of Parliamentary Research Services in Central Europe and the Western Balkans*, National Democratic Institute for International Affairs. Accessible at <https://www.ndi.org/sites/default/files/development-of-parliamentary-research-services-CEE.pdf>

⁸⁰ *Ibid*. At the time of the above study, The Polish Parliamentary Chancellery had the most widely staffed research unit, with nine subject-matter related units, and had prepared 2,114 expert reports in the first term of *Sejm* (1991-1993) and 11,681 expert reports in its 4th term (2001-2005).

5. The Attorney General as Advisor to the Government

At present, the Attorney General's Department tenders legal advice, either upon advice being sought or on its own initiative to the Central Government, Provincial Councils, Government Departments, Statutory Boards and such other semi government institutions with regard to civil and criminal matters including constitutional and commercial jurisdictions.⁸¹ It is proposed that the Attorney General retain this function as chief advisor to the government, while delegating its prosecutorial and legislative functions to other autonomous bodies. This advisory function would also mean that the Attorney General functions as the lawyer of the State, and appears for and on behalf of the State agencies and department and represents them before judicial, quasi – judicial and International Organizations.

Several have proposed different models for reform in the past. For example, a “two- person” model has been proposed by President's Counsel J. C. Weliamuna where an Attorney General devoid of the prosecutorial arm should advise the State and defend the State to which it is advisor. He goes on to propose the creation of a special independent prosecutor to prosecute grave human rights violators and raises concerns of conflict with the following *“But the AG being authorized to prosecute and to defend is a major conflict of interest”*⁸² A different model was proposed by senior counsel Viran Corea where the Attorney General retains the prosecutorial arm, but the role of legal advisor to government is re-assigned to a different body. Accordingly, *“I would say the AG, since he has the wherewithal and the mechanisms and systems, should continue to be chief prosecutor. I think the role of advising the Government should in certain respects could be given to somebody else”*⁸³ As noted by lawyers, conflict of interest is also likely to spill over into situations where the Attorney General is expected to represent the State before International Organizations.⁸⁴

A similar kind of conflict of interest also arises where Executive actions are concerned, as was succinctly elicited during the dissolution of Parliament in 2018. Commenting on the role played by

⁸¹ Ministry of Justice and Prison Reforms, ‘Attorney General's Department’

https://www.moj.gov.lk/web/index.php?option=com_content&view=article&id=22&Itemid=169&lang=en

⁸² “Attorney General's Role in Defending Sri Lanka must be re-visited: Lawyers”, Daily FT, 29.09.2015
<<http://www.ft.lk/news/attorney-generals-role-in-defending-sri-lanka-must-be-revisited-lawyers/56-476705>>

⁸³ *Ibid*

⁸⁴ *Ibid*

the Attorney General during this constitutional crisis, then Member of Parliament Jayampathy Wickramaratne commented in the following manner,

*“It is a question whether the President obtained the advice of the Attorney General when the Parliament was dissolved. But we don’t see that he did. **However, the Attorney General had to defend the President’s decision in court. In that instance, the Attorney General considered the President as his client and acted in the best interest of the client.***

According to the Constitution, the Attorney General should be named a party in every Fundamental Rights petition. If a case is to be filed against the President, then it should be done under the Attorney General’s name.

*However, this does not mean that the Attorney General is obliged to protect the President at all times. **What is required is that the Attorney General express his independent views to the court as an amicus of the court.** In this situation, we might even have to change certain paragraphs in the 19th Amendment, especially in situations like the past 52-day controversy.*

During that period when the Speaker sought the advice of the Attorney General, they said that if the issue was taken to court, they might have to represent the President and therefore refused to advise the Speaker. Similarly, the Legal Advisor to the Government is the Attorney General. Hence there is a conflict of interest. If the Attorney General has to act as instructed by the President as a client, then there arises an issue regarding their independence.”⁸⁵ (Emphasis added).

As such, it is evident that the Attorney General cannot dispense all of his present duties, albeit constitutionally required, in a manner that is impartial and independent. In view of this, delegating and/or re-assigning certain functions, particularly his roles in prosecution and the legislative process, would remove the conflicts of interest that exist at present.

Even where the Attorney General acts as advisor to the government, it is to be borne in mind that it is a public office. As has been held by the Supreme Court, and previously highlighted in this paper, the powers of the Attorney General are

⁸⁵ Proposal to make Attorney General’s Department Independent, Daily FT, 02.04.2019
<<http://www.ft.lk/front-page/Proposal-to-make-Attorney-General-s-Dept--independent-%C2%A0/44-675772>>

*“similar to other powers vested by law in public functionaries. **They are held in trust for the public**, to be exercised for the purposes for which they have been conferred, and not otherwise.”⁸⁶ (Emphasis added)*

It must be reiterated that it has been pointed out that the Attorney General must assist the Court as an *“amicus of the Court”*⁸⁷

Nancy Baker, authoring one of the earliest and most influential studies on the subject of the Attorney General, has proposed the bifurcate models of the “advocate” and “neutral”. The former of these envisage the Attorney General as an advisor to and lawyer of the Executive – the latter sees the duty of the Attorney General as being owed to the Law, in a more general and fundamental sense. Other models of the advisory role of the Attorney General to follow Baker’s study largely subsumed under the broader heads proposed by Baker, like the “Court – centered”, “independent authority” and “situational” models proposed by John O. McGinnis.⁸⁸

Of more immediate relevance is a study by Guy Powles which proposes models for smaller jurisdictions whose origins are rooted in the Commonwealth legal system. The ‘Integrated’ approach proposes that the Attorney General is characterized as a political office, whereby it is “fully integrated into the political process.” The ‘Independent’ and ‘Quasi – Independent’ models envisage the Office of the Attorney General on a spectrum, where, as opposed to the ‘Integrated’ model, the Attorney General remains entirely apolitical and renders advice only upon request by the government.⁸⁹ One must agree with Baker when she concludes that a rigid choice between any bifurcate models is neither feasible nor warranted, but that a judicious balance between the two options may best serve the interests of the government, law, and the People.

⁸⁶ *Victor Ivan v. the Attorney General* (1998) 1 SLR 340

⁸⁷ Proposal to make Attorney General’s Department Independent, Daily FT, 02.04.2019
<<http://www.ft.lk/front-page/Proposal-to-make-Attorney-General-s-Dept--independent-%C2%A0/44-675772>>

⁸⁸ Dailey W.R., “*Who is the Attorney General’s Client*” (2012) 87 Notre Dame Law Review 1113

⁸⁹ Powles G., “*Why So Complicated: The Role and Status of Attorney General in Pacific Island States, and the Case of Tonga*” (2015) 21 New Zealand Association for Comparative Law Yearbook 13

6. Conclusion

This paper has carried out a detailed analysis of three of the primary functions of the Attorney General at present with regards to (a) Criminal Prosecution (b) Legislative Process and (c) Advising the government. After studying the real and perceived issues that each of these functions could possibly be faced with, proposals for reform, including the introduction of alternative and/or delegated offices are discussed. Special emphasis has been placed on the proposal for introducing a Public Prosecutor's Office, as well as, a Parliamentary Research Unit.

At the beginning of this paper, it was highlighted that meaningful reforms to the Attorney General's Office must be a process that both evolves over the years, as well as, one that must be supplemented by reforms to other agencies and departments that function within the legal system. Bearing in mind that the subject of studying and introducing reforms to the well-established and eminent Attorney General's Department is likely to be a Herculean task, this paper hopes to provide a useful starting point for discussion, as it provides ideas for reforms to some of the most pervasive issues that have been identified with the Office of the Attorney General – some of which nearly all jurisdictions grapple with.
