

PARLIAMENT

Law, History and Practice

Pasan Jayasinghe

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Asanga Welikala

Parliament: Law, History and Politics

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A NOTE ON THE PARLIAMENT BUILDINGS AND THE ARCHITECT

Andrew Cusack¹

When Prime Minister Ranasinghe Premadasa, on behalf of the government of President J.R. Jayewardene, obtained the consent of Parliament to relocate the national legislature to a new administrative centre called Sri Jayawardenapura Kotte, the task of designing the country's new Parliament was given to Sri Lanka's most eminent architect, Geoffrey Bawa. One of Bawa's pencil sketches of the proposed Parliament is reproduced on the cover of this book.

Bawa's story is, in many ways typically atypical of Sri Lanka. His grandfather was a Muslim lawyer who married an Englishwoman of Huguenot extraction. Their son became one of the most prominent lawyers in Colombo, and married a Burgher lady of Dutch and Sinhalese descent. Geoffrey was born in 1919, and left to study English at Cambridge before completing his own legal studies in London. After the end of the Second World War, Bawa became disenchanted with the prospect of a legal life and spent a year travelling the world; first throughout the Orient, then across the Pacific to America, and finally around Europe. A stay in Lake Garda convinced him of the beauty of Italy, especially of Italian architecture and landscaping.

Bawa returned to an independent Ceylon, bought a derelict rubber plantation and planned to transform it into his own tropical version of an Italian lakeside garden. As his interest in architecture grew, he took an apprenticeship with the Colombo firm of Edwards, Reid, and Begg before transferring directly into

¹ Andrew Cusack is a researcher in the UK House of Commons who also writes about architectural history.

the third year of studies at the Architecture Association's school in London. His final year was spent in Rome, where he completed his dissertation on the German Baroque architect Johann Balthasar Neumann.

The early work of Geoffrey Bawa is best described as 'tropical modernism,' attempting to adapt the ideas of Le Corbusier to a tropical setting. The results were mixed, but as Bawa the architect matured, he began to exhibit a greater appreciation of the Sri Lankan vernacular in his work. Terms like 'contemporary vernacular' and 'contextual modernism' became the bywords of Bawa.

Having been commissioned by Parliament to design its new home, Bawa took several helicopter flights over the site to determine how it could best be used. He proposed the marshy land be flooded to create an artificial lake, placing the parliament building on the high ground at the centre, on a twelve-acre island in the middle of the lake. In his own words, Bawa "conceived of the Parliament as an island capitol surrounded by a new garden city of parks and public buildings. Its cascade of copper roofs would first be seen from the approach road at a distance of two kilometres floating above the new lake at the end of the Diyavanna valley."

The design placed the main chamber in a central pavilion surrounded by a cluster of five satellite pavilions. Each pavilion is defined by its own umbrella roof of copper and seems to grow out of its own plinth, although the plinths are actually connected to form a continuous ground and first floor. The main pavilion is symmetrical about an axis running north-south through the debating chamber, the Speaker's chair and the formal entrance portal.

But the power of this axis and the scale of the main roof are diffused by the asymmetric arrangement of the lesser pavilions around it. As a result, the pavilions each retain a separate identity but join together to create a single upward sweep of roofs. The use of copper in place of tile gives the roofs a thinness and the tent-like quality of a stretched skin.²

Because Ceylon spent a comparatively long time as a Commonwealth Realm of the House of Windsor, many traditions of Britannic origin remain. The privileges and customs of the Sri Lankan Parliament are derived from the practice of the House of Commons. At ceremonial sittings of Parliament, the President and the Speaker are preceded into the chamber by the uniformed mace-bearer carrying the body's mace. And while semicircles are all the vogue in modern parliament buildings, Geoffrey Bawa's design retained the more traditional antiphonal arrangement so widespread throughout the Commonwealth.³

² All quotations are from David G. Robson, *Bawa: Genius of the Place: An Architect of Sri Lanka* (Deutsches Architekturmuseum 2004) 45.

³ Andrew Cusack, 'The Senate of South Africa', 17th November 2009: <http://www.andrewcusack.com/2009/senate-cape-town/>

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FOREWORD BY THE SPEAKER

Understanding the Role of Parliament

in a Democratic Republic

Throughout the majority of our day-to-day lives, we relate to Parliament as that place where our elected representatives ply their trade. When the people elect Members of Parliament, they largely imagine a process of selecting politicians to represent their interests in the business of voting for and against the passage of laws. However, in the last five years, many more of Parliament's constitutionally mandated roles have been thrust into the centre of our national discourse.

From the passage of the Nineteenth Amendment to the Constitution in April 2015, the spirited public debates that have surrounded the various lapses exposed in successive incisive reports by the Committee on Public Enterprise (better known by its acronym COPE), to the introduction of the Constitutional Council – and with it a critical role for Parliament in the curation of the independent commissions and the judiciary – Parliament's place in the public pecking order was well on the rise by the time I had the privilege of being selected as its Speaker just over four years ago.

In the past year of my tenure as the elected advocate of the House, the proceedings of this august assembly have gripped the country on a number of occasions, sparking national curiosity and intrigue over the role of Parliament and the roots of its powers. Last November, our Parliament for the first time passed a vote of no-confidence in a government. This was followed shortly thereafter by a unique resolution that leveraged the parliamentary power of the purse to choke off funding from those purporting to serve as a government without the sanction of the House.

Earlier this year, in the wake of the horrific Easter terrorist attacks, Parliament was called upon to ratify and as necessary extend the State of Emergency declared by the President, and thereafter, for the first time in Sri Lanka's history, the House appointed a Select Committee to probe serious lapses in the security apparatus that gave way to the attacks.

It is in light of such developments that public interest in the genesis of Parliament, its history, role, and constitutional influence has reached an all-time high. In this book, the authors spared no effort in wresting the hidden secrets of generations of scholarship and parliamentary tradition, and distilling this knowledge into an accessible work of literature steeped in an intimately Sri Lankan context.

Whether it is setting out the individual duties and powers of our own Parliament in their historical context, explaining the evolution of newer and more uniquely Sri Lankan governance features like the Constitutional Council or walking the readers through various iterations of parliamentary oversight structures from around the globe, *Parliament: Law, History and Practice* is a unique resource for scholars, lawmakers, attorneys, students, and civic-minded citizens who seek to better understand the legacy of our legislative apparatus, or indeed, to contribute to its advancement in the years to come.

In particular, it is the future generations who will shape the trajectory of our republic, who may most value the opportunity to have their political views and objectives informed by the best practices and lessons learned from legislatures past and present so readily accessible in these pages.

Unfortunately, despite the many powers vested in the Speaker of Parliament by the Constitution and Standing Orders of Parliament, one of them is not the ability to mandate a book as required reading for all new members of the legislature. In a world in which the Speaker was indeed possessed of such power and

thus able to command a comprehensive study of this book by every freshman lawmaker, I believe that all future sittings of Parliament would be bereft of chilli powder and butter knives. In such a world, we could all rest assured that the furniture in the chamber would remain firmly on the ground.

The Hon. Karu Jayasuriya, MP
Speaker of the Parliament of Sri Lanka

PREFACE

This publication is the latest product of a research and knowledge exchange partnership between the Centre for Policy Alternatives (CPA) and the Edinburgh Centre for Constitutional Law since 2015. It is funded by impact acceleration grants provided by the UK Economic and Social Research Council through the University of Edinburgh. I wish to also thank the Friedrich Naumann Foundation (FNF) for their financial support to produce Sinhala and Tamil translations of the book. This is yet another milestone in our valued and long-standing partnership with FNF to strengthen the institutions and processes of liberal democracy in Sri Lanka.

The global trend is towards populism and away from the mediating influences of the institutions and processes of parliamentary politics and government. This publication aims to underscore the centrality of Parliament as the central institution in our democracy, and examine the opportunities this presents for robust and enduring good governance through its deep embedding in our political culture and practice. Parliament is more than a site for the contestation of policies through the cut and thrust of debate and argumentation. It is essentially an idea of an ideal world of rational debate and reasoned discourse, and of the ways and means by which the diversity of our polity is fashioned into a strong and viable democracy above the vicissitudes of partisan rivalry.

Recently, Sri Lanka experienced a serious challenge to its democratic institutions amounting to a constitutional coup that was reversed through strong resistance from Parliament itself, landmark judgments of the superior courts, and civil society activism. Parliament's supremacy over its internal procedures, and moreover, the protection of its hallowed traditions, were challenged. They were, however, robustly defended and upheld in the country at large by a civil society moved strongly in their defence, and determined to restore parliamentary democracy to

the pivotal position it has, and always will occupy, in our polity. The position of civil society, based largely on the principles of parliamentary democracy, played a key role in restoring democratic tradition and practice in our government and governance in a time of crisis.

I wish to thank the three authors for their dedication and commitment in making this publication a reality, particularly to Dr Welikala for his championing of parliamentary democracy and the constitutional state in his writings.

I hope and trust that the publication will be of value to members and staff of both the legislature and executive, as well as to scholars and activists alike, and thereby make its contribution to parliamentary democracy in Sri Lanka.

Dr Paikiasothy Saravanamuttu
Executive Director
Centre for Policy Alternatives

MESSAGE FROM THE FRIEDRICH NAUMANN FOUNDATION

The Friedrich Naumann Foundation for Freedom (FNF) has worked around the world to promote freedom, peace, democracy, the rule of law, human rights, and the social market economy for over five decades.

One core area of the Foundation's work is on promoting a liberal, democratically constituted state under the rule of law. Therefore the Friedrich Naumann Foundation is happy to be associated with this insightful, comprehensive, and timely book on the law, history and practice of Sri Lanka's Parliament.

In countries like ours, Parliament represents one of the three key pillars on which the foundation of democracy is built. Parliament is also of paramount importance to the existence of a democratic state. If the institutions of democracy are worth preserving, the duty to explain that to the people that Parliament is meant to serve, also become vitally important. I believe this publication is one such instrument.

This important book will be published not only in English, but also in Sinhala and Tamil, thus providing access of the contents to the widest possible audience.

I congratulate the authors for undertaking this meaningful and important task. I also hope their commitment to upholding liberal democracy will also provide an impetus for the legislators to whose benefit this book is directed.

Sagarica Delgoda
Representative – Sri Lanka
Friedrich Naumann Foundation for Freedom

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AUTHORS' INTRODUCTION

It gives us great pleasure to introduce this short treatise on the law, history, and practice of the Parliament of Sri Lanka.

The colonial origins of the legislature go back to 1833 when a Legislative Council was first established to provide advice and consent to the Governor in the making of laws for the peace, order, and good government of the island. In 1931, whilst still a British colony, the legislature became the first in Asia to be elected on the basis of adult universal franchise. With independence in 1948, Parliament became a sovereign legislature, and after 1972, the principal legislative organ of the Sri Lankan Republic.

This book has been written in a context in which Parliament has a new constitutional prominence after the structural changes effected by the Nineteenth Amendment to the 1978 Constitution in 2015. Indeed, it is the first extended consideration of the constitutional role and operation of Parliament after the Nineteenth Amendment and the introduction of a comprehensive new committee system in 2016. In late 2018, the Parliament of Sri Lanka attracted the approbation of the democratic world when it successfully withstood an attempt to subvert the Constitution, demonstrating not only its new institutional resilience but also its maturity as the national legislature of an established democracy. It is our hope that this book will contribute to the continuing reinforcement of Parliament's role in national life, and thereby to the further development of Sri Lanka's constitutional democracy.

The book is primarily meant to assist the work of Members and staff of Parliament, although we hope it will be useful to the general reader as well. It covers the main areas relevant to the

study of the powers and functions of a modern legislature that draws its customs, conventions, and practices from the traditions shared by all Commonwealth Parliaments.

The Arrangement of the Contents of this Book

To guide the reader to the overall scheme of the book, synopses of the nine substantive chapters are given below:

Chapter 2: Parliament in its Historical and Constitutional Context: Parliament is the primary legislative organ of Sri Lanka. Its powers flow from the Constitution. Parliament traces its roots back to the colonial Legislative Council of 1833 and has experienced significant reform over the last two centuries. Parliament retains the influences of Westminster traditions and customs. The changes introduced by the Nineteenth Amendment are the *Fixed Term Principle*, the *Consent Principle*, and the *Confidence Principle*. There are ongoing debates about further reform.

Chapter 3: Powers and Privileges of Parliament: The Parliament of Sri Lanka's powers and privileges exist by virtue of the Constitution, and the Parliament (Powers and Privileges) Act 1953. Privilege protects Parliament from interference by external actors. Parliament's key privileges are freedom of speech and exclusive cognisance. The Supreme Court and Parliament share jurisdiction for punishing some contempts of Parliament, while the Supreme Court has exclusive jurisdiction over other contempts.

Chapter 4: The Speaker: The Speaker is Parliament's spokesperson. He particularly defends Parliament against intrusion by the executive and the judiciary. The duties of the Speaker can be broken down into six categories: upholding the rules of the House; protecting Parliament's privileges; certifying Bills; performing administrative duties; representing the House externally; and filling the office of the President under certain circumstances.

Chapter 5: The Legislative Process: The Constitution provides Parliament with supreme law-making power. The legislative process can be divided into two main phases: the pre-parliamentary phase and the parliamentary phase. During the parliamentary phase, a Bill goes through multiple readings. Certain Bills, such as Constitutional Amendment Bills, are subject to special procedures. In practice, the executive has almost exclusive authority in initiating legislation. However, the changes brought in by the Nineteenth Amendment and the introduction of the new parliamentary committee system have changed the relationship between the executive and Parliament in the legislative process.

Chapter 6: The Committee System: The parliamentary committee system has gone through distinct phases of development since the Executive Committees were established by the Donoughmore Constitution in 1931. It underwent a major overhaul at the end of 2015, with the introduction of Sectoral Oversight Committees (SOCs) and a Committee on Public Finance. Formally, the new system represents a positive development, and signifies a major strengthening of Parliament's scrutiny and oversight powers. However, there are also practical concerns which require remedies if the new committee system is to fulfil its potential.

Chapter 7: Executive Oversight: Oversight is one of the key roles of Parliament, aside from its law-making function and provision of appropriations. Parliamentary Questions and Ministerial Statements are two primary methods of enforcing parliamentary oversight of the executive. Moreover, control and oversight of public finance is a major aspect of Parliament's constitutional role. The finance committees of Parliament comprise of the Committee on Public Finance (COPF), the Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE).

Chapter 8: Parliamentary Oversight of States of Emergency and Counter Terrorism Powers: The constitutional framework governing states of emergency is set out in Chapter XVIII of the Constitution. Special anti-terrorism powers are provided in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended. Parliament has a major role in the oversight and control of the executive during an emergency. However, Parliament has found it difficult to effectively hold the executive to account, partly as a result of the vast powers of the presidential executive, and partly due to the pressures of public opinion.

Chapter 9: Parliament and Fourth Pillar Institutions: Fourth Pillar Institutions (FPIs) are a recent innovation used in many countries to boost good governance. The Constitutional Council is the apex body of the framework of FPIs in Sri Lanka. The Constitutional Council is a product of the Nineteenth Amendment and remedies some of the weaknesses of the old Constitutional Council and Parliamentary Council that preceded it.

Chapter 10: Parliamentary Services: Parliamentary services help MPs perform their functions. They boost the independence of Parliaments and uphold the separation of powers. The Parliament Secretariat is Sri Lanka's parliamentary service. The roles and appointments of the Secretary-General and the Parliamentary Staff Advisory Committee in Sri Lanka vary significantly from their counterparts in the rest of the Commonwealth. The Parliament Research Library helps to keep MPs fully informed on all aspects of executive activity. In-house legal services in other parts of the Commonwealth are currently ahead of those in Sri Lanka.

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We were assisted in various ways in the production of this book. Through the College of Arts, Humanities, and Social Sciences of the University of Edinburgh, financial assistance was provided by

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For the translation and printing of the Sinhala and Tamil versions of the book, financial support was provided by the Friedrich Naumann Stiftung, whose Resident Representative in Sri Lanka Mrs Sagarica Delgoda has always been a staunch ally of constitutional reform. In Edinburgh, we wish to thank Anne-Sofie Laegran and Shauna Thompson for all their support for this project. At the Centre for Policy Alternatives (CPA) in Colombo, we wish to thank Dr Paikiasothy Saravanamuttu, Harshini Amarasinghe, and Charya Samarakoon.

We wish to thank Mr Andrew Cusack, researcher in the UK House of Commons, for the note on the parliamentary buildings and Geoffrey Bawa, and The Lunuganga Trust for permission to reproduce Bawa's pencil sketch of the proposed parliamentary buildings in the cover of this book.

In particular, for their unstinted cooperation and invaluable assistance towards the research for this book, in the Parliament of Sri Lanka we wish to thank: Mr Speaker, the Hon. Karu Jayasuriya, MP; Mr Dhammika Dasanayake, Secretary General; Mr Tikiri Jayathilake, Assistant Secretary General, for providing many valuable insights about the internal processes in Parliament; Mr Sanath Wijegunawardhana, Deputy Principal Information Officer, for very helpfully compiling responses to a number of large Right to Information requests; and Mr Prasad Kariyawasam, Advisor to the Speaker, and former Secretary to the Ministry of Foreign Affairs.

Pasan Jayasinghe
Peter Reid
Asanga Welikala

Colombo
20th December 2019

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PARLIAMENT IN ITS HISTORICAL AND CONSTITUTIONAL CONTEXT

Introduction

The Parliament of Sri Lanka is the organ of the Republic through which the legislative power of the people is exercised by democratically elected representatives under the Constitution.¹ Occasionally, when important matters such as the amendment of the Constitution is at stake, the people exercise legislative sovereignty directly through a referendum.² During states of emergency, the Constitution permits the President to make law.³ In addition, the Constitution has devolved some powers to Provincial Councils.⁴ Aside from these exceptions, Parliament is the primary legislative organ of the state, and as such, it has a number of distinctive functions and powers.⁵ Its first function is as the democratically representative assembly of the people – to reflect their diverse views, to debate their problems, and to ensure government serves them well. Its major constitutional power is to enact, amend, or repeal laws, including most amendments to the Constitution. Its other main function and power is to hold the executive to account – through oversight of Ministers, scrutiny of government policy and legislation, and in exceptional circumstances, dismissing the government by withdrawing

¹ The Constitution of Sri Lanka (1978): Articles 3, 4(a), 75, 76.

² Ibid: Articles 83, 85.

³ Ibid: Article 155.

⁴ Ibid: Chapter XVII A.

⁵ For a general description of the functions of modern democratic legislatures, see Philip Norton, *Parliament in British Politics* (2nd ed. Palgrave-Macmillan 2013) 7-12.

confidence from the Cabinet or impeaching the President.⁶ And finally, Parliament is the custodian of public finances and the executive cannot raise or spend any public money without parliamentary sanction.⁷

The Sri Lankan legislature can trace its origins back to 1833, when a colonial proto-legislature was first established.⁸ Through a process of continuous historical evolution and growth – at times gradual, at others more dramatic – Parliament acquired the constitutional characteristics of a legislature in a democratic republic that it has today.⁹ At various times during this history, it has been known as the Legislative Council (1833-1931), the State Council (1931-1946), Parliament (comprising a House of Representatives and a Senate, 1946/7-1971/2), the National State Assembly (1972-1978), and once again Parliament under the 1978 Constitution.

Given its origins under British colonialism, it is not surprising that the Sri Lankan Parliament has been influenced by Westminster traditions and customs. In relation to parliamentary privileges particularly, the Sri Lankan Parliament has close similarities with other Commonwealth legislatures that have been influenced by the Westminster model. However, over time, this legacy has adapted to major political changes, including the establishment of

⁶ The Constitution of Sri Lanka (1978): Articles 38, 48.

⁷ Ibid: Chapter XVII.

⁸ Established by The King's Supplementary Commission to Governor Horton, 19th March 1833, and The King's Additional Instructions to Governor Horton, 20th March 1833, reproduced in G.C. Mendis (ed.), *The Colebrooke-Cameron Papers: Documents on British Colonial Policy in Ceylon 1796-1833* (Oxford University Press 1956): Chapters XI, XII.

⁹ Government of Ceylon, *Ceylon: Report of the Commission on Constitutional Reform* (Ceylon Government Press, 1969) [The Soulbury Commission Report (1945)] Chapters I-V; L.J.M. Cooray, *Constitutional Government in Sri Lanka 1796-1977* (Lake House, 1984) Chapter I; J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi, 1995) Chapter 1.

the Republic in 1972, and the introduction of presidentialism in 1978. Most recently, the Nineteenth Amendment introduced major structural changes to the 1978 Constitution, the net effect of which has been to enhance the constitutional significance of Parliament as an organ of the state.¹⁰ In some ways, this greater constitutional prominence of Parliament has accentuated its Westminster heritage. This was demonstrated during the constitutional crisis of 2018 when the twin principles of ‘confidence’ and ‘responsibility’ took centre-stage in Parliament’s resistance to presidential attempts to dismiss the government and dissolve Parliament.¹¹

There are also continuing debates about further constitutional reform. If the executive presidential system is abolished in the future, then it has significant consequences for Parliament as an institution. In a system of Cabinet government in a parliamentary democracy, Parliament becomes the central focus of all political activity in the country.¹² Without a directly elected President acting to an independent agenda, the government can function only so long as it enjoys the confidence of Parliament. Parliament becomes the fount of all power and authority in the state, confined only by the separation of powers and the fundamental rights enshrined in the Constitution. If such a big change is contemplated, then it is important for all Members of Parliament to be aware of its implications.¹³

¹⁰ Asanga Welikala (ed.), *The Nineteenth Amendment to the Constitution: Content and Context* (CPA 2016).

¹¹ Asanga Welikala, ‘The Sri Lankan Culture of Constitutional Law and Politics: The Lessons of the Constitutional Reform Exercise of 2015-19 and the Constitutional Crisis of 2018’ in Asanga Welikala, ed., *Constitutional Reform and Crisis in Sri Lanka* (CPA 2019) Chapter 7.

¹² David Judge, *The Parliamentary State* (SAGE 1993).

¹³ Alfred Stepan and Cindy Skach, ‘Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism’ in Alfred Stepan, *Arguing Comparative Politics* (Oxford University Press 2001) Chapter 12; Anthony W. Bradley and Cesare Pinelli,

The Constitutional Evolution of the Sri Lankan Legislature

Sri Lanka has a long history and many of today's political institutions – the Head of State, various systems and courts of law, and even local government – arguably have a cultural genealogy that goes back centuries into the pre-colonial past.¹⁴ It is therefore noteworthy that in Sri Lanka there is no ancient tradition of a legislature as a law-making institution, as a check on monarchical power, or even simply as a societal assembly. Two factors explain this: the concept of law in the pre-colonial polities, and the nature of kingly authority in the ancient monarchy.¹⁵ The dominant source of law was custom, which is a product of social habits over long periods of time. And even though it was recognised that customs could be changed with legislation, the legislator in such cases was always the monarch. While the conception of monarchical power was extensive, the Sri Lankan monarchical tradition was not absolutist; but all constraints on monarchical power stemmed from moral principles derived from religion and were given effect through the force of custom. Kings thus were not restrained through institutional checks in the form of a legislature, or substantive checks imposed by legislation made by a legislature. In these pre-colonial conditions, there was no necessity for a legislature to exist, in contrast for example to the conditions in medieval England that lie at the origin of the

'Parliamentarism' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) Chapter 30.

¹⁴ Asanga Welikala, 'Nation, State, Sovereignty and Kingship: The Pre-Modern Antecedents of the Presidential State' in Asanga Welikala (ed.), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (CPA 2015) Chapter 13.

¹⁵ A.R.B. Amerasinghe, *The Legal Heritage of Sri Lanka* (The Royal Asiatic Society of Sri Lanka 1999) Chapter XI.

Westminster model.¹⁶ The idea of Parliament is, therefore, a modern one in the Sri Lankan context.

The moment that most historians would identify as marking the beginning of modern government in Sri Lanka is the colonial constitution that was introduced in 1833 following the recommendations of the Colebrooke-Cameron Commission.¹⁷ Among many other significant features, this constitution established for the first time a Legislative Council. Although at first quite weak, the establishment of the Legislative Council was historically significant. It was a reform underpinned by liberal philosophical principles of representation and accountability prevailing at the time, and from the start it was intended as only the first step in a path of institutional development that would lead to full self-government in the future.¹⁸

Over the next century, the constitutional instruments through which the island was governed changed several times, which also changed the composition and powers of the Legislative Council, as a result of growing pressures for constitutional reform from local elites. The size of the Legislative Council grew over time, and the number of members who were not colonial officials also grew, eventually becoming a majority within the Council. The ‘unofficial members’ were appointed to represent various economic interests as well as ethnic and religious communities. Gradually, they came to be elected, although at the beginning only by an electorate much restricted by wealth and education.

By the 1920s, however, this model had reached the end of its utility. By the standards of the time, the Legislative Council had become both elective and representative, the unofficial members were in a majority, and the colonial government was normally

¹⁶ S.B. Chimes, *English Constitutional History* (Oxford University Press 1967) 72-86.

¹⁷ Mendis (1956) ix-lxiv; Cooray (1984) 22; Cooray (1995) 16

¹⁸ Mendis (1956) xxxv-xxxvii, xliii-xlvi.

dependent on its consent to pass measures to conduct the work of the government. However, the unofficial members had no prospect of gaining the responsibility for, or at least a share of the powers of, government under this system, and therefore no incentive to cooperate with the colonial government. The latter in turn was hamstrung by the requirement of legislative consent. This therefore became an unworkable system of government.¹⁹

The Donoughmore Constitution departed radically from this path in 1931.²⁰ It introduced a State Council, which exercised both legislative and executive power, that was elected on the basis of universal adult franchise from territorial constituencies, although the colonial government still held certain significant powers. The elected members of the State Council were divided into committees which exercised executive powers over major areas of government policy. Together with the chief colonial officials, the chairpersons of the committees collectively formed a Board of Ministers. Influenced by the progressive views of the time, the Donoughmore Constitution was an attempt at accelerating the process through which self-government would be achieved, and an unprecedented democratic experiment with the universal franchise in the British Empire beyond the white settler dominions.²¹

Independence was granted under the Soulbury Constitution in 1948. This constitution provided for a traditional Westminster-style system of government, with a bicameral Parliament. The lower chamber was the directly elected House of Representatives, while the upper house was the Senate, which was part indirectly elected and part appointed. Even though the country became

¹⁹ Soulbury Commission Report (1945) 16.

²⁰ T.J. Barron, 'The Donoughmore Commission and Ceylon's National Identity' (1988) *Journal of Commonwealth and Comparative Politics* 26(2) 147-157.

²¹ Martin Wight, *The Development of the Legislative Council 1606-1945* (Faber & Faber 1945) 74, 94-97.

fully independent in 1948, one of the most distinctive features of the independence constitution was that the legislative power of Parliament was procedurally restricted to discourage legislation being passed too easily that might discriminate against ethnic and religious minorities. Accordingly, section 29 of the constitution provided that legislation having any such discriminatory effect could not be passed by the normal simple majority. However, the limitation on legislative power was also widely if wrongly understood to be a limitation on the country's sovereignty itself – that the independence the country had won in 1948 was somehow incomplete.²² Although legally a misconception, this added impetus to the growing political desire in the 1960s to effectuate a total severance of links with the imperial power. In the general elections of 1970, accordingly, the people gave an overwhelming mandate for a new constitution which would create the new Republic of Sri Lanka.²³

The first republican Constitution enacted in 1972 established a unicameral legislature called the National State Assembly (NSA), and removed all previous limitations on its legislative power. In so resoundingly embedding the doctrine of parliamentary sovereignty, however, the first republican Constitution was, ironically, even more British than the Soulbury Constitution.²⁴

²² Ivor Jennings, *The Constitution of Ceylon* (3rd ed. Oxford University Press 1953); Asanga Welikala, 'Specialist in Omniscience?' Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon', *CPA Working Papers on Constitutional Reform No.18*, April 2017 < http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA_WP_CR_No_18_Final-1.pdf > accessed 19 October 2019.

²³ Nihal Jayawickrama, 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective' in Asanga Welikala, (ed.), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (CPA 2012) Chapter 1.

²⁴ Rohan Edrisinha, 'Sri Lanka: Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions' in Rohan

However, the objective of its framers in designing such an unfettered legislature was not to copy Westminster, but to establish a powerful legislature that could sweep away legal and other impediments to the rapid introduction of a socialist economy and society. This was however the shortest-lived Sri Lankan constitution, because in the general elections of 1977, another landslide mandate resulted in the introduction of a new constitution that would make a further radical change to the institutional form of the state. The 1978 Constitution consolidated the semi-presidential system of government in Sri Lanka. With the establishment of the mighty executive presidency, unlike under the two previous parliamentary constitutions, Parliament now became the distinctly subordinate one of the two political branches of the state.²⁵

Parliament in a Semi-Presidential System

Parliament under the 1978 Constitution must be understood in the context of the semi-presidential model of government that is the hallmark of that constitution. After pure presidentialism (or the US model) and pure parliamentarism (or the UK model), this third model is today mainly inspired by the Constitution of the French Fifth Republic that was introduced by General Charles de Gaulle in 1958, although it was first experimented with in the German Weimar Constitution in between the two world wars.²⁶ This is why it is often also known as the Gaullist model, and President J.R. Jayewardene who first advocated this system as necessary for Sri Lankan conditions in 1966, drew directly from the French experience. In his view, only a President popularly

Edrisinha and Asanga Welikala, (eds.), *Essays on Federalism in Sri Lanka* (CPA 2008) Chapter 1 at 21-27.

²⁵ A.J. Wilson, *The Gaullist System in Asia: The Constitution of Sri Lanka* (1978) (Hurst 1980).

²⁶ Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton University Press 2005).

elected for fixed terms, and enjoying independence from Parliament and the legitimacy of a direct mandate from the people, would be able to provide the strong and stable executive government that was needed to deal with the central challenge of economic development of a post-colonial society. The compromises needed to maintain parliamentary majorities in the Westminster system had resulted in indecisive leadership, and the reluctance of MPs to adopt unpopular but necessary policies for fear of losing their seats, he felt, had worked to the disadvantage of the country.²⁷

For Jayewardene, an integral part of the response needed to address the problem of economic underperformance and crisis was institutional: the inefficient system of government had to change. Jayewardene submitted a proposal for a presidential constitution to the Constituent Assembly in 1970-72, but he was strongly opposed by his own party leader Dudley Senanayake, an advocate of parliamentary democracy.²⁸ After Senanayake's death soon thereafter, Jayewardene assumed the leadership of the UNP and led it to a landslide victory in the 1977 general elections. Using his five-sixths parliamentary majority, he then enacted the Second Amendment to the 1972 Constitution to introduce the office of a directly elected executive President, which was then consolidated in the second republican Constitution which came into force in 1978.

There are two essential features to the semi-presidential form of government. The executive is made up of (a) a directly elected fixed term President and (b) a Prime Minister and Cabinet

²⁷ J.R. Jayewardene, Keynote Address to the Ceylon Association for the Advancement of Science, 14th December 1966, Colombo.

²⁸ K.M. de Silva and Howard Wriggins, *J.R. Jayewardene of Sri Lanka* (Vol.2) (Leo Cooper 1994) 378-379.

accountable to the legislature.²⁹ It is thus a model of executive power-sharing between the President and the Prime Minister and Cabinet. In the conceptual model, the President is the Head of State (albeit with substantive executive powers) whereas the Prime Minister is the Head of Government, but the 1978 Constitution has always provided that the President is both the Head of State and the Head of Government. This system can be more or less stable depending on a range of factors, including the nature of the parliamentary majority and who commands it, and the political culture of governance that may or may not facilitate the cooperation required between the President and the Prime Minister. Parliament's importance in this scheme is that it provides the confidence that keeps the Prime Minister and Cabinet in office, and the division and sharing of executive power is intended to ensure the President does not become too overweening.³⁰

The semi-presidential constitutions are also often subdivided into two main sub-types: 'president-parliamentary' and 'premier-presidential'.³¹ In the former, the Prime Minister and Cabinet are jointly accountable to both the President and Parliament. In the latter, the Prime Minister and Cabinet are solely accountable to Parliament. The constitutional effect and significance of the Nineteenth Amendment in 2015 was that, by removing key presidential powers over the dismissal and appointment of the Prime Minister, it transformed the 1978 Constitution from a 'president-parliamentary' to a 'premier-presidential' model of

²⁹ Robert Elgie, 'What is Semi-Presidentialism?', (n.d.) <
http://www.semipresidentialism.com/?page_id=2> accessed 19
October 2019.

³⁰ Maurice Duverger, 'A New Political System Model: Semi-Presidential Government' (1980) *European Journal of Political Research* 8(2): 167-187.

³¹ Matthew Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge 1992).

semi-presidentialism.³² These changes to the institutional form of the executive are fundamental. As President Sirisena's ill-advised moves during the constitutional crisis of 2018 leading to judicial declarations of their illegality demonstrated, the full ramifications of the Nineteenth Amendment have not been properly understood even at the highest levels of the state.

For President Jayewardene, however, the blend of presidentialism and parliamentarism was the ideal constitutional model for Sri Lanka. It brought the benefits of strong presidential leadership while preserving the benefits of democratic accountability through the parliamentary traditions of the Westminster model. It has also been a relatively stable model of government because, except for brief periods of 'cohabitation' which have been exceptions to the norm (2001-4 and 2015 to the present), the 1978 Constitution has operated through what is known as 'consolidated majority government', i.e., the President and Prime Minister have usually belonged to the same majority in the legislature.³³ Moreover, the President until 2015 has been the dominant actor in the executive and the Prime Minister, appointed and dismissed by the President without formal reference to Parliament, has been more a lieutenant from his or her own party than a plausible rival with an independent source of legitimacy and authority derived from Parliament.

Even before the Nineteenth Amendment, however, notwithstanding the undoubted dominance of the executive presidency in the constitutional landscape, the Constitution did give Parliament many significant roles. It is the main institutional organ of the state that exercises the legislative sovereignty of the

³² Asanga Welikala, *The Westminster Viceroy and the Republican Monarch: The 2018 Sri Lankan Constitutional Crisis in Historical Context* in Harshan Kumarasingham, (ed.), *Viceregalism: The Crown and its Representatives in Political Crises in the Post-War Commonwealth* (Palgrave-Macmillan, forthcoming).

³³ Skach (2005): 15-17.

people, by their elected representatives on their behalf. The legislature so defined is the legislature of a democratic republic, as stated in the preamble to the Constitution. This means that the state has been constituted to pursue the common good of the people, based on the legitimacy of popular sovereignty as well as the liberty guaranteed by the rule of law. The preamble speaks of these republican principles as “immutable” and, even more aspirationally, the “intangible heritage that guarantees the dignity and wellbeing of succeeding generations of the people of Sri Lanka and of all the People of the World”. What freedom and justice in this republican sense means is that each citizen has the right not to be dominated, or in other words, not to be subject to the arbitrary will of others.³⁴ The whole system of government established by the Constitution is premised on this core idea of republicanism. These are the high ideals that define the concept of legislative sovereignty, and the constitutional role of Parliament, in the 1978 Constitution.

The Composition of Parliament

The Sri Lankan Parliament is a unicameral legislature, and its 225 Members are elected according to a system of proportional representation. In the 88 years since 1931 when there has been an elected legislature, it was only between 1946 and 1971 that Parliament was bicameral.³⁵ The Senate was the upper house under the independence constitution, which had been recommended by the Soulbury Commission rather than local leaders. Bicameralism has not generally been viewed with much interest or favour within the Sri Lankan political elite, although in broader constitutional discourse, the principle has been defended as a necessary institution of ‘shared rule’ if there is further

³⁴ Maurizio Viroli, *Republicanism* (Hill and Wang, 1999): 3-19.

³⁵ Jennings (1953): 97-99.

devolution to the Provinces, or in more orthodox terms, as an institution of deliberative democracy.³⁶

The 1978 Constitution introduced proportional presentation, although it was only in the 1989 parliamentary elections that it was used for the first time.³⁷ Prior to that, elections were held on the basis of the first-past-post system (although the elected component of the Senate had also used a form of proportional representation). Of the 225 MPs, 196 are elected from 22 electoral districts. The remaining 29 MPs are allocated for appointment by political parties (the 'National List' seats). Voters cast their vote for a party and then up to three preferences for candidates from that party's list for the electoral district. Seats are apportioned among parties using the 'largest remainder' method.³⁸ Proportional representation has been a key constitutional device for the accommodation and representation of the political and cultural pluralism of the Sri Lankan society, although it has also served to fragment the party-political structure of the system and

³⁶ Chanaka Amaratunga and Tissa Jayatilaka, 'Constitutional Safeguards in Developing Democracies: The Case for a Second Chamber in Sri Lanka' in Chanaka Amaratunga (ed.), *Ideas for Constitutional Reform* (Council for Liberal Democracy 1989): 129-141.

³⁷ This was because the term of the Parliament elected in 1977 was extended by a referendum in 1982, in lieu of the general election due in 1983, which would otherwise have been the first use of proportional representation. The 1982 referendum (to date the only referendum held) is highly controversial, both in principle and in terms of how it was conducted: De Silva and Wriggins (1994): 539-550.

³⁸ Kåre Vollan and Luwīe Ganeshathasan, 'A System of Electoral Representation for Sri Lanka: The Principles Behind the Choice', *CPA Working Papers on Constitutional Reform No.16*, April 2017 <http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA_WP_CR_No_16_Final-2.pdf> accessed 19 October 2019. 4-5.

aggravate undesirable tendencies of the political culture such as corruption and violence.³⁹

The Powers of Parliament under the 1978 Constitution

All of Parliament's powers and functions, just like those of the other branches, flow from the Constitution.⁴⁰ In other words, there are no sources other than the Constitution for Parliament's legal powers, and accordingly, the Sri Lankan Parliament is a legislature of constitutionally limited competence, although within the four corners of the Constitution, the scope of that legislative competence is very broad and substantial. While sometimes the Westminster doctrine of parliamentary sovereignty is still occasionally used to describe the legislative power of the Sri Lankan Parliament, this is, as a legal proposition, entirely wrong.⁴¹ Unlike the British system which uses the doctrine of the sovereignty of the Crown-in-Parliament as a substitute for a codified constitution, in Sri Lanka a written constitution creates a Parliament that is not sovereign in the British sense.⁴² Article 3 of the Constitution states that, "In the

³⁹ Amita Shastri, 'Channelling Ethnicity through Electoral Reform in Sri Lanka' (2005) *Commonwealth and Comparative Politics* 43(1): 34-60.

⁴⁰ *Singarasa v. Attorney General* [2013] 1 SLR 245 at 255-256 (SC).

⁴¹ *In Re the Thirteenth Amendment to the Constitution* [1987] 2 SLR 312 at 320-322 (SC), Niran Anketell and Asanga Welikala, *A Systemic Crisis in Context: The Impeachment of the Chief Justice, the Independence of the Judiciary and the Rule of Law in Sri Lanka* (CPA 2013): 25-26. Similarly, the notion that the President enjoys plenary or residual executive powers independent of the Constitution is often argued but consistently rejected by the courts: *Singarasa v. Attorney General* [2013] SLR 245 (SC); *In Re the Nineteenth Amendment to the Constitution* [2015] *Parliamentary Debates* 234(2), 9th April 2015: Columns 261-284; SC Reference by the President 2/2003 [unreported]; *Sampanthan v. Attorney General* [2018] SC (FR) Application No.351/2018, SC Minutes 13th December 2018; *Viyangoda v. Rathnayake* [2019] CA Writ Application No.425/19, 15th October 2019.

⁴² Anketell and Welikala (2013): 22-26.

Republic of Sri Lanka sovereignty is in the People and is inalienable.” It follows that if it is the people that are inalienably sovereign in the Sri Lankan republic, then no other person or institution within the constitutional order can lay claim to sovereignty. Therefore, the fundamental principle that the Constitution as the supreme law creates, provides for, and limits the legislative competence of Parliament governs any consideration of the Sri Lankan Parliament.

Articles 75 and 76 are the key provisions delineating the scope and limits of Parliament’s legislative power. In these terms, Parliament has the power to make laws, including laws of retroactive effect, and it has the power to amend the Constitution (except the entrenched constitutional provisions that require referendum approval in addition to a parliamentary supermajority).⁴³ The constitutional amendment power is restricted by the requirements that no law can suspend the operation of the Constitution in whole or in part, and no law can repeal the Constitution unless it also enacts a replacement. Moreover, as a general principle Parliament cannot abdicate or alienate its legislative power and cannot set up a rival legislative authority.

This scheme of legislative power however must be understood in the context of four exceptions. First, the people retain the right to exercise their legislative sovereignty directly through the referendum under specified circumstances.⁴⁴ Second, it did not prevent the introduction of devolution in 1987, because the Supreme Court determined that the manner in which some legislative powers were devolved to the Provincial Councils under the Thirteenth Amendment did not affect Parliament’s overriding legislative power.⁴⁵ Third, it is permitted for the law governing

⁴³ The Constitution of Sri Lanka (1978): Article 83.

⁴⁴ The Constitution of Sri Lanka (1978): Articles 83, 85, 86.

⁴⁵ Asanga Welikala, ‘The Sri Lankan Conception of the Unitary State: Theory, Practice, and History’, *CPA Working Papers on Constitutional*

states of emergency to confer a law-making power on the President during emergencies.⁴⁶ And finally, Parliament can delegate powers of subordinate legislation to others for prescribed purposes.

Three other major powers are given to Parliament. Article 148 formally gives Parliament full control over public finance.⁴⁷ No revenues may be raised nor any expenditure undertaken by any public authority except by or under the authority of an Act of Parliament. Provincial Councils and local authorities also raise some revenues, but their authority for this stems from, respectively, the Constitution and local government laws. Parliamentary control over supply is a formal principle underpinning every constitutional democracy, although functionally, it is the government with a parliamentary majority that exercises real control over the annual budget.⁴⁸ This principle was an early feature in the evolution of the Sri Lankan legislature even during the colonial period, and was fully established by the Donoughmore Constitution in 1931. It is one of the main principles through which the government is made accountable to Parliament. If Parliament withholds funds, no government can continue to function in practice, and it is also expressly provided that a government must resign if defeated on its budget.⁴⁹

Article 155 provides for the parliamentary oversight of states of emergency. A proclamation of a state of emergency by the President must be immediately communicated to Parliament. Without parliamentary approval, a proclamation stands revoked, and extensions of the state of emergency must be approved by

Reform No.1, June 2016 < <http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-1.pdf> > accessed 19 October 2019.

⁴⁶ See Chapter 8 of this book.

⁴⁷ See Chapter 7 of this book.

⁴⁸ Cooray (1995): 259-276.

⁴⁹ The Constitution of Sri Lanka (1978): Article 48.

Parliament every month. Parliament must be summoned for this purpose even when it stands dissolved, prorogued, or adjourned. This framework governing the declaration, extension, and termination of states of emergency, including the requirements of communication and approval, meet basic standards governing the deployment of emergency powers in constitutional democracies.⁵⁰

And finally, by Article 4 and 67, Parliament is given control over its internal business. Parliament has judicial powers over its privileges, immunities, and powers, and these are determined and regulated according to law. This is an area in which the Westminster influence is most visible in contemporary Sri Lankan parliamentary practice. The rules of the Westminster system relating to parliamentary privilege were developed in the context of historic conflicts between Crown and Parliament for supremacy. The modern rules stem from historic settlements that ensured the independence of the House of Commons from monarchical interference.⁵¹ Today these rules perform the same function of protecting the Sri Lankan Parliament from undue intrusion from the executive.⁵²

Parliament and the Executive after the Nineteenth Amendment

The 1978 Constitution, which while as noted established a dominant President and a subordinate Parliament, nevertheless did contemplate the principle of executive accountability to the legislature. J.R. Jayewardene, the first executive President and architect of the 1978 Constitution, once even stated that if there

⁵⁰ Asanga Welikala, 'States of Emergency: Issues for Constitutional Design', *CPA Working Papers on Constitutional Reform No.5*, August 2016 < <https://www.cpalanka.org/wp-content/uploads/2016/08/States-of-Emergency-Working-Paper-5.pdf> > accessed 19 October 2019

⁵¹ Norton (2013): Chapter 2.

⁵² See Chapter 3 of this book.

were to be a conflict or direct confrontation between a Parliament with a hostile majority and the presidency, he would adopt the course of reverting to prime ministerial government with the President functioning as a constitutional head.⁵³

The President was always responsible to Parliament (now Article 33A) while the Cabinet was both responsible and answerable to Parliament (Article 42(2)). The rationale for this distinction is not made explicit in the Constitution, and it was not clear how that presidential responsibility could be enforced other than indirectly through the accountability of Ministers, or in the exceptional circumstances of impeachment proceedings. The Nineteenth Amendment made fundamental changes to the relationships of accountability in the Constitution and it is important that these are properly understood. It rebalanced these crucial relationships by strengthening the position of the Prime Minister and Cabinet within the executive, and by strengthening the control by Parliament of the executive as a whole.

In terms of the intra-executive relationship between the President and the Prime Minister and Cabinet, the Nineteenth Amendment established a better balance through both temporal and substantive limitations on the presidency. Temporally, it reintroduced the two-term limit (and reduced the term of the President – and of Parliament – from six to five years), which is a key feature of democratic presidential systems.⁵⁴ Substantively, two key changes abolished or reduced what were previously unlimited presidential powers. Firstly, it strengthened the position of the Prime Minister by removing the unilateral power of appointment and dismissal from the President, and permitting the appointment of the Prime Minister impliedly on the confidence of Parliament, and his dismissal expressly only on the loss of the confidence of Parliament in the government as a whole, death,

⁵³ Wilson (1980): 46 and 208, note 8.

⁵⁴ The Constitution of Sri Lanka (1978): Articles 30(2), 31(2).

resignation, or on ceasing to be a Member of Parliament.⁵⁵ Secondly, the President is now required to act on the advice of the Prime Minister when appointing and dismissing Cabinet and other Ministers, although the President need only consult the Prime Minister when determining the number of Cabinet ministries, and the assignment and reassignment of subjects to Ministers.⁵⁶

The suite of changes introduced by the Nineteenth Amendment which had the effect of strengthening Parliament *vis-à-vis* the executive might be boiled down into three major principles. The first is the *Fixed Term Principle*. Before the Nineteenth Amendment, the President could dissolve Parliament at will after the first year of its six-year term, whereas after it, the President cannot dissolve Parliament during the first four and a half years of its five-year term, unless Parliament itself requests a dissolution by a resolution passed by a two-thirds majority.⁵⁷ The removal of the dissolution power for the duration of most of the parliamentary term is a major transfer of power from executive to legislature.⁵⁸

The second might be termed the *Consent Principle*, which has two limbs. The first requires the President to act on the advice of the Prime Minister in relation ministerial appointments, as discussed above. The second regulates the President's appointment power in relation to other high constitutional offices. Before the Nineteenth Amendment, in making appointments to high posts and independent oversight commissions, the President merely

⁵⁵ Ibid: Articles 42(4), 48.

⁵⁶ Ibid: Article 43.

⁵⁷ Ibid: Article 70.

⁵⁸ Asanga Welikala, 'The Dissolution of Parliament in the Constitution of Sri Lanka', *Groundviews*, 12th November 2018 < <https://groundviews.org/2018/11/12/the-dissolution-of-parliament-in-the-constitution-of-sri-lanka/> > accessed 19 October 2019.

However, prorogation remains a presidential prerogative.

consulted the Parliamentary Council. After the Nineteenth Amendment, in making appointments to high posts and independent oversight commissions, the President has to either seek the approval, or act on the recommendations, of the relatively more efficacious Constitutional Council.⁵⁹ Although it has civil society representation, the Constitutional Council is primarily a parliamentary body whose independence is ensured by its inclusive multiparty composition. Its intercession in a critical range of decisions over key appointments has discernibly attenuated presidential discretion, and again, shifted power from executive to legislature.⁶⁰

But the most important change in this respect is the entrenchment of the *Confidence Principle*, as discussed above. Before the Nineteenth Amendment, the President appointed as Prime Minister the Member of Parliament who in his opinion enjoyed the confidence of the House, and the President dismissed and replaced Prime Ministers at any time. After the Nineteenth Amendment, however, the President still appoints as Prime Minister the Member of Parliament who in his opinion enjoys the confidence of the House, but it is much more strongly implied now that this must be someone who objectively commands confidence.⁶¹ And the key change is that the Prime Minister cannot be dismissed by the President. The Prime Minister loses office only by death, resignation, by ceasing to be an MP, or when Parliament withdraws confidence from the government as a

⁵⁹ The Constitution of Sri Lanka (1978): Chapter VII A.

⁶⁰ See Chapter 9 of this book.

⁶¹ Asanga Welikala, 'Nailing Canards: Why President Sirisena's Actions Remain Illegal, Unconstitutional, and Illegitimate', *Groundviews*, 1st November 2018 < <https://groundviews.org/2018/11/01/nailing-canards-why-president-sirisenas-actions-remain-illegal-unconstitutional-and-illegitimate/> > accessed 19 October 2019.

whole.⁶² In short, it is now Parliament, and not President, that decides who holds the office of Prime Minister.

Further Reform?

The abolition of presidentialism and the return to a parliamentary form of government has been a major topic of political discussion for many years. Supporters of executive presidentialism see it as a necessity in maintaining the unity of the country, as a source of stability, and a means of strong government needed for economic development. Its critics see it as the wellspring of authoritarianism in the political system, and the abuses of power and the weakening of democracy, the rule of law, and fundamental rights that result from the over-centralisation of political power and legal authority.⁶³ Executive presidentialism, it has been noted, has delivered neither the peaceful stability nor the economic development that President Jayewardene promised that it would in 1978.⁶⁴ The advantages of Cabinet government are that it provides for a collegiate executive that reduces the scope for one-man rule, and in subjecting the survival of governments to responsibility to and the confidence of Parliament, the system provides a much stronger framework of accountability.⁶⁵

Recent proposals have seen a parliamentary model proposed as part of a new constitution to replace the 1978 Constitution as a whole, as well as proposals for a specific constitutional amendment that would only abolish the current executive

⁶² The Constitution of Sri Lanka (1978): Article 48.

⁶³ Juan Linz and Arturo Valenzuela (eds.), *The Failure of Presidential Democracy: Comparative Perspectives* (John Hopkins University Press 1994).

⁶⁴ Asanga Welikala, 'The Executive Presidency and the Sri Lankan State: Myths and Realities', *Groundviews*, 20th January 2015 < <https://groundviews.org/2015/01/20/the-executive-presidency-and-the-sri-lankan-state-myths-and-realities/> > accessed 19 October 2019.

⁶⁵ *In Re the Thirteenth Amendment to the Constitution* [1987] 2 SLR 312 at 341; Stepan and Skach (2001).

presidency and leave other parts of the Constitution intact.⁶⁶ The removal of the lynchpin of the system established by the 1978 Constitution, however, also attracts debate about consequential changes. For example, it has legitimately been noted that the abolition of the executive presidency directly implicates electoral reform to ensure the stability of a parliamentary executive, and indeed, the precise form of the parliamentary executive that might replace the executive presidency.⁶⁷ The Constitutional Assembly process begun in 2016 did not succeed, and neither so far have attempts to enact a Twentieth Amendment as an abolition bill. It is conceivable that this is a debate that will continue to occupy public discourse into the future.

Conclusion

The fundamental structural changes made to the executive by the Nineteenth Amendment have enhanced the constitutional position of Parliament to an unprecedented level under the 1978 Constitution. The semi-presidential model continues but with a much more co-ordinate relationship between the executive and Parliament. In addition to constitutional changes, the recent overhaul of the parliamentary committee system would also likely

⁶⁶ The Interim Report of the Steering Committee of the Constitutional Assembly of Sri Lanka, 21st September 2017; Twentieth Amendment to the Constitution (A Private Member's Bill to be presented in Parliament by the Hon. Vijitha Herath, MP), *Gazette of the Democratic Socialist Republic of Sri Lanka*, 6th July 2018; *In Re the Twentieth Amendment to the Constitution* [2018] SC SD 29/2018.

⁶⁷ Michael Mendis and Asanga Welikala, 'Reshaping the Executive: Choosing the Prime Minister in a Parliamentary System', *CPA Working Papers on Constitutional Reform No.2*, June 2016 <<http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-2.pdf>> accessed 19 October 2019.

serve to strengthen Parliament's capacity to scrutinise and oversee the performance of the executive.⁶⁸

Under the leadership of an intrepid Speaker, Parliament's new powers underwent a severe stress-test during the constitutional crisis of 2018, from which it emerged with its prestige enhanced and Sri Lanka's constitutional democracy reinforced.⁶⁹ The further strengthening of Parliament, it would seem, would only assist Sri Lanka's continuing democratic development.⁷⁰

⁶⁸ See Chapter 6 of this book.

⁶⁹ Dharisha Bastians, 'The Siege: Inside 52 Days of Constitutional Crisis in Sri Lanka' in Welikala (2019): Chapter 1 at 39-45.

⁷⁰ Asanga Welikala and Harshan Kumarasingham, 'Soulbury Plus: Conceptual Foundations and Institutional Features of a Parliamentary-Constitutional State', *CPA Working Papers on Constitutional Reform No.4*, August 2016, accessed 19 October 2019.

3

POWERS AND PRIVILEGES OF PARLIAMENT

Introduction

Most Parliaments grant their members special powers and immunities that are exemptions from the normal application of the law. These are called ‘privileges’. Privilege ensures that Parliaments can effectively carry out their functions without interference. It was historically seen as an exception to the rule of law, and therefore the legislature must have the upmost respect for democratic principles when relying on its unique power. Privilege should be used in the public interest, and the interests of others outside the house should be considered. This chapter describes the continuing importance of parliamentary privilege. It sets out the powers and privileges of the Sri Lankan Parliament, which can be summarised as freedom of speech, exclusive cognisance, and limited freedom from arrest. This chapter also gives an overview of the enforcement mechanisms for protecting Parliament’s privilege and comparative examples from across the Commonwealth.

Why is Parliamentary Privilege Necessary?

Despite its antiquated title, parliamentary privilege is still needed for two important reasons. Firstly, it upholds the independence, authority, and dignity of Parliament by preventing interference from outside bodies and the other branches of government. In the words of a report from the UK Parliament’s Joint Committee on Parliamentary Privileges:

The work of Parliament is central to our democracy, and its proceedings must be immune from interference by the

executive, the courts or anyone else who may wish to impede or influence those proceedings in pursuit of their own ends.¹

Secondly, parliamentary privilege allows effective debate and quality law making. In his 2010 opening statement, the Speaker of the UK House of Commons described freedom of speech as, “the very heart of what we do here for our constituents, and it allows us to conduct our debates without fear of outside interference”.² When MPs debate ‘without fear’ of outside interference, the quality of debate is enhanced. The threat of civil or criminal action against MPs for performing their functions would create a ‘chilling effect’ that would lower the quality of debate. MPs would be unduly cautious of the words they spoke, and Parliament would be less effective as a result.³

Question of Privilege – Standing Order 29(1)

(1) An urgent motion directly concerning the privileges of Parliament shall take precedence of all other motions, and any Orders of the Day. The proceedings of Parliament may be interrupted at any moment, save during the progress of a division, by a motion based on a matter of privilege when a matter has recently arisen which directly concerns the privileges of Parliament. (2) Any Member intending to raise such a matter of privilege shall first inform and obtain the permission of the Chair to interrupt the proceedings of Parliament

(2) Any Member intending to raise such a matter of privilege shall first inform the Chair and obtain the permission of the Chair to interrupt the proceedings of Parliament.

¹ The Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report of Session 2013/14* (HL and HC joint report 2013/14) (United Kingdom), para 14.

² HC 27 May 2010, vol 510, column 30.

³ Joint Committee on Parliamentary Privilege (2013/14), para 102.

Parliament (Powers and Privileges) Act 1953

The Constitution and the Structure of the 1953 Act

The Constitution states that the provisions of the Parliament (Powers and Privileges) Act No. 21 of 1953 will continue to apply until such time as Parliament makes other provisions.⁴ As amended from time to time, this Act ('the 1953 Act') declares and defines the powers, privileges and immunities of Parliament and its members. It also extends privilege to certain non-members when they act under the authority or at the request of Parliament. Not only does Parliament enjoy all of the privileges contained within the 1953 Act, but it also enjoys any extra immunities that may have belonged to the British House of Commons at the time of the Act's enactment.⁵

The authority to convict individuals for offences committed under the 1953 Act is set out in its schedule. Offences only punishable by the Supreme Court are contained in Part A; offences that punishable by either the Supreme Court or Parliament are set out in Part B.⁶

⁴ The Constitution Sri Lanka (1978): Article 67.

⁵ Parliament (Powers and Privileges) Act 1953, s 7.

⁶ Offences included in **Part A** are "Assaulting, insulting or wilfully obstructing any member coming to or going from Parliament or on account of his conduct in Parliament or any committee, or endeavouring to compel any member by force, insult or, menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before Parliament or any committee". Also, "Tampering with, deterring, threatening, beguiling or in any way unduly influencing any witness in regard to evidence to be given by him before Parliament or any committee". Offences included in **Part B** are "The wilful failure or refusal to obey any order or resolution of Parliament under this Act, or any order of the President or Speaker or any member which is duly made under this Act". Also, "Assaulting or resisting or wilfully interfering with an

The 1953 Act and Contempt of Parliament

Erskine May (2019) defines contempt as:

[A]ny act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or Officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.⁷

Contempt of Parliament in Sri Lanka has its roots in this definition. However, its boundaries are now defined by statute. As already mentioned, Parts A and B of the 1953 Act's Schedule split responsibility for punishment of certain offences between the Supreme Court and Parliament. All of these offences are contempts of Parliament. Therefore, although the rationale is the same as in the UK, in Sri Lanka the offences that comprise contempt of Parliament are statutory.

Freedom of Speech

When in Parliament, Members are entitled to freedom of speech.⁸ This freedom also extends beyond actual 'speech' to any documents presented in Parliament. This includes, but is not limited to, petitions, bills, resolutions, motions, and committee reports.⁹ Fundamentally, this means that Members cannot attract civil or criminal liability for anything that they say in Parliament.

officer of Parliament in the Chamber or in committee or in the precincts of Parliament”.

⁷ Erskine May Online, para 15.2

<<https://erskinemay.parliament.uk/section/4991/contempts/>>
accessed 19 October 2019.

⁸ *Supra* note 5, s 4

⁹ Members are only protected from liability for matters relating to documents if they are presented to Parliament or a committee.

In the words of the 1953 Act, “freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament”.¹⁰ The effect of this privilege, which is directly borrowed from the UK Bill of Rights (1689), is to oust any jurisdiction of the courts to interfere in the internal workings of Parliament.

The 1953 Act seems to privilege anything said within the walls of Parliament; however, it is unlikely that courts would apply this interpretation in practice. Comparative law is useful in understanding the limits of freedom of speech. Erskine May states that,

Not everything said within Parliament is covered by the privilege of freedom of speech. Particular words said or acts committed within the precincts may be entirely unrelated to any business being transacted or ordered to come before either House in due course.¹¹

In India, the Supreme Court has held that freedom of speech applies “during the sitting of Parliament and in the course of the business of Parliament”,¹² although what is meant by ‘in the course of business’ is not clear. This may be the same as ‘proceedings’ in Parliament, which are discussed in relation to exclusive cognisance in the next section.

Freedom of speech demands that no external actors interfere with Parliament’s discussions. It does not demand that MPs can say anything they want without consequences. Commonwealth Parliaments have many procedures governing what can be said and who can say it. These rules are upheld by Parliaments internally, normally by the Speaker. However, MPs across the

¹⁰ Supra note 5, s 3.

¹¹ UK Parliament, Erskine May Online (paragraph 13.2) <<https://erskinemay.parliament.uk/section/4581/freedom%20of%20speech%20in%20debate/>> accessed 19 October 2019.

¹² *Tej Kiran v S Reddy* (1970) SC 1573-74.

Commonwealth occasionally rely on freedom of speech to make statements that would constitute a civil or criminal offence if made outside of Parliament.¹³ It is good practice to take careful thought and expert advice before making such statements. How to deal with these statements tends to be a matter for the Speaker to decide. By developing an ethical framework of procedures, Parliament can enjoy this privilege with the support of external actors.

These protections are extended to all ‘Members’ in Sri Lanka. This means a Member of Parliament and includes the President, the Speaker, and any Member presiding in Parliament or in committee.¹⁴ Special protections are also extended to individuals who give evidence to Parliament or a committee. Like Members, they will not entail criminal or civil liability for anything they say in such evidence.¹⁵

Individuals authorised by Parliament to make publications regarding its proceedings also have the privilege of freedom of speech. Such publications must be “bona fide and without malice”.¹⁶ However, Parliament’s authorisation must have been granted. The author of a newspaper report, unauthorised by Parliament, is not protected even if the report is an accurate account of proceedings. This principle was established in the case of *Hewamanne v De Silva*.¹⁷

¹³ In the modern era, freedom of speech has been used to subvert civil injunctions protecting an individual’s identity.

¹⁴ Parliament (Powers and Privileges) Act 1953, s 2.

¹⁵ Such protection is not extended, however, if the evidence provided by an individual violates section 190 of the Penal Code or constitutes an offence under the Powers and Privileges Act 1953. This does not apply to Members.

¹⁶ Joseph A.L. Cooray *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers 1995) 291.

¹⁷ *Hewamanne v De Silva* (1983) 1 SLR 1.

Exclusive Cognisance

Exclusive cognisance refers to Parliament's right to regulate its own affairs. This power does not include all situations simply because they occur within Parliament – many criminal offences capable of being committed within Parliament are only punishable in court. Exclusive cognisance only applies to the 'proceedings' of Parliament¹⁸. The meaning of 'proceedings' is discussed at the end of this section. Nonetheless, exclusive cognisance does give Parliament four key rights: the right not to have the legality of its proceedings questioned outside of Parliament; the right to remove strangers from the House; the right to discipline Members for their conduct; and the right to order the attendance of witnesses.

The Four Components of Exclusive Cognisance

1) Right not to have to legality of its proceedings questioned outside of Parliament

Parliament has sole jurisdiction over the legislative process. Only it can decide whether its procedures for passing laws are followed properly.¹⁹ The only exception to this is the Supreme Court's right to decide a Bill's consistency with the Constitution or if its passing requires special procedures under the Constitution. These exceptions to exclusive cognisance are contained in Articles 120 and 121 of the Constitution.

2) Right of the House to remove strangers

Under the 1953 Act, the Speaker has the power to control the presence of strangers (those who are neither Members of Parliament nor officials) in the House and its precincts²⁰. He may have them removed without consulting the House. Alternatively,

¹⁸ Parliament (Powers and Privileges) Act, s 3.

¹⁹ Constitution of Sri Lanka (1978): Article 124.

²⁰ Parliament (Powers and Privileges) Act, s 20

the House may pass a motion that the strangers withdraw. The Serjeant at Arms is entitled, on the instruction of the Speaker, to forcibly remove both strangers and Members. The Speaker's decision is not open to appeal in any court.

3) Right of the House to discipline Members for their conduct

The Speaker upholds the rules of the House. To do this, he has numerous mechanisms to discipline Members. As is common in the Westminster tradition, the House retains the right to review the Speaker's decisions on points of order. However, this can only be done through a substantive motion after the Speaker has delivered his decision. Notice must be given.²¹

4) Right to order the attendance of witnesses

Parliament can order any individual to appear before the House or its committees and produce any paper, book, record or document in such person's possession or under such person's control. It may also conduct an oral examination. Refusal to obey a summons, intentionally providing a false answer to any question material to the subject of inquiry, and intentionally giving false evidence in the course of certain investigations, are all offences.²² Some individuals may have counter-privileges to Parliament's right to obtain information. Under the 1953 Act, these conflicts will be determined in line with the law of the United Kingdom.²³ However, it is permitted for Acts of Parliament to limit the scope of others' privileges.

What are Proceedings'?

What constitutes 'proceedings' is an evolving area of law. In Sri Lanka, the leading case is that of *AG v Michael de Livera*. The Privy Council held that the relevant considerations are, "In what

²¹ For more information on the Speaker's powers, see Chapter 3 of this book.

²² Parliament (Powers and Privileges) Act, s 14.

²³ *Ibid*, s 15.

situations is a member of the House exercising his “*real*” or “essential” function as a *Member*”²⁴ [Emphasis added].

Therefore, as was held in this case, the act of taking bribes is not a ‘proceeding’ because the Member was acting outside his legal capacity. UK judgments are useful for gauging what the boundaries of this test may. In the UK, it includes more actions than simply speech (for example voting and taking part in committee meetings) but does not include all actions taken while proceedings are in progress (for example screening a documentary or ‘ordinary crimes’).²⁵ The prorogation of Parliament is not a proceeding in Parliament.²⁶

The Constitution of Sri Lanka

Article 32

(3) The President shall, by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members.

²⁴ *Attorney General v. Michael de Livera*, Privy Council Appeal No. 6 of 1961 S. C. 31 A-B-D. C. (Criminal) Colombo, N 1939, (5/SC), Decided on 5/11/1962 (as cited in LST Lanka < <https://lslanka.org/wp-content/uploads/2017/11/english-20160725141445.pdf> > accessed 19 October 2019) at para 413.

²⁵ See the Zircon discussed in the Leader of the House of Commons Report, *Parliamentary Privilege* (April 2012) (United Kingdom) at para 201. See also *R v Chaytor and others* [2010] UKSC 52.

²⁶ *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41 at para 69.

Freedom from Arrest

In limited circumstances, and with caveats, Members are free from arrest. A Member cannot be arrested when proceeding to, in attendance at, or returning from, any meeting or sitting of the House for actions related to civil proceedings.²⁷ This privilege does not apply, therefore, to purely criminal proceedings. This privilege also comes with three exceptions: it does not apply if the grounds of arrest are a contravention of the 1953 Act; an act of insolvency under the Insolvency Ordinance; or an Emergency Regulation made under the Public Security Ordinance. A Member may also be detained under the PSO. If a Member is imprisoned or arrested, the House should (by custom) be informed immediately through the Speaker.²⁸

Section 7 and the Immunities of the House of Commons

Section 7 of the 1953 Act additionally provides Parliament and its Members with “Such and the like immunities as are for the time being held, enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof”.²⁹ The phrase “for the time being” likely refers to the time at which the 1953 Act became law. Similar provisions in other Commonwealth jurisdictions are linked to the time at which the relevant law was passed.³⁰

‘Immunities’ is a more complex term. This provision endows Parliament with the immunities, but not the powers or privileges, of the House of Commons. An immunity is freedom from interference; however, it is not the right to take positive action. For example, the House is ‘immune’ from having its proceedings

²⁷ Parliament (Powers and Privileges) Act, s 5.

²⁸ D.M. Karunaratne, *Survey of the Law of Parliamentary Privileges in Sri Lanka* (2nd edn, Vishva Lekha Publications 2003) 113.

²⁹ Parliament (Powers and Privileges) Act, s7.

³⁰ See, for example, Parliamentary Privileges Act 1888 (Australia), s38. See also The Constitution of India: Article 105 (3).

questioned in any place or court outside of Parliament. On the other hand, the ‘power’ of the UK Speaker to seek audience with the Queen is not transferred to the Parliament of Sri Lanka by section 7. Hansard shows that MPs intended to interpret this provision as narrowly as possible. This provides the House with maximum protection without unintentionally transplanting any of Westminster’s powers.³¹

Cooray summarises the evidentiary requirements relating to this provision:

A copy of the journals of the House of Commons of the United Kingdom or of its proceedings or of a report of any of its Committees printed by order of the House or by its printer is received as *prima facie* evidence in inquiries touching the privileges of the Parliament of Sri Lanka or of its Members.³²

Punishment for Breaches of Privilege

As mentioned above, Parliament has the right to exercise judicial power and punish individuals for certain breaches of its privileges.³³ The offences that Parliament can exercise judicial power in relation to are listed in Part B of the 1953 Act’s schedule. Under section 28 of the 1953 Act, the only punitive powers possessed by Parliament are those of admonition at the Bar of

³¹ Sir Lalitha Rajapakse, Minister of Justice: “The reason for confining this clause to immunities alone was the determination of the committee as far as possible not to recommend vesting in the two Houses the punitive powers enjoyed by the House of Commons. I think that is quite clear to Hon. Members, that is we want the immunities and privileges enjoyed by the House of Commons”: Hansard (House of Representatives) Vol XIII column 2789. See also Karunaratne (2003) 131.

³² Cooray (1995) 302.

³³ The Constitution of Sri Lanka (1978): Article 4(c).

Parliament or removal from the precincts of Parliament.³⁴ On the other hand, if the offender is a Member of Parliament, then Parliament, in addition to or in lieu of these punishments, may suspend that Member's service to Parliament for any period not exceeding one month. If the offender is not a Member of Parliament, then Parliament may order that the offender be prohibited from entering Parliament or its precincts for a period not exceeding six months.

Parliament shares jurisdiction with the Supreme Court over the offences contained in Part B of the Schedule to the 1953 Act. This, along with other aspects of the 1953 Act and Constitution, creates the potential for conflicts of jurisdiction between Parliament and the courts of Sri Lanka.³⁵ The main areas of possible conflict are:

- Whether the courts of Sri Lanka can hear proceedings relating to a breach of Parliament's privilege without Parliament referring the case to the Court first.
- Whether the courts can intervene when Parliament is acting outside of its judicial powers but claims to be acting under Article 4(c) of the Constitution.
- Whether, when Parliament acts under provisions of the 1953 Act, the courts of Sri Lanka can intervene to

³⁴ However, under the Parliament (Powers and Privileges) (Amendment) Law No.5 of 1978 Parliament had significantly broader powers. This law was in force from 1978 to 1997. During this period, Parliament handed out two fairly steep fines for breaches of privilege. See *National State Assembly Debates*, 2nd February 1978: Column 949 and P.D 12th December 1980: Column 9183. The Parliament (Powers and Privileges) (Amendment) Act No.27 of 1997 removed these powers.

determine the legal limits of those provisions (and whether Parliament's actions fall within said limits).³⁶

Parliamentary Privilege Across the Commonwealth

The right to freedom of speech of Members of the Indian Parliament is subject to certain limitations. For example, members cannot discuss the professional conduct of any Judge of the Supreme Court or of a High Court unless this is upon a motion, presenting an address to the President, calling for that judge's removal.³⁷

In India, no one is liable for a substantially true report of the proceedings in Parliament – whether such a report is authorised by Parliament or not – unless the report was made with malice.³⁸ Similar provisions exist in New Zealand.³⁹ However, in India, the premature publication of Parliament's proceedings constitutes a contempt.⁴⁰ Hansard publications are not protected by parliamentary privilege in the UK. This was established in the case of *Stockdale v. Hansard*.⁴¹ Instead, they are protected by statute. MPs are entitled, voluntarily, to waive their own immunity in defamation cases.⁴²

³⁶ Karunaratne (2003) 165-170.

³⁷ The Constitution of India (1949): Article 121.

³⁸ The Constitution of India (1949): Article 361A. See also Parliamentary Proceedings (Protection of Publication) Act 1977, s 3 and s 4 (India).

³⁹ Parliamentary Privilege Act 2014, s 20 (New Zealand).

⁴⁰ The Committee of Privileges (Rajya Sabha), *Twenty-Ninth Report of the Committee of Privileges* (29th Report 1991) (India) para 10.

⁴¹ *Stockdale v Hansard* (1839) 9 Ad & El 1.

⁴² A strong argument against the House being entitled to waive an MP's privilege without their consent can be found in the Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report of Session 2013/14* (HL and HC joint report 2013/14) (United Kingdom), particularly at para 161.

In the UK, it is also the House itself that decides who may enter Parliament. A newly appointed MP, who had refused to take his oath, failed in filing an injunction against the Serjeant at Arms. The injunction aimed to stop the Serjeant at Arms from blocking the MP's entrance.⁴³

MPs' freedom from arrest in India is more extensive than in Sri Lanka. The Rules of Procedure and Conduct of Business in the Lok Sabha state that no arrest will be made and no criminal or civil legal process will be served within the House without the permission of the Speaker.⁴⁴ Furthermore, Members' freedom from arrest and imprisonment under civil processes extends to forty days prior to the commencement of and forty days after the conclusion of a session of the House or meetings of any committees (as well as the duration of the session or meeting).⁴⁵ Finally, the Lok Sabha has set out in its rules of procedure that the Speaker *must* be informed of a Member's arrest, detention, conviction, imprisonment, or release (with limited exceptions).⁴⁶

In Australia, a combination of legislation, resolutions in the Senate, Standing Orders in the House of Representatives and judicial review powers have been combined to ensure a fair hearing during contempt hearings, which both the Senate and the House of Representatives have the power to hold.⁴⁷

The idea that MPs have special immunities under English law has ancient roots. One of the earliest known enunciation of this principle comes from 1397. Thomas Haxey brought a petition to

⁴³ *Bradlaugh v Gossett* (1884) 12 QBD. 271.

⁴⁴ The Rules of Procedure and Conduct of Business in Lok Sabha (16th edn) rules 232 and 233.

⁴⁵ Code of Civil Procedure 1908, s. 135A (India).

⁴⁶ The Rules of Procedure and Conduct of Business in Lok Sabha (16th edn), rules 229, 230 and 231.

⁴⁷ See House of Representatives Information Sheet No.5, *Parliamentary Privilege* (Australia). Also, see Guide to Senate Procedure No.20 *Parliamentary Privilege* (Australia).

Parliament that was critical of Richard II's royal expenditure. He was subsequently convicted of treason. The conviction was reversed on the grounds that the laws and customs of England demand freedom of speech within Parliament and this takes precedence over the normal application of criminal law.⁴⁸

The UK House of Commons' right to freedom of speech is reinforced with the election of every new Speaker. The Speaker elect becomes the new Speaker when he declares this ancient privilege before the House of Lords.

Conclusion

Parliamentary privilege has long historic roots and is still important today in protecting the separation of powers and productive debate. The application and content of Parliament's powers and privileges is largely set out in the Constitution and the 1953 Act. The key areas of privilege are freedom of speech, exclusive cognisance, and limited freedom from arrest.

⁴⁸ Encyclopaedia Britannica Online, "Thomas Haxey" < <https://www.britannica.com/biography/Thomas-Haxey> > accessed 19 October 2019.

4

THE SPEAKER

Introduction

The powers and duties of the Speaker are contained partly in the Constitution and partly in the Standing Orders. Certain characteristics of the Speaker's role are not codified but instead exist through custom. These characteristics have often developed in tandem with those of other Commonwealth jurisdictions. The duties of the Speaker can be broken down into six categories: upholding the rules of the House; protecting Parliament's privileges; certifying Bills; performing administrative duties; representing the House externally; and filling the office of the President under certain circumstances. This chapter examines the appointment and removal process of a Speaker and the Speaker's duties. It concludes with comparative examples from across the Commonwealth.

Appointment and Retirement of the Speaker

After a general election, the first order of business of the new Parliament is the election of a Speaker, and the second order of business is for that Speaker to take his oath¹. A Member may propose to the Secretary General any other Member that they wish to be considered for the role of Speaker. The proposal shall be seconded, and no debate is allowed.² Before proposing another Member, the MP should check whether that Member is willing to serve as Speaker.³ If only one Member is proposed, then they will

¹ Standing Order 1(a) and (b).

² Standing Order 4(b).

³ Standing Order 4(a).

be appointed as Speaker.⁴ If multiple Members are proposed, then the Speaker will be selected by way of a secret ballot.⁵

For a candidate to win the secret ballot, they must gain more than half of the votes cast. If there are more than two candidates, then multiple rounds of votes may be held. In each round, the Member with the lowest number of votes will be removed until one of the candidates wins more than half of the votes (it is possible for this to occur when there are more than two candidates left). If the two lowest scoring candidates have an equal number of votes, then another ballot is held. If the votes are still equal, then “the candidate to be excluded shall be determined by lot which shall be drawn in such manner as the Secretary-General shall decide”.⁶

The Speaker takes the Official Oath or the Official Affirmation first. This is administered by the Secretary-General. The Speaker then administers the Official Oath or Official Affirmation to all Members present.⁷

Subject to the Constitution, “Parliament may by resolution or standing order provide for the retirement of the Speaker”.⁸ Therefore, although it is undoubtedly within the power of Parliament to remove the Speaker, such an act would have to be conducted by amendment of the Standing Orders or by resolution, and in conformity with the Constitution as a whole. Currently, the Standing Orders provide no mechanism for removing the Speaker.

⁴ Standing Order 4(c).

⁵ Ibid.

⁶ Standing Order 4(f).

⁷ Standing Order 5(1).

⁸ The Constitution Sri Lanka (1978): Article 74(1).

Duties and Powers of the Speaker

Upholding the Rules of the House

The Speaker upholds the rules of the House in a way that enables every Member to express his views, provides sufficient opportunity for debate, and prevents decisions being taken in undue haste.⁹ Rules are also upheld in a manner that maintains the dignity of the House. The Standing Orders provide the Speaker with a wide array of specific powers to maintain order during debates, and therefore only the key ones will be discussed here.

The Speaker's decision on any point of order is not open to appeal, and, except by way of a substantive motion, not open to review by Parliament.¹⁰ Notice is required for such a motion. The Speaker will often remind Members of points of order throughout a debate, and he must be heard. Whenever the Speaker interrupts during a debate, any Member speaking or offering to speak must sit down.¹¹

When two Members rise to speak at the same time, it is the Speaker who decides which one will be heard. The Standing Orders state that "the Speaker shall call on the Member who first catches his eye",¹² however in reality, like other Speakers in the Commonwealth, he also factors in considerations such as allowing time for minority opinions to be heard. 'Catching the Speaker's eye' is still, nonetheless, a talent, or a skill that parliamentarians acquire with experience.

The Speaker also has the power to discipline Members. If a Member's actions amount to gross disorder, the Speaker will

⁹ Priyane Wijesekera, *Parliamentary Practice in Sri Lanka* (Parliamentary Secretariat 2002) 40.

¹⁰ Standing Order 76(1).

¹¹ Standing Order 76(2).

¹² Standing Order 91(d).

order the Member to withdraw immediately from Parliament for the remainder of the day's sitting.¹³ If this is insufficient – that is, in the most egregious of offences – the Speaker may 'name' the Member. The Speaker shall then forthwith put the question on a motion being made "that such Member be suspended from the service of Parliament". No amendment, adjournment, or debate is allowed for such a motion.¹⁴ If a Member is named by the Speaker and the motion carries, then that Member's first expulsion will be for the duration of two weeks, the second expulsion during the same session for three weeks, and any other expulsions that may follow for four weeks.¹⁵ In both cases, ordered withdrawal and 'naming', the Speaker may order such actions as are necessary for enforcement. If the Member refuses to vacate the chamber, for example, the Speaker may instruct the Serjeant-at-Arms to remove him. The Serjeant-at-Arms must comply.¹⁶

It is also within the Speaker's power to order a Member to discontinue a speech if that Member "persists in irrelevance or tedious repetition either of his own arguments or of the arguments made by other Members in debate".¹⁷

Standing Order 143 endows the Speaker with residuary powers:

"Every matter not specifically provided for in these Standing Orders and every question relating to the detailed working of these Standing Orders shall be regulated in such manner as the Speaker may deem appropriate and direct, from time to time".¹⁸

¹³ Standing Order 79(1).

¹⁴ Standing Order 77(1).

¹⁵ Standing Order 77(2).

¹⁶ Standing Order 79(1).

¹⁷ Standing Order 78.

¹⁸ Standing Order 143.

This clause fills the gaps in the Standing Orders when new situations arise in practice: For example, “Acting under this Standing Order, the Speaker has in the past used the collective right of the House to regulate time by an extension of a few minutes during the Committee stage of a Bill”.¹⁹

Protecting Parliamentary Privilege

As Parliament’s spokesperson, the Speaker plays a vital role in protecting the privileges of Parliament. Speakers are expected to fearlessly stand in the way of outside forces that may wish to interfere with privileges. This may include the executive and the judiciary. In recent times, there have been a number of instances in which Speakers have given Rulings asserting the autonomy of Parliament. In 2001, Anura Bandaranaike issued a Ruling refusing to comply with an interim order of the Supreme Court purporting to postpone an investigation by Parliament into the then Chief Justice Sarath Silva.²⁰ Likewise, in 2003 and 2012, Speakers Joseph Michael Perera and Chamal Rajapaksa issued Rulings to a similar effect.²¹ In 2018, Speaker Karu Jayasuriya helped the House withstand President Sirisena’s unconstitutional dismissal of the Government and dissolution of Parliament.²² These Speakers successfully relied on the exclusive cognisance of Parliament set out in section 3 of the Parliament (Powers and Privileges) Act

¹⁹ Wijesekera (2002) 44.

²⁰ Colombo Telegraph, ‘Is the Anura Bandaranaike Ruling Relevant Today?’ *Colombo Telegraph* (Colombo, 30 December 2012) < <https://www.colombotelegraph.com/index.php/is-the-anura-bandaranaike-ruling-relevant-today/>> accessed 19 October 2019.

²¹ Nihal Seneviratne, ‘Parliament vs Supreme Court: Speaker Anura Bandaranaike’s historic ruling’ *Sunday Times* (Colombo, 28 May 2017) < <http://www.sundaytimes.lk/170528/news/parliament-vs-supreme-court-speaker-anura-bandaranaike-historic-ruling-242674.html>> accessed 19 October 2019.

²² Dharisha Bastians, ‘The Siege: Inside 52 Days of Constitutional Crisis in Sri Lanka’ in Asanga Welikala (ed.), *Constitutional Reform and Crisis in Sri Lanka* (CPA 2019) 39-43.

1953.²³ The following extract from Speaker Rajapaksa's Ruling captures the sense of the approach:

No person or institution outside Parliament has any authority whatsoever to issue any directive either to me as Speaker or to Members of the Committee appointed by me. This is a matter which falls exclusively within the purview of Parliament's authority. The established law in this regard was exhaustively surveyed by my distinguished predecessor, the late Hon. Anura Bandaranaike in his historic ruling delivered in this august Assembly on 20th June, 2001. It is clear from this ruling that the matters concerned fall within the exclusive domain of Parliament and that no intervention in any form by any external agency is consistent with the established principles of law, and is therefore to be rejected unreservedly as an unacceptable erosion of the powers and responsibilities of Parliament.²⁴

Certifying Bills

Article 79 of the Constitution states that, "The Speaker shall endorse on every Bill passed by

Parliament a certificate in the following form :- "This Bill (here state the short title of the Bill) has been duly passed by Parliament."²⁵

Although the Speaker has no discretion over the endorsement of this certificate when the required majority has passed a Bill, this is still an important act. It is what turns a Bill into law, and the

²³ See Chapter 3 of this book.

²⁴ Ruling by the Hon. Speaker on the Question of Privilege raised by the Leader of the House regarding Supreme Court Notices, Parliamentary Debates (Hansard) Volume 213 No.9, 29 November 2012, 1835.

²⁵ The Constitution of Sri Lanka (1978), Article 79.

fact that the Speaker is the one who administers the certificate, rather than a member of the executive or judiciary, ensures parliamentary privilege is protected even at the final stage of the legislative process. Referring to the 1972 Constitution, in which this arrangement was first established, Jayawickrama writes:

To protect the integrity of the supreme instrument of state power [i.e., the National State Assembly], and in a further departure from the practice both in the United Kingdom and in Ceylon, the constitution excluded the President of the Republic from the law-making process by not requiring his assent; instead, the Speaker would certify that a law had been duly passed.²⁶

Administrative Duties

Standing Order 138 states that, “The Speaker shall be responsible for the management of buildings, security arrangements and the general administration of the Chamber”.²⁷ Although it is important that such functions are carried out by Parliament rather than the executive,²⁸ in practice the Speaker delegates these duties’ performance to other staff while retaining ultimate accountability.

Representing the House Externally

Across the democratic world, there is a growing movement of ‘parliamentary diplomacy’, and it is very much Speakers that are at the forefront of this movement. Numerous international conventions and organisations such as the Inter-Parliamentary Union (IPU), which now organises a Speakers’ summit, and the Commonwealth Parliamentary Association (CPA) exist to

²⁶ Nihal Jayawickrama, ‘Reflections on the Making and Content of the 1972 Constitution: An Insider’s Perspective’ in Asanga Welikala (ed) *The Sri Lankan Republic at 40: Reflections on Constitutional Theory, History and Practice* (CPA 2012) Chapter 1 at 86.

²⁷ Standing Order 138.

²⁸ See Chapters 3 and 10 of this book.

encourage legislatures to work together for institutional development. As Parliament's spokesperson, the Speaker plays a vital role in representing Sri Lanka in the international parliamentary sphere.

Filling the Office of President if Necessary

Under the Constitution, the Speaker is third in line of protocol if, for various reasons, the office of President needs to be filled and the Prime Minister is unable to act.²⁹

Speakers Across the Commonwealth

The position of Speaker was first developed in England. Some trace its roots back to the mid-13th century,³⁰ however the first MP to be given the title of 'Speaker' was Sir Thomas Hungerford in 1377. Previous Speakers of the House of Commons have identified impartiality as the most important trait of a good Speaker. Indeed, House of Commons Speakers have traditionally upheld the most stringent standards of impartiality. The Speaker accepts lifelong retirement from party politics on the day that he takes the chair. This tradition has been "built up and embedded over many years".³¹ Betty Boothroyd refused to join her former colleagues on the Labour benches of the House of Lords when she moved there after her speakership. Both the appearance of and actual impartiality are necessary. The House of Commons Speaker does not socialise in the smoking rooms and tearooms and invariably cuts special ties he may have with particular MPs to ensure equal attention to all Members. In the words of one prominent writer, the Speaker is "of necessity lonely in his

²⁹ The Constitution of Sri Lanka (1978): Articles 31(3) and (4), 37(1) and (2), 38(1), 40(1).

³⁰ See, for example, Matthew Laban, *The Speaker of the House of Commons: The Office and Its Holders since 1945* (ProQuest Dissertations Publishing UK & Ireland 2014) 5.

³¹ *Ibid*, 57.

eminence”.³² These traditions have not been fully replicated in other Commonwealth jurisdictions. In Canada, the Speaker is expected to be impartial in the chair but is not expected to completely sever all personal ties to party politics.³³

As in Sri Lanka, Speakers in the UK are also seen as the champions of their House’s privileges. Perhaps in a similar set of circumstances to Sri Lanka’s recent constitutional crisis, on 3rd January 1642, King Charles I forcibly entered the House of Commons. He stood upon the Speaker’s chair and demanded the whereabouts of five Members that he accused of treason. Parliament met him with silence, so the King turned to the Speaker, William Lenthall, and demanded the information from him personally. In an act of historic courage, Lenthall replied, “May it please Your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here”.³⁴

While Members must confirm in advance whether their proposed candidate would be willing to serve as Speaker in Sri Lanka, in the UK the role has traditionally been forced upon reluctant Members. This is reflected in the custom of ‘dragging’ a newly appointed Speaker to the Chair. However, in recent years professional backbenchers have begun to compete for the office, and the ‘reluctance’ of a new Speaker is only feigned as part of the theatrics.

Speakers in the UK have also developed new techniques for facilitating smooth debate and upholding the rules of the House. Previously unapproachable figures, Speakers increasingly work to resolve issues and acquaint themselves with the attitudes of the

³² Philip Laundy, *The Office of Speaker* (Cassell 1964) 8.

³³ Dale Lovick, ‘Impartial but Not Non-partisan: Re-examining the Mythology of the Speakership’ (1996) *Canadian Parliamentary Review* 19(4): 2-6.

³⁴ Laundy (1964) Chapter 24.

House behind the scenes rather than during debates. This can be used to improve the quality of debates. UK Speakers make an effort to become acquainted with all MPs. As long as attention is given equally, this does not violate the requirement of impartiality. MPs are now comfortable to voice their concerns to the Speaker – these concerns are often areas that the Speaker can provide help in but occasionally MPs simply relying on the Speaker as a confidant for certain frustrations.³⁵ This allows the Speaker to both resolve issues directly and also broaden his understanding of the atmosphere of the House. Modern Speakers have also gone out of their way to become acquainted with new MPs by holding dinner parties for them at Speaker's House. Furthermore, the Speaker tends to hold weekly meetings with the leaders of the various political parties as well as their chief whips.³⁶ These informal meetings can be used to raise and resolve issues and discipline Members in a less public way to ensure more productive formal sessions.

Speakers in New Zealand have also been proactive in strengthening parliamentary diplomacy. The New Zealand Speaker travels abroad on an annual basis to improve links with other countries.³⁷ UK Speakers have also grown accustomed to hosting dinner parties for a wide variety of foreign dignitaries. Such social events are combined with lectures and educational events that are more formal.³⁸

³⁵ Laban (2014) 77.

³⁶ Ibid, 76.

³⁷ Matthew Laban, 'More Westminster than Westminster? The Office of Speaker across the Commonwealth' (2014) *The Journal of Legislative Studies* 20(2): 143-155, at 149.

³⁸ See UK Parliament Website

<<https://www.parliament.uk/business/commons/the-speaker/speeches/>> accessed 19 October 2019.

Conclusion

The Speaker is, fundamentally, Parliament's mouthpiece. In performance of this role, the office has acquired many related duties, functions, and powers. The Speaker is an essential piece of constitutional furniture, and Parliament would be a weaker, less organised, and more vulnerable institution without him. Speakers across other Commonwealth Parliaments essentially perform the same role as their counterpart in Sri Lanka.

5

THE LEGISLATIVE PROCESS

This chapter looks at the legislative process in Sri Lanka. It examines the law-making process and how legislation is introduced, debated, amended and passed in Parliament. It also looks at the various elements of legislative scrutiny available, both within and outside Parliament. The chapter aims to broadly show how law comes into being in Sri Lanka.

The Law-Making Process

The Constitution provides Parliament with supreme and exclusive power over lawmaking nationally. Articles 4(a), 75 and 76 set this out:¹

- 4(a) – The legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum.
- 75 – Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending the Constitution.
- 76 – Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power subject to the provisions of Article 76(2)(3) and (4).

Parliament has the power to make both primary legislation (Acts of Parliament) and delegated legislation (regulations, rules, order,

¹ The Constitution of Sri Lanka (1978): Articles 4(a), 75 and 76.

by-laws made under primary legislation). Legislation is sourced from Bills in Parliament and there are four main types of Bills:

- Ordinary Bills – Bills introduced and led through Parliament by the government
- Constitutional Amendment Bills – Bills to amend the Constitution
- Appropriation Bills – Bills dealing with the Budget
- Private Member's Bills – Bills introduced by individual MPs

The process that a Bill goes through to become enacted legislation is what is called the legislative process. In terms of procedure, the legislative process can be divided into two main phases: the pre-parliamentary phase and the parliamentary phase.

The Pre-Parliamentary Phase

The pre-parliamentary phase mainly consists of legislation being created and prepared to go through the parliamentary phase. In Sri Lanka, the executive, consisting of the Cabinet of Ministers, has the power of legislative initiation.² Any Minister and Ministry which wants a law enacted must prepare a Cabinet Memorandum setting out the details of the proposed law. Once Cabinet approves the Memorandum, and the Cabinet decision authorising the drafting of legislation is made, the Ministry takes the initiative to prepare the law and finalise it.³ The Legal Draftsman is authorised to draft the required legislation and submit it to the relevant Ministry. This is a process between the Legal Draftsman and the Ministry where several drafts may be made before being finalised. Other actors authorised by the Minister or Ministry, such as subject matter experts, may also be involved in the process. Completed draft legislation is then brought to Cabinet

² Priyaneer Wijesekera, *Parliamentary Practice in Sri Lanka* (Parliament of Sri Lanka 2007) 50.

³ *Ibid.* 52.

for its approval. Once a draft Bill receives Cabinet approval, it is then printed in the Gazette as a Supplement. The gazetted bill is then sent to Parliament. From here on begins the parliamentary phase.

Parliamentary Phase – First Reading

The parliamentary process is regulated primarily by the Constitution and the Standing Orders. Any gaps between these two are generally filled with reference to standard texts within the Westminster tradition such as Erskine May, and Kaul and Shakader on *Parliamentary Practice and Procedure*.⁴ The parliamentary process is the legitimating stage of the legislative process – in other words, when a proposed law receives formal consideration. It begins when a Bill is published in the Gazette and by listing it after one week in the Order Paper of Parliament.

The First Reading of Bill begins after 14 days from the publication in the Gazette in terms of Article 78 of the Constitution and on the request of any Minister, a Bill is placed in the Order Paper for the First Reading.⁵ However, if the subject matter of the Bill comes under the Provincial Council List, the President must refer that Bill to all Provincial Councils for the expression of their views, before being placed on the Order Paper for the First Reading.

After the Bill is introduced, the Bill is ordered to be printed by Parliament and shall be referred to a relevant Sectoral Oversight Committee for its consideration.⁶

⁴ D. Laksiri Mendis, 'Legislative Law and Process' *The Island* (Colombo, 29 July 2005) <<http://www.island.lk/2005/07/29/features1.html>> accessed 19 October 2019.

⁵ Standing Order No. 50(1). Prior to the passage of the Nineteenth Amendment to the Constitution, this time period was seven days.

⁶ Standing Order 50(2).

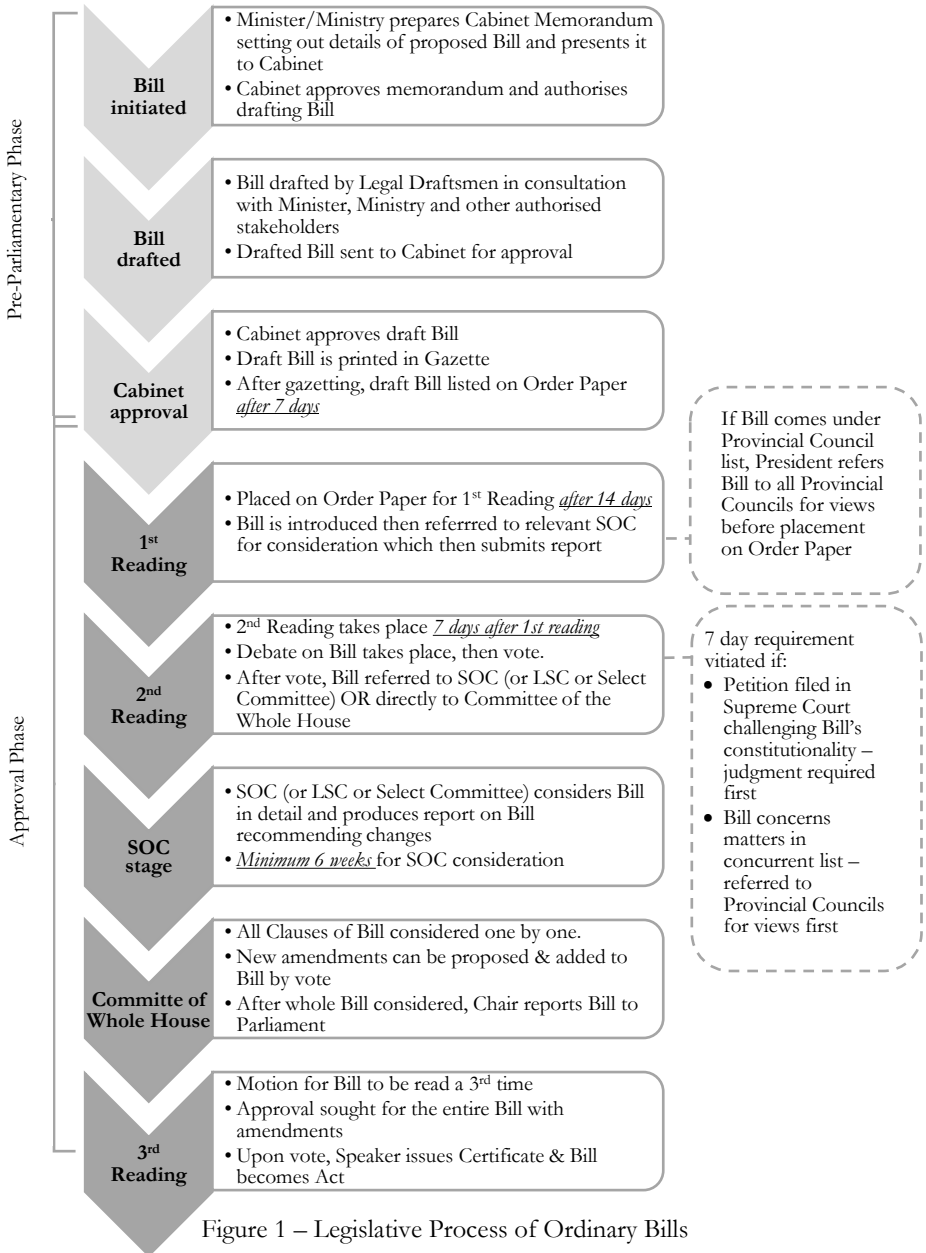


Figure 1 – Legislative Process of Ordinary Bills

Parliamentary Phase – Second Reading

The Second Reading of a Bill is set down after seven days from the date of First Reading.⁷ The date for Second Reading of a Bill is decided by the Committee on Parliamentary Business. The Sectoral Oversight Committee which the Bill was submitted to must submit its report on the Bill to Parliament before the Bill is scheduled for a Second Reading. The requirement for the Second Reading to take place seven days from the First Reading is vitiated when:

- A Petition has been filed in the Supreme Court against a Bill under Article 121 of the Constitution. In this case, the Second Reading is fixed after the determination of the Supreme Court is announced in Parliament.⁸
- When Bills in respect of matters in List III of the Ninth Schedule to the Constitution (Concurrent List) under Article 154G(5)(a) are presented to Parliament, such Bills are referred to all Provincial Councils for their views.⁹ In this case, the Second Reading is fixed after the views of Provincial Councils are announced in Parliament.¹⁰

On a Second Reading of a Bill, a debate on the Bill takes place.¹¹ This provides the Government and the Opposition the opportunity to debate the merits and demerits of a draft Bill. In general, at the Second Reading debate, the whole principle of the Bill is at issue more so than the detail of each individual clause. At the end of the Second Reading, the Bill shall be passed by a vote in any manner as prescribed in the Standing Orders (i.e. by

⁷ Standing Orders 50(1) and 55(1).

⁸ Standing Order 55(2).

⁹ Standing Order 51(2)(a).

¹⁰ Standing Order 51(2)(b).

¹¹ Standing Order 56.

voice vote; by division by row; by division by name; or by name using the electronic vote recorder).¹²

When a Bill is read a Second time, upon a motion made by a Minister of the Cabinet of Ministers, a Minister who is not a member of the Cabinet of Ministers or a Deputy Minister, the Bill (other than an Appropriation Bill) shall be referred to the Committee of the Whole Parliament or may be referred to an appropriate Sectoral Oversight Committee (or the Legislative Standing Committee, or a special Select Committee appointed by Parliament).¹³

When the Bill has been referred to a Sectoral Oversight Committee, the Legislative Standing Committee or a Select Committee after the Second Reading, no further proceedings are taken until that Committee has reported to Parliament.¹⁴ The Standing Orders govern the rules and procedures of the various Select Committees.¹⁵ There is a six week period once a Sectoral Oversight Committee reference has been made by Parliament before a Bill can be considered by Parliament again.

The parliamentary committee phase is one of the main avenues for Parliament to scrutinise legislation. In general, Sri Lanka's system is broadly in line with other Commonwealth legislatures in terms of the length of time committees are able to examine legislation. New Zealand, for instance, requires Select Committees to consider Bills referred to them for at least six months.¹⁶ Here, the fact that the Sri Lankan Parliament is unicameral has material bearing, as the absence of legislative consideration by committees or other bodies within a second

¹² Standing Order 47.

¹³ Standing Order 57.

¹⁴ Standing Order 58.

¹⁵ Standing Order 111, 113, and 100-110.

¹⁶ Parliament of New Zealand Brief, *The Legislative Process* (New Zealand) <<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/pbrief6/>> accessed 19 October 2019.

chamber considerably shortens how fast legislation is able to progress. The Australian Senate, for example, has a number of Committees which consider in detail Bills referred to them through the House of Representatives.¹⁷

It must also be noted the relative powers of parliamentary committees vis-à-vis Parliament as a whole. When considering Bills referred to them, all parliamentary committees are empowered to examine the Bills, call for expert and stakeholder evidence, and eventually make recommendations for amendment. These amendments, however, may be further amended by Parliament after the parliamentary committee has reported back. Further, while parliamentary committees are able to recommend that a Bill as a whole is passed by Parliament, they cannot recommend or vote against a Bill passing or proceeding further in Parliament, and have no power to ‘kill’ proposed Bills by preventing them from progressing further.

Parliamentary Phase – Committee of the Whole House

When a Bill has been referred to the Committee of the Whole Parliament, the proceedings of the Committee are conducted in terms of Standing Orders 93 to 99. At the committee stage, all the Clauses of the Bill are considered and new amendments may be moved.¹⁸ When new clauses and new schedules are proposed to the Bill they are considered as read at first time and a question that such clauses and schedules “be read a second time” and to “be added to the Bill” must be put before the committee.¹⁹ Amendments to the Bill at the committee stage are governed by Standing Orders 43, 44, 45 and 46. When the Committee of the Whole House has completed the consideration of the Bill, the

¹⁷ Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate 2003) 190–191.

¹⁸ Standing Orders 60–65.

¹⁹ Standing Orders 66(1) and (2).

Chair reports the Bill with or without amendments to the Parliament.²⁰

The Third Reading on a Bill takes place when a motion is made that the Bill be read a Third time and passed by Parliament by a vote.²¹ At the Third Reading, approval of the House is sought for the entire Bill with the amendments proposed at the committee stage. Upon an affirmatory vote, the Bill becomes an Act upon the endorsement of the Speaker on the Bill through the issuing of the Certificate of the Speaker.²²

Constitutional Amendment Bills

In a Constitutional Amendment Bill, it has to be expressly specified in the long title that the Bill is for the amendment to the Constitution. The other procedures are same as the procedure of Ordinary Bills, except the Bill has to be passed with a majority of two-thirds, or both a majority of two-thirds and the approval at a referendum.

There is a slight gap in the Constitution and Standing Orders with respect to amendments to a Constitutional Amendment Bill. It is not clear whether a simple majority or a special two-thirds majority is required to pass an amendment to a bill at committee stage.²³ In practice, simple majorities have been taken to be sufficient to pass amendments Constitutional Amendment Bills.

²⁰ Standing Order 67.

²¹ Standing Orders 71, 72 and 47.

²² The Constitution of Sri Lanka (1978): Articles 79 and 80. See also Standing Order 74.

²³ Asoka Obeyesekere, '19th Amendment: Understanding the Committee Stage of Parliament', *The Sunday Times* (Colombo, April 19, 2015) <<http://www.sundaytimes.lk/150419/sunday-times-2/19th-amendment-understanding-the-committee-stage-of-parliament-145379.html>> accessed 19 October 2019.

A greater discrepancy exists in the committee stage. There is no provision to refer the additions or deletions made during the committee stage for further scrutiny by the Supreme Court to determine consistency with the Constitution. This highlights a gap in the separation of powers, whereby the Supreme Court's opinion on the constitutional conformity of a Constitutional Amendment Bill can be overruled by Parliament later through amendment. The Supreme Court could certify the constitutional conformity of a Constitutional Amendment Bill once it has been tabled in Parliament. But the Bill could be amended later by Parliament in ways that undermine the Court's judgment, with there being no avenue for the Court to examine the amendments or the amended Constitutional Amendment Bill as a whole before it is passed.

Appropriation Bills

The procedure for an Appropriation Bill is the same as for Ordinary Bills but twenty six days are allotted for the consideration of the Bill.²⁴ The Second Reading of the Appropriation Bill starts with the Budget speech and it is followed by a maximum of seven days of debate. At the end of the allocated seven days of the Second Reading debate, a vote will be taken for the Appropriation Bill.²⁵ Once Parliament votes for the Bill, it will be referred to a Committee of the whole House.

A maximum of 22 days are allocated for the Committee Stage of the Appropriation Bill and when the Bill is referred to the Committee of the Whole House, all clauses, heads and schedules are considered together with the amendments proposed thereon and reported to Parliament.²⁶

Having passed the Heads of Appropriation in the Committee of Whole Parliament, Parliament resumes sitting and the Chair

²⁴ Standing Order 75.

²⁵ Standing Order 47.

²⁶ Standing Order 130.

reports to Parliament that the relevant Heads have been considered and passed in the Committee with or without amendments. After all the Heads are considered and passed, the Bill is read a third time and passed by Parliament by a vote as prescribed by Standing Order 47. After this, the Speaker announces that the Appropriation Bill for that particular year is passed by Parliament with or without amendments. If Parliament rejects the Appropriation Bill, the Cabinet of Ministers stands dissolved, as per Article 48(2) of the Constitution.

The appropriation process is considered in more detail in Chapter 7, under Parliament's exercise of scrutiny over the executive and its particular functions over scrutiny of public finance.

Private Members' Bills

A Private Members' Bill can be introduced by any 'Private Member', defined in the Standing Orders as an MP who is not holding the offices of the Speaker, Deputy Speaker, Deputy Chairperson of Committees, Prime Minister, Ministers of the Cabinet of Ministers, Ministers who are not members of the Cabinet of Ministers, Deputy Ministers, Leader of the House of Parliament, Leader of the Opposition in Parliament, Chief Government Whip, or the Chief Opposition Whip.²⁷ In practice, Private Members' Bills provide an opportunity for less powerful MPs – meaning those who may be in opposition, government backbenches, or from minor parties – to participate in the legislative process.

A Private Members Bill is received in Parliament under Standing Order 52. Thereafter, the Bill is referred to the Attorney-General to seek his opinion as to whether it is inconsistent with the Constitution and whether it contravenes the Thirteenth Amendment to the Constitution. After receiving the opinion of

²⁷ Standing Order 24(3).

the Attorney-General within six weeks, the Bill is gazetted, then after 14 days placed on the Order Paper for the First Reading.²⁸

After the First Reading, the Bill is forwarded to the relevant Minister for a report.²⁹ After the Minister's Report is received in Parliament together with the observation of the Attorney-General and Cabinet approval, the Bill is printed in the form of a Report and tabled in Parliament. Upon the Report of the Minister being received or six months passing,³⁰ the Bill goes for its Second Reading and is referred to the Legislative Standing Committee. With the latter's report, the Bill is read for a third time and passed.

²⁸ Standing Order 52(5).

²⁹ Standing Order 52(6).

³⁰ Standing Order 52(7).

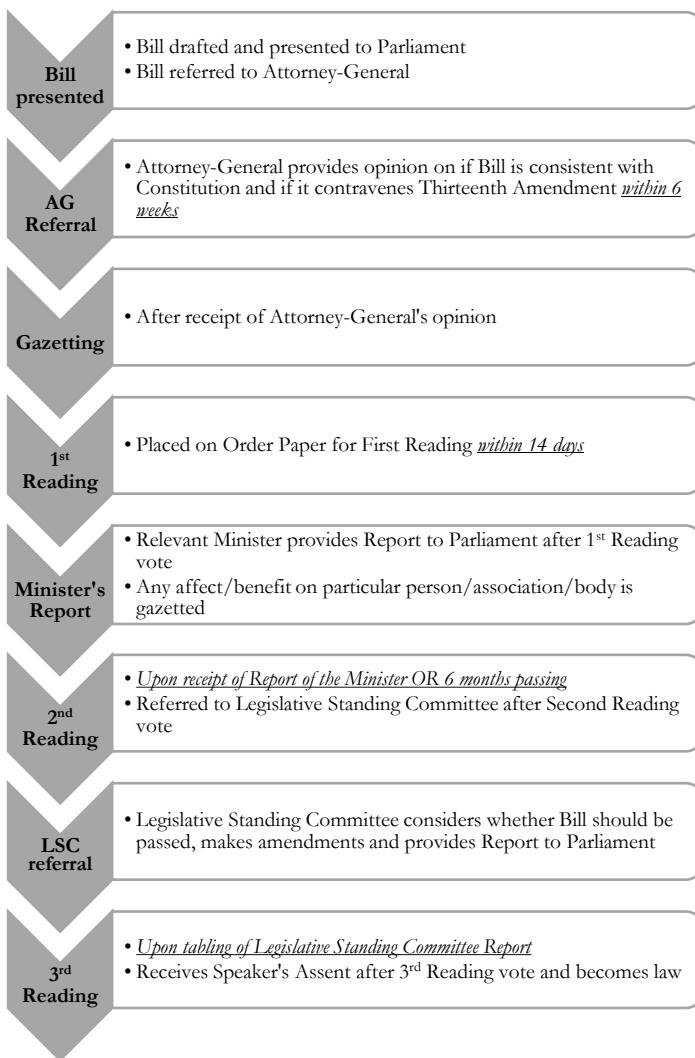


Figure 2 – Legislative Process for Private Members' Bills

The New Zealand Parliament has a formalised process, whereby any MP who is not a Minister is able to submit prepared Bills into a ballot drawn regularly to fill a specified number of slots on the Order Paper on days specially reserved for debate of such Bills.³¹ As a result, there is always a regular number of Private Member's Bills progressing through Parliament and MPs are encouraged to submit Bills.

Evaluating Parliament as a Law-making Body

The above discussion reveals a number of important dynamics about the institutional framework that enables the legislative process in Sri Lanka. First, the executive has almost exclusive authority in creating legislation. This reduces Parliament's role in the legislative process to one of legislative consideration and approval. Once a Bill enters Parliament, however, Parliament assumes near complete control over how a law proceeds. Parliamentary committees in particular can be seen as providing Parliament with its own authority to shape legislation. The only other intervening party in this context is the Supreme Court which may consider the constitutional validity of a Bill.

The changes brought in by the Nineteenth Amendment to the Constitution and the introduction of the new parliamentary committee system have changed the relationship between the executive and Parliament in the legislative process. In particular, the removal of the 'Urgent Bill' procedure, the extension of the time allowed for judicial review of Bills (from 7 to 14 days), and the mandatory consideration of Bills by parliamentary committees, have all reduced to some extent the considerable power the executive wielded over the legislative process previously.

³¹ New Zealand Parliament website, "Members' Bills" (15 Feb 2017) <<https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP2017011/members-bills>> accessed 19 October 2019.

These changes can be considered alongside how the legislative process in legislatures across the world are seen. Despite the centrality of the legislature to a democratic state, a prevailing view among scholars over the last few decades has been that Parliaments only play a marginal role in the policymaking process.³² Government policy and executive action is almost always seen as setting the legislative agenda.³³ Most European Parliaments and Westminster-modelled Parliaments appear as more 'reactive' in this sense, especially compared to legislatures such as the United States Congress which can be seen as more 'active' legislatures.³⁴ This type of 'reactive' legislature can be delved into further based on the degree of authority it has over the legislation brought before it by the executive.³⁵ For instance, some legislatures may be extensively involved in the legislative process, being able to amend, revise, and even block legislation proposed by the executive, whereas others may act as a mere rubber stamp.

In this context, Sri Lanka's system of semi-presidentialism presents interesting dynamics in terms of thinking about the legislative process and Parliament's role in it. Despite the recent weakening of the executive's hand in the legislative process, Sri Lanka still provides a high degree of authority to the executive in how legislation is processed. Government defeats in Parliament are rare, and non-government amendments to Bills appear to

³² Martin Lanny and Georg Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (Oxford University Press 2011) 4.

³³ Michael Laver, 'Legislatures and Parliaments in Comparative Context' in Barry Weingast and Donald Wittman (eds), *The Oxford Handbook of Political Economy* (Oxford University Press 2001) 121-140, at 125.

³⁴ Michael Mezey, *Comparative Legislatures*, (Duke University Press 1979) 38.

³⁵ Philip Norton, 'The Institution of Parliaments' in Philip Norton (ed), *Parliaments and Governments in Western Europe* (Frank Cass 1998) 49.

rarely pass. This broadly aligns with numerous studies of parliaments which suggest that executive bills and executive-backed amendments tend to dominate.³⁶

The key distinction between presidential and parliamentary systems is that executives in the latter are agents of Parliament, rather than having independent electoral accountability.³⁷ The Sri Lankan Parliament can therefore still be defined as a 'reactive' legislature. The Nineteenth Amendment and the new parliamentary committee system could be seen as signalling moves towards making Parliament somewhat less 'reactive'. Nonetheless, the basic framework of the legislative process being driven by the executive and laws being considered and approved by Parliament, remains unchanged.

³⁶ Meg Russell, Daniel Gover, Kristina Wollter, 'Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt' (2016) *Parliamentary Affairs* 69 (2): 286-308, 306.

³⁷ Arend Lijphart (ed) *Parliamentary Versus Presidential Government* (Oxford University Press, 1992) 129.

6

THE COMMITTEE SYSTEM

Introduction

Sri Lanka's parliamentary committee system underwent a major overhaul at the end of 2015, the third such major change in 84 years of the country's legislature operating under universal suffrage. The new parliamentary committee system consists of 16 Sectoral Oversight Committees (SOCs) and a Committee on Public Finance. It was introduced with the primary objective of enabling greater scrutiny over government actions, deeper parliamentary involvement in legislation, and greater involvement of non-governmental parties in law-making and governance.¹

This chapter will analyse the new parliamentary committee system in depth. It will first contextualise the new system by looking at the history of committees in the Sri Lankan legislature. It will then examine the introduction of the new system, the process used to do so, and the immediate constitution of the committees. Third, it will make an assessment of how the system has functioned in practice so far over the past three years, taking into account noted improvements and drawbacks. Lastly, the chapter will compare the new system to committee systems in other Parliaments and contextualise it in terms of evolving international parliamentary practice. This will allow making a conclusion on whether the new system is fulfilling its constitutional purpose of enhancing the

¹ Yohan Perera, '20 Parliament committees after Polls' *Daily Mirror* (25 March 2015) <www.dailymirror.lk/67299/nt-committees-after-polls> accessed 19 October 2019.

scrutiny of legislation and policy, and ensuring executive accountability.

Debates on political reform in Sri Lanka tend to focus on methods of legal accountability and how this might be achieved through strengthening the judiciary and strengthening rights protections. Relatively less attention is paid to issues of political accountability, and mechanisms designed to engineer it. Among these mechanisms, the initiation of the new committee system in Parliament stands as one of the few attempted reforms on political accountability made in recent years which has, nonetheless, not received extensive attention.

The History of Committee Systems in the Sri Lankan Legislature

Prior to the introduction of the new parliamentary committee system in 2015, the Sri Lankan legislature had three distinct phases of committee systems: Executive Committees under the Donoughmore Constitution from 1931-1946; a traditional Westminster-style committee system under the Soulbury and first republican Constitutions from 1946-1977; and the committee system under the second Republican Constitution from 1978 onwards.

Executive Committees under the Donoughmore Constitution

Sri Lanka has had a representative legislature under universal suffrage since 1931, when the Donoughmore Constitution instituted the State Council. The State Council was divided into Executive Committees which each elected a chairperson who sat as a Minister on a collective Board of Ministers. The Minister was not permitted to take executive decisions by themselves, but rather act on the collective decisions of the Executive

Committee.² The basis of this arrangement was providing every legislator with the opportunity to participate in policymaking.³ Under the first ever experiment with representative democracy in Sri Lanka, and particularly in the absence of a political party system, this arrangement had some appeal, particularly to the British who sought to ‘ease’ colonised populations into self-rule. (The Governor, of course, retained the power of veto over Committee and Board decisions).⁴

The Executive Committees had relatively large powers in initiating legislation and overseeing the legislative process. Bills would come before the Committees before being forwarded to the Board of Ministers, and then finally presented at the State Council.⁵ The Committees had further Departments under them according to the subjects allocated to the Committees and the Committees could meet to confer over the various Departments’ executive tasks.⁶

Through the Executive Committee system, there was a much closer connection between legislators in the State Council and the country’s executive. This resulted in a number of outcomes. Governance became a ‘collective, interlinked exertion’ and the responsibility of all the legislators, and not just those in power; any autocratic tendencies of respective Ministers were curbed as they relied on the Executive Committees to exercise power; the

² Taiabur Rahman, *Parliamentary Control and Government Accountability in South Asia: A Comparative Analysis of Bangladesh, India and Sri Lanka* (Routledge 2008) 176.

³ Asanga Welikala, *Parliamentary Committee Systems* (CPA 2002) 2

⁴ Rahman (2008) 177.

⁵ Colvin R. de Silva, ‘The Effectiveness of Parliament as an Instrument of Pluralist Democracy’ in Chanaka Amaratunga (ed.), *Ideas for Constitutional Reform* (Council for Liberal Democracy 1989). 45-48.

⁶ Ibid.

capacity to initiate a greater volume of legislation was initiated; and a close relationship between electors and elected was created.⁷

It has especially been noted that the Executive Committee system sensitised legislators to the problems of minority communities, enabling a greater degree of their participation in exercising power at the centre.⁸ Equally, however, the introduction of universal franchise increased Sinhala political representation and reduced minority representation in the legislature, essentially formalising the process of bargaining of minority interests.⁹ Less favourable accounts of the Executive Committee system also see the Ministers as patronising the Committee members for material and social benefits, instead of participating in any co-equal governance relationship.¹⁰

Committee System under the Soulbury and First Republican Constitutions

The Soulbury Constitution promulgated in 1947 introduced a more traditional parliamentary system modelled on the Westminster system to Sri Lanka just as the country became independent the year after. The legislature would have a House of Representatives and a second chamber (half elected by the House and the other half appointed by the Governor-General); a Cabinet under a Prime Minister responsible to the legislature and a Governor-General who retained control of external affairs and defence. The committee system it implemented contained Standing Committees, Select Committees, and specialised

⁷ Fr. Oswald B. Firth and Richard A. Dias, "The Donoughmore-type Executive Committee System: The Case for Its Re-adoption by the APRC", *The Island* (Colombo, 29 March 2009) <<http://www.island.lk/2009/03/29/features13.html>> accessed 19 October 2019.; See also De Silva (1989) 45-48.

⁸ Supra Rahman (2008), 177.

⁹ Saul Rose, *Politics in Southern Asia* (Macmillan 1963) 55-57.

¹⁰ Supra Rahman (2008), 177.

Committees on Petitions, Public Accounts, Public Enterprises and High Posts.

The parliamentary committee system under the Soulbury Constitution began a disentangling of the executive from the legislature. As committee chairpersons no longer directly participated in the executive, the legislature began to take on a more overt representative function, giving away some of its powers of initiating legislation. This coincided with a rapidly emerging and solidifying party-political system, meaning that the exercise of political power through governance was becoming a more politically charged exercise. As a result, committees in the legislature lost some of the power and prominence they had previously.

Nevertheless, Warnapala argues that the election of parliamentarians influenced by the Donoughmore tradition perpetuated the experience of the previous Executive Committees well into the newly independent nation's legislature.¹¹ This, combined with Parliament retaining its supremacy, is argued as resulting in the committee system largely functioning effectively and serving its intended purpose.¹²

Unfortunately, this was in the broader context of a political arrangement where executive power was increasingly driven by an embedded majoritarianism.¹³ The succeeding Constitution of 1972, which made the country a republic and replaced the Governor-General with a President, represented this process becoming more intensive. Thus, whilst it carried through the

¹¹ Wiswa Warnapala, 'Parliamentary Oversight Committees', *The Island*, (Colombo, 15 October 2003)

<<http://www.island.lk/2003/10/15/midwee01.html>> accessed 19 October 2019.

¹² Ibid.

¹³ Harshan Kumarasingham, *Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (I.B.Tauris 2013) 23-4.

parliamentary committee system from previously, it was in service of a strengthened and forceful executive.

Committee System under the Second Republican Constitution

The introduction of the second republican Constitution in 1978 brought large scale changes to political governance in Sri Lanka. It shifted executive power away from a Cabinet that was part of the legislature to an independently elected President who was not directly accountable to the legislature. The largest change to the committee system was the introduction of new Consultative Committees corresponding to each Cabinet Ministry. The new Consultative Committees would be chaired by the relevant Cabinet Minister or Deputy Minister.

The committee system as a whole thus comprised of the following:

- a) Consultative Committees
- b) Standing Committees
- c) Committees for Special Purposes (consisting of the Committees on Selection; on Public Accounts; on Public Enterprises; on Privileges; and on Public Petition; and the House Committee, the Committee of Standing Order, the Business Committee, the High Post Committee and the disciplinary Committee)
- d) Select Committees (*ad hoc* Committees that may be appointed by the Speaker to look into matters referred to them by Parliament)

The introduction of the Consultative Committees only created a modest change in the committee system overall, as most of the previous Westminster-based parliamentary committees were carried over. The experience of the committee system's function over 37 years, from 1978 until 2015, however, demonstrates how the committee system operated in a much weaker manner. First, the committees became very removed from the legislative process. The operations of Committees were limited to matters

referred to them by the House, and the Consultative Committees were specifically restricted to a set number of matters by the Standing Orders.¹⁴ Because of this, very few Bills would come before the committees.¹⁵ Instead, the committees became forums for procedural matters of the public service. As Warnapala notes, “constituency oriented issues such as appointments, promotions, vacancies and transfers and basic constituency needs ... began to dominate” committee business.¹⁶ Unfortunately, instead of functioning as a space for lively debate of proposed legislation or consideration of policy matters from a national perspective, this system merely operates as another platform where MPs either advocate party positions on various issues and engage in partisan political strategies or vocalise their constituents’ local issues.¹⁷

Second, a number of procedural features also dampened the committees’ effectiveness, including relevant Ministers and Deputy Ministers being able to chair the committees;¹⁸ committee deliberations not being open to the public or media and proceedings not being published; and loopholes in the Standing Orders excluding non-Cabinet Ministries from parliamentary scrutiny entirely.¹⁹

Third, irregular meetings, poor attendance by MPs, a lack of adequate resourcing in practice and seldom produced committee reports further worsened the committee system’s

¹⁴ Rahman (2008) 202.

¹⁵ Ibid.

¹⁶ Wiswa Warnapala, *Parliament and Public Accountability in Sri Lanka* (Godage International Publishers 2004) 223.

¹⁷ Rohan Edrisinha, ‘Constitutionalism, Pluralism and Ethnic Conflict: The Need for a New Initiative’, in Robert Rotberg (ed) *Creating Peace in Sri Lanka* (The World Peace Foundation and The Belfer Centre for Science and International Affairs 1999) 172.

¹⁸ Save for the two finance-specific committees, the Committees on Public Accounts (COPA) and Public Enterprises (COPE).

¹⁹ Welikala (2002) 25.

ineffectiveness.²⁰ In addition, as Priyaneer Wijesekera, the former Secretary General of Parliament has observed, Parliament has sometimes resorted to irregular procedures in the appointment of various committees in direct contravention of its Standing Orders, such as not following the requirements for the composition numbers of committees.²¹ The resulting committee system cannot be seen as ensuring government oversight and accountability in a meaningful sense. The system was instead a barely functional and relevant appendage to a super-powered executive.

Finally, the committee system overall was weakened because Parliament itself was diminished as a result of a number of changes introduced by the new Constitution. This is mainly because the Constitution changed the balance of power between the executive and the legislature through the introduction of the executive presidency, with the executive's power itself becoming concentrated within a single person located outside of Parliament over whom Parliament did not have much control.

The New Parliamentary Committee System

Introduction of the System

A major overhaul of the parliamentary committee system was signalled well before the change in government in 2015. The 100 day work programme of presidential candidate Maithripala Sirisena promised that "Oversight Committees will be set up comprising members of Parliament who are not in the Cabinet will be established [sic] and their Chairmanship will be given to representatives of all Ministers [sic] in consultation with the

²⁰ Rahman (2008), 198-205.

²¹ Priyaneer Wijesekera, *Parliamentary Practice in Sri Lanka* (Parliament Secretariat 2002) 76.

leaders of all parties represented in Parliament.”²² Similarly, Prime Minister Ranil Wickremesinghe stated the intention to “re-introduce the Parliamentary Committee System” following parliamentary elections in August 2015.²³

The changes were finally affected in December 2015 through a Resolution of Parliament.²⁴ The Resolution introduced 16 Committees named Sectoral Oversight Committees (SOCs), and an additional Committee on Public Finance (COPF). The SOCs detach parliamentary committees from specific Ministries (as under the ministerial Consultative Committee regime) and are instead organised by subject, with multiple Ministries falling under each. (See Figure 1 for an overview of the entire committee system).

The new SOCs are empowered to examine for report all Bills, Resolutions, Treaties, Reports and other matters within their jurisdiction prior to being considered by Parliament. They are also empowered to determine whether laws, projects and programmes addressing subjects within their jurisdiction are being implemented and carried out in accordance with the intent of Parliament, and conduct such investigations and studies as they consider necessary or appropriate. The Committee of Selection decides which Committee introduced legislation will be examined by.

²² Yohan Perera, ‘20 Parliament committees after Polls’, *Daily Mirror* (March 25, 2015) <<http://www.dailymirror.lk/67299/nt-committees-after-polls>> accessed 19 October 2019.

²³ Frontpage, ‘20 Parliament committees after Polls’ *Frontpage* (March 20, 2015) <<http://www.frontpage.lk/page/20-Parliament-committees-after-Polls/2685>> accessed 19 October 2019 .

²⁴ Parliament of Sri Lanka, *Sectoral Oversight Committees & Committee on Public Finance* (December 19, 2015) <<https://www.parliament.lk/files/committees/docs/soc-pfc-resolution.pdf>> accessed 19 October 2019.

The new Committee on Public Finance (COPF) complements the existing Committee on Public Accounts (COPA) and Committee on Public Enterprises (COPE) and is required to examine revenue collection, the use of various public funds, and public debt and debt service.²⁵ Unlike the COPA and COPE which perform only oversight functions, however, the COPF is also empowered to examine legislation related to finances, including the annual Appropriation Bill.²⁶

The Resolution setting up the new committee system directly addresses some of the flaws with the previous system. It creates specific, definite, criteria for appointment of SOC members, including restrictions on members of the executive being part—Ministers and Deputy Ministers, for instance, may not be part of a SOC whose jurisdiction and related functions include their subject ministries.²⁷ This enforces a much clearer separation between the executive and the legislature within the committee system. The Resolution further enforces stricter schedules in terms of meetings (with a minimum of two meeting dates per month), and crucially requires all SOCs to publish their meeting schedule for the year.²⁸ The Resolution also sets out clearly defined matters SOCs are empowered to examine and SOCs are required to be more transparent in their dealings, particularly in terms of reporting.²⁹

²⁵ Ibid.

²⁶ See Chapter 6, on Parliament's Oversight over the Executive and on Parliament's scrutiny of public finance in particular, for a more detailed discussion on the COPF, COPA and COPE.

²⁷ Supra note 24, clause 8(b).

²⁸ Ibid., clause 6.

²⁹ Ibid, clauses 5 and 10.

Committees for Special Purposes [x12]	Ministerial Consultative Committees [x37]
<ol style="list-style-type: none"> 1. Committee on High Posts 2. Liaison Committee 3. Committee of Selection 4. Committee on Parliamentary Business 5. Committee on Ethics and Privileges 6. House Committee 7. Committee on Standing Orders 8. Backbencher Committee 9. Committee on Public Petitions 10. Committee on Public Finance 11. Committee on Public Accounts 12. Committee on Public Enterprises 	<ol style="list-style-type: none"> 1. Agriculture, Livestock Development, Irrigation and Fisheries & Aquatic Resources Development 2. Buddhasasana & Wayamba Development 3. City Planning, Water Supply and Higher Education 4. Defence 5. Development Strategies and International Trade 6. Digital Infrastructure and Information Technology 7. Economic Reforms and Public Distribution
Legislative Standing Committee	
Sectoral Oversight Committees [x16 + x11 Sub-committees (SCs)]	
<ol style="list-style-type: none"> 1. Agriculture and Lands <ul style="list-style-type: none"> • SC on Agriculture Policy 2. Business and Commerce <ul style="list-style-type: none"> • SC on Resolving issues relating to the National Intellectual Property Office of Sri Lanka 3. Economic Development 4. Education and Human Resources Development <ul style="list-style-type: none"> • SC appointed to look into the issue of the Principal of Tamil Balika Maha Vidyalaya in Baddulla 5. Energy <ul style="list-style-type: none"> • SC on Power and Renewable Energy • SC on Education 6. Health and Human Welfare, Social Empowerment <ul style="list-style-type: none"> • SC on Health, Nutrition & Indigenous Medicine • SC on Hill Country New Villages, Infrastructure and Community Development 7. Internal Administration and Public Management 8. International Relations 9. Legal Affairs (anti-corruption) and Media 	<ol style="list-style-type: none"> 8. Education 9. Finance 10. Foreign Affairs 11. Health, Nutrition & Indigenous Medicine 12. Highways & Road Development and Petroleum Resources Development 13. Hill Country New Villages, Infrastructure & Community Development 14. Housing, Construction and Cultural Affairs 15. Industry & Commerce, Resettlement of Protracted Displaced Persons, Co-operative Development and Vocational Training & Skills Development 16. Internal & Home Affairs/Provincial Councils & Local Government 17. Justice & Prison Reforms 18. Labour and Trade Union Relations 19. Lands and Parliamentary Reforms 20. Mahaweli Development & Environment 21. Mass Media 22. Megapolis & Western Development 23. National Integration, Official Languages, Social Progress and Hindu Religious Affairs 24. National Policies, Economic Affairs, Resettlement & Rehabilitation, Northern Province Development/Youth Affairs

<ul style="list-style-type: none"> 10. Manufacturing and Services <ul style="list-style-type: none"> • SC for Improving the Government Institutions involved in Cement Production 11. National Security <ul style="list-style-type: none"> • SC on Prison Reforms • SC on Traffic Management 12. Reconciliation and North & East Reconstruction 13. Sustainable Development & Environment & Natural Resources 14. Transport and Communication 15. Women and Gender 16. Youth, Sports, Arts and Heritage <ul style="list-style-type: none"> • Joint SC to Consider Environmental and Social Impacts on Waste Management 	<ul style="list-style-type: none"> 25. Plantation Industries 26. Ports & Shipping and Southern Development 27. Postal Services & Muslim Religious Affairs 28. Power, Energy and Business Development 29. Primary Industries and Social Empowerment 30. Public Administration, Disaster Management and Rural Economic Affairs 31. Public Enterprise, Kandyan Heritage and Kandy Development 32. Science, Technology & Research 33. Special Area Development 34. Telecommunication, Foreign Employment and Sports 35. Tourism Development, Wildlife and Christian Religious Affairs 36. Transport & Civil Aviation 37. Women & Child Affairs and Dry Zone Development
Select Committees [x5]	
<ul style="list-style-type: none"> 1. Steering Committee of the Constitutional Assembly of Sri Lanka 2. To look into and report to Parliament on the terrorist attacks that took place in different places in Sri Lanka on 21st April 2019 3. To study and report to Parliament its recommendation to ensure National Evaluation Capacity in Sri Lanka 4. To study and report to Parliament its recommendations to ensure Communal and Religious Harmony in Sri Lanka 5. To introduce Legal & Legislative framework and Common template for Annual Reports of Government Institutions to ensure National Evaluation Capacity 	

Figure 1. Parliamentary Committee System at a Glance

Broadly, SOCs are more thoroughly involved in the legislative process. The Resolution's undertaking for SOCs to be fully engaged in all lawmaking within the purview of their jurisdiction is given effect to by the Standing Orders which explicitly spell out the SOCs' role during various points of the legislative process.¹ Parliamentary Bills are now required to be manoeuvred through the committees and subjected to another, perhaps more intensive, layer of parliamentary scrutiny beyond the Committee of the whole House before being passed. Crucially, Bills cannot progress after the first, second, and Committee of the Whole Parliament stages without SOC approval, through either motion or a report produced by the SOC.² Additionally, minimum time periods are built into the system where Cabinet is obliged to consider SOC recommendations on proposed legislation before proceeding, which creates more of a concrete feedback loop with the executive than before.³ Finally, the additional level of scrutiny actively engages a more diverse array of parliamentarians than before, particularly those from smaller parties and those serving as backbenchers in the major parties.⁴ In this manner, the system claws back some of the power the legislature had ceded to the executive under the previous committee system.

This dynamic must also be viewed in the context of the Nineteenth Amendment to the Constitution (passed just months prior to the initiation of the new Committee system), which in itself effected a notable reduction in the executive President's powers. The Committee system can thus be seen as part of a

¹ See in particular Standing Orders 50, 54, 57.

² Standing Orders 50, 54, 57, 58, 68 and 70.

³ See, for example, clause 13 which stipulates Cabinet action upon a SOC's report. Parliament of Sri Lanka, *Sectoral Oversight Committees & Committee on Public Finance* (19 December 2015) < <https://www.parliament.lk/files/committees/docs/soc-pfc-resolution.pdf> > accessed 19 October 2019.

⁴ See, for example, *ibid*, clause 8.

broader strengthening of the legislature’s powers with regards the President when viewed alongside measures such as the devolution of powers of institutional appointment away from the President to other decision-making bodies such as the Constitutional Council, and the removal of the President’s unilateral power to dissolve Parliament.⁵

The New Parliamentary System in Practice

In practice, the new Parliamentary Committee system displays certain positive developments. First, legislation that is brought before Parliament now receives more scrutiny by the Committees than before as they are now mandated to consider all Bills tabled in Parliament. The Committees’ activity since their introduction to March 2019 shows the number of Bills considered by each (see Figure 2).

Committee	Bills considered
Agriculture and Lands	0
Business and Commerce	3
Economic Development	9
Education and Human Resources Development	6
Energy	3
Health and Human Welfare, Social Empowerment	6
Internal Administration and Public Management	9
International Relations	0
Legal Affairs (Anti-Corruption) and Media	31
Manufacturing and Services	0
National Security	2

⁵ Reeza Hameed, ‘Parliament and Government after the Nineteenth Amendment’ in Asanga Welikala (ed) *Nineteenth Amendment to the Constitution: Content and Context* (CPA 2016).

Reconciliation and North and East Reconstruction	0
Sustainable Development and Environment and Natural Resources	3
Transport and Communication	5
Women and Gender	0
Youth, Sports, Arts and Heritage	1
Committee on Public Finance	19

Figure 2. Bills considered under the new committee system from 2016 to March 2019⁶

The total number of Bills considered by the committees during this period, 97, corresponds to the number of Acts passed by Parliament in the same period, meaning that all Bills which became subsequent Acts were considered by a committee. There are clear discrepancies between the numbers of Bills considered between the committees, with four SOCs not considering any Bills, and only the Legal Affairs (Anti-Corruption) and Media SOC and Committee of Public Finance considering more than 10 Bills. This suggests that there is space for some reordering of the Committees' subjects if the burden of considering legislation is to be more evenly shared between them.

The period of the new system's operation has, overall, given parliamentary committees more prominence than before. This is especially true of COPE and COPA, which oversaw high profile special investigations and produced well publicised reports during the period, in particular conducting two special investigation reports on questionable treasury bond transactions and the rice

⁶ Compiled through Right to Information Act request submitted by the Centre for Policy Alternatives to the Parliament of Sri Lanka (Request No: P/I/19/0021) on March 5, 2019 (and received on April 4, 2019). Covers period from December 2015 to March 2019.

importation scam.⁷ COPE's special report on irregularities of treasury bonds led to legal action being instituted after the Presidential Commission of Inquiry report. Similarly, the Legal Affairs (Anti-Corruption) and Media SOC has had a high media profile, particularly because of its work leading to consequential changes to the justice system. More recently, the International Affairs SOC received attention as it was considering the Counter Terrorism Bill.⁸

Reports made by SOCs have also led directly to executive action and subsequent legislation in concordance. For instance, the SOC on Legal Affairs (Anti-Corruption) and Media headed by Ajith Mannapperuma MP produced a report titled 'Recommendations Pertaining to the Expeditious and Efficient Administration of Criminal Justice' in September 2017, looking into criminal justice system's processing of cases. The SOC was able to identify average case handling times of serious criminal cases. Subsequent to the report's publication, the government amended the Judicature Act to implement the recommendations in the report. The government also legislated to establish a new permanent High Court at Bar focusing on corruption and increased the

⁷ Disna Mudalige, 'Parliament and accountability: New lease of life for watchdog committees', *The Sunday Observer* (Colombo: August 9 2019) <<http://www.sundayobserver.lk/2018/08/19/issues/parliament-and-accountability-new-lease-life-watchdog-committees>> accessed 19 October 2019.

⁸ See, for example, The Sunday Observer, 'More tinkering with the proposed Counter-Terrorism Act?', *The Sunday Observer* (Colombo: February 3, 2019) <www.sundayobserver.lk/2019/02/03/news-features/more-tinkering-proposed-counter-terrorism-act> accessed 19 October 2019; and commentary by the SOC's Chair, Mayantha Dissanayake, 'The Case for the Counter Terrorism Bill', *The Sunday Observer* (Colombo: February 24, 2019) <www.sundayobserver.lk/2019/02/24/opinion/case-counter-terrorism-bill> accessed 19 October 2019.

maximum number of High Court judges.⁹ This demonstrates a greater interplay between the legislature and the executive than was observed under the previous system, and can be seen as strengthening the accountability of the executive to some degree.

The period under survey has also displayed a greater dynamism within the Committee system's institutional framework. The amendment of the Standing Orders during the new system's operational period is a good example of this. The Committee on Standing Orders, chaired by the Speaker, met 12 times from December 2015 until October 2017, canvassing proposals for amendment from all MPs and seeking the views of Parliamentary Secretariats from a number of Commonwealth countries before producing a report in December 2017.¹⁰

Following this report's tabling, Parliament adopted the new Standing Orders 143 which, among other measures, clarifies in detail how SOCs are to operate, elaborating on the Resolution empowering SOCs. The Standing Orders revision also incorporated a requirement for the Finance Ministry and a subject Ministry to report back to Parliament, within two months of the submission of COPE and COPA reports, about the actions taken with regard to those committees' recommendations.¹¹ This revision was based on concerns from the COPE and COPA Chairpersons that their reports were not being met with enough action from the relevant Ministries.¹² This process has created

⁹ Mudalige (2019).

¹⁰ Nihal Seneviratne, 'New Standing Orders for Parliament to make it more vibrant and effective', *The Sunday Times* (Colombo: June 10, 2018) <<http://www.sundaytimes.lk/180610/sunday-times-2/new-standing-orders-for-parliament-to-make-it-more-vibrant-and-effective-297538.html>> accessed 19 October 2019.

¹¹ Mudalige (2019).

¹² Ibid.

precedent for future revisions of the Standing Orders to reflect evolving operational necessities of the committees.

Likewise, the practical demands of the committee system are driving certain technological innovations within Parliament's administrative apparatus. For instance, COPA has devised a computerised information management system to assess the financial management and performance of all 837 public institutions coming under its purview. This helps to resolve the practical difficulties of summoning all the institutions to Parliament within a year.¹³

Despite these positive developments, however, there are a number of concerns with the operation of the new committee system. First, despite the high profiles of certain committees, the public profile of the majority of SOCs is virtually non-existent. On the one hand, this is due to their subject matters not being controversial or contested. The workloads between the committees is also clearly not equal, with certain SOCs receiving more Bills for consideration than others on account of their subject matter and being required to carry out their annual reporting functions over a much larger number of public departments and authorities. The equal memberships across the Committees (20 in each SOC, and 26 in COPE, COPA, and Committee on Public Finance), should perhaps, therefore, be revised.

It is also the case that certain kinds of work conducted by committees may have a significant impact, despite it not receiving widespread publicity. For instance, the Women and Gender SOC initiated a review of reproductive health and sexual education in the country, bringing together a number of government agencies and experts, which instigated changes in the national health education curricula and a trial of a reproductive and sexual health

¹³ Ibid.

education programme across schools in the Western Province (to be expanded nationally).¹⁴ This goes beyond the strictly expected work of Committees, and shows different ways in which Committees can work to bring about institutional change.

On the other hand, the variance in the number of meetings the committees have held (see Figure 3) points to varying levels of motivation and productivity between them.¹⁵ Committees are empowered to do more than simply consider legislation referred to them and audit public authorities—there is space for them to initiate their own enquiries and consider amended, new or additional legislation of its own accord. The agendas of the committees during the period shows certain committees displaying more imagination and forethought than certain others in going beyond their minimum remits. A contributing factor to this is the initiative of each committee’s chairperson – those of the more prominent and productive committees are widely regarded as being more effective at steering their committees and understanding their purposes more broadly.

¹⁴ Parliament of Sri Lanka, Women and Health Sectoral Oversight Committee, ‘Report of the Sectoral Oversight Committee on Women and Gender on Teaching Reproductive Health to School Children’ (March 2019)

<https://www.parliament.lk/uploads/comreports/155383627307102_2.pdf> accessed 19 October 2019.

¹⁵ Committees are mandated to meet at least twice a month. Parliament of Sri Lanka, *Sectoral Oversight Committees & Committee on Public Finance* (19 December 2015)

<<https://www.parliament.lk/files/committees/docs/soc-pfc-resolution.pdf>> accessed 19 October 2019. Clause 6(b).

Committee	2016	2017	2018	2019 (Jan-Mar)
Agriculture and Lands	8	13	12	3
Business and Commerce	7	8	5	1
Economic Development	8	23	14	2
Education and Human Resources Development	14	21	9	3
Energy	13	10	5	1
Health and Human Welfare, Social Empowerment	11	10	7	1
Internal Administration and Public Management	11	12	9	0
International Relations	11	10	3	4
Legal Affairs (Anti-Corruption) and Media	14	20	19	3
Manufacturing and Services	7	7	4	1
National Security	6	8	3	1
Reconciliation and North and East Reconstruction	9	6	4	0
Sustainable Development and Environment & Natural Resources	12	9	6	1
Transport and Communication	8	16	7	0
Women and Gender	8	13	9	4
Youth, Sports, Arts and Heritage	9	10	8	0
COPF	23	31	22	5
COPE	60	51	32	–
COPA	73	63	25	6

Figure 3. Number of meetings of newly introduced Parliamentary Committees (and the COPE and COPA) from 2016 to March 2019¹⁶

¹⁶ Compiled through Right to Information Act request submitted by the Centre for Policy Alternatives to the Parliament of Sri Lanka (Request No: P/I/19/0021) on March 5, 2019 (and received on April 4, 2019). Covers period from December 2015 to March 2019. Figures for COPE unavailable.

The variance in the number of meetings convened by Committees is related to an even more pressing concern, which is the attendance of MPs at Committees. All Committees display poor attendance rates across the board (see Figure 4). Only one committee records an average annual attendance rate of more than 50 per cent (the Committee on Public Finance in 2016).

Committee	2016	2017	2018	2019 (Jan-Mar)
Agriculture and Lands	41.88%	33.46%	19.17%	26.67%
Business and Commerce	37.86%	31.88%	24.00%	20.00%
Economic Development	46.25%	31.52%	24.64%	25.00%
Education and Human Resources Development	46.79%	27.86%	34.44%	31.67%
Energy	24.23%	17.50%	18.00%	15.00%
Health and Human Welfare, Social Empowerment	36.36%	24.50%	20.71%	15.00%
Internal Administration and Public Management	35.91%	24.58%	19.44%	–
International Relations	30.45%	16.50%	20.00%	26.25%
Legal Affairs (Anti-Corruption) and Media	30.00%	23.00%	20.53%	21.67%
Manufacturing and Services	30.71%	20.71%	20.00%	95.00%
National Security	35.83%	18.13%	25.00%	15.00%
Reconciliation and North and East Reconstruction	32.78%	28.33%	20.00%	–
Sustainable Development and Environment and Natural Resources	37.92%	31.11%	27.50%	25.00%
Transport and Communication	38.13%	33.44%	24.29%	–
Women and Gender	35.00%	22.69%	22.78%	17.50%
Youth, Sports, Arts and Heritage	26.11%	23.50%	26.88%	–
COPA	24.66%	20.76%	21.54%	21.79%
Public Finance	54.52%	38.96%	32.17%	36.92%

Figure 4. Average attendance rates at meetings of newly introduced parliamentary Committees (and COPA) from 2016 to March 2019¹⁷

¹⁷ Ibid. Averages derived from total attendance over. Four SOCs did not hold meetings in 2019 up to March.

Perhaps most worrying is the decline in meeting attendance over the three full years the new committee system has been in operation, from an average of 35.85 per cent across all committees in 2016, to 26.02 per cent in 2017, to 23.39 in 2018.

Attendance at committees is a problem that has persisted throughout the various iterations of committee systems in Sri Lanka, and one which worsened through the Consultative Committee system from 1978-2015 where there was little incentive for regular attendance for both government and opposition MPs given the little power the committees had.

However, under the new committee system, committees do have more powers of inquiry and oversight. It demands participation in the legislative process at a deeper level and performing oversight over executive action, in mechanisms marked by policy subject matter and applying to the country as a whole instead of particular constituencies. Adapting to this dynamic requires deeper changes in the country's political culture but it may be addressed in the short-term with more intensive trainings for MPs, particularly as they are being inducted.

It must be noted here that the induction new MPs receive would not have addressed the new committee system on account of it being introduced (in December 2015) after the election of the current Parliament (in August 2015). It could, at a basic level, also be addressed by having stricter attendance requirements, enforced either by Parliament or through political parties. Soft measures of compulsion such as making MPs' Committee attendance records more prominent, particularly on the Parliament website, could also be considered.

In addition to problems with attendance, the question of resources for committees arises repeatedly. Staffing, expert advice and technological resources is shared unevenly between the committees. In terms of resourcing, the new committee system

requires a much larger investment than the previous one; not only are there more committees currently, but their larger mandates mean that there are more administrative and research staff demands as well as physical resource demands such as IT systems.

Parliament currently attempts to meet these demands through a combination of its annual budgetary appropriation and funding from capacity-building and support programmes from international donors.¹⁸ It appears, however, that this support is insufficient to provide a consistent level of resourcing for all committees. Committee chairpersons, particularly those of the finance committees, have said that Parliament is sometimes unable to meet their requirements for staffing (particularly audit staff), IT systems and expert knowledge.¹⁹

Finally, there are persistent problems of public access to the workings of committees. Whilst Parliament's website provides some of the reports and attendance records of the committees, full minutes and complete versions of committee reports tabled in Parliament are not available or are not up to date. Physical public access to committees is also not a norm; while civil society organisations, public stakeholders, and citizens sometimes attend

¹⁸ For instance, the Strengthening Democratic Governance and Accountability Project (SDGAP) programme funded by the United States Agency for International Development (USAID)—
<<https://www.dai.com/our-work/projects/sri-lanka-strengthening-democratic-governance-and-accountability-project-sdgap>> accessed 19 October 2019. See also programmes run by the Commonwealth Parliamentary Association UK <<https://www.uk-cpa.org/where-we-work/asia-pacific/sri-lanka>> accessed 19 October 2019.

¹⁹ Ravi Ratnasabapathy, 'Sri Lanka's political system: A Failure of Governance', *Groundviews* (Colombo: January 3 2019) <<https://groundviews.org/2019/03/01/failure-of-governance-in-sri-lankas-political-system/>> accessed 19 October 2019. See also Mudalige (2019). For more information on parliamentary services, see Chapter 10 of this book.

committee meetings, this must be upon the invitation of MPs, thus necessitating citizens to have access to MPs on relevant committees.²⁰ There are no provisions for ordinary citizens to attend and observe committee proceedings (in the way they can observe debate in the main parliamentary chamber) and committees do not make open calls for members of the public to make submissions in person. This compares particularly badly with legislatures such as the Scottish Parliament which make all committee proceedings open to the public. Committee proceedings are also not televised or streamed online, and media access can be sporadic, though this is due in part to certain restrictions imposed by the Parliament (Powers and Privileges) Act (these restrictions are currently intended to be eased through amendment).²¹ In 2019, a dedicated Media Centre was opened in Parliament and the COPE and the COPA proceedings were opened to the media.²² Opening of the remaining committees to media access would further improve public access to committee proceedings.

Conclusion

By design, the new parliamentary committee system represents a significant advance from the previous committee system, and among the various committee systems of the Sri Lankan

²⁰ Interviews with civil society activists.

²¹ Interview with the Assistant Secretary General of Parliament. The restrictions stem primarily from section 17 on Evidence of proceedings in Parliament or committee not to be given without leave, Parliament (Powers and Privileges) Act, No. 21 of 1953. For a description of the Parliament (Powers and Privileges) Act, see Chapter 3 of this book.

²² Ashwin Hemmathagama, 'COPE Proceedings Open to Media from Today', *Daily FT* (Colombo: August 9 2019) <<http://www.ft.lk/news/COPE-proceedings-open-to-media-from-today/56-683674>> accessed 19 October 2019.

legislature historically. Giving subject-specific committees a greater role and power in the legislative process; more clearly marking out their jurisdictions and mandates in relation to the executive, and introducing mechanisms to hold the executive to account, represents a more equitable balancing of powers between the legislature and the executive. The vision of carving out a more distinct and independent role for Parliament is a particularly important exercise in Sri Lanka in the context of its very powerful executive.

In practice, some of this vision has been realised. Committees now play a much larger role in the proceedings of Parliament and the wider national political debate. As a result of committee action, the past three years have witnessed some important touchstones in legislative accomplishment, institutional change, and government accountability. However, the success of committees is as much dependent on the drive and capability of their members as it is on their institutional design. Here, poor committee attendance, inadequate and inconsistent committee resourcing, and restricted public access hinder the committee system.

Improving the parliamentary committee system requires a broad commitment to the reimagined role of the parliamentarian the new committee system has created. Parliamentarians are no longer simply representatives for their electoral constituents and dutiful voices for their political party and positions. They are now more deeply embedded in the legislative process. They are agents that can enforce government accountability, and are representatives of the people when it comes specific subjects of governance as well. This renewed commitment must come from MPs individually as well as their parties in order for the new committee system's promise to be fully realised, and for the system to be sustainable into the future.

7

EXECUTIVE OVERSIGHT

Introduction

This chapter looks at Parliament's oversight over the executive. The first part of the chapter looks at oversight as a constitutional concept, and then examines Parliamentary Questions and Ministerial Statements as mechanisms and conventions in Parliament to exercise oversight over the executive (this discussion excludes Parliamentary Committees which were looked at in Chapter 6). The second part of the chapter examines Parliament's scrutiny over public finance as a major component of Parliament's oversight over the executive, looking in particular at the budget process and the finance committees.

Oversight as a Concept

Oversight of the executive can be defined as any activity that involves examining the expenditure, administration, and policies of the government of the day. It often includes examining the wider context in which government is operating in order to identify opportunities and risks that may currently lie outside the ambit of a government's mandate.

Oversight is one of the key roles of Parliament, aside from its lawmaking function and provision of appropriations. When Parliament scrutinises the executive through oversight, it can, legally or by convention, require a representative of the government to explain or justify their individual or organisational decisions, actions, and performance in relation to any

expenditure, administrative action, or policy of the government.¹ Here, the representative function vested in Parliament by the people through voting is used to evaluate the executive's governance.

Oversight as a constitutional concept is related to but not identical to transparency and accountability. Transparency generally describes a state of affairs, whilst accountability tends to describe a formal relationship. Oversight, meanwhile, is an active process one body engages in against another.²

Parliamentary oversight is a distinctive process. First, it is undertaken by democratically elected representatives of the citizenry.³ This lends parliamentary oversight a particular legitimacy and importance not found in other methods of oversight over the executive. Second, parliamentary oversight is often a prescribed process with traditions, conventions, and procedures designed to induce oversight by producing particular answers from the executive.⁴ This differs from other processes of scrutinising the executive, such as what is done by the media or by civil society, which may have less concrete procedures and obligations attached to them.

Third, the process of parliamentary oversight generally takes place in public and is often a matter of public record (except for

¹ Mark Philip, 'Delimiting Democratic Accountability' (2009) *Political Studies*, 57: 28-53.

² A. Paun and J. Harris, 'Accountability at the Top' (2014) Institute for Government, <<http://www.instituteforgovernment.org.uk/publications/accountability-top>> accessed 19 October 2019.

³ Ibid.

⁴ Hannah White, 'Parliamentary Scrutiny of Government' (2015) Institute for Government <<https://www.instituteforgovernment.org.uk/publications/parliamentary-scrutiny-government>> accessed 19 October 2019. 15-16.

committee deliberations and the consideration of evidence in private). This has a definite effect on the parties involved in parliamentary oversight.⁵ The awareness that oversight activity is visible to the public always influences the behaviour of those involved in the process. Finally, parliamentary oversight involves an accountability relationship. Parliament can ‘require’ an explanation from Ministers of their performance, decisions and actions in relation to any expenditure, administrative actions, or policy of the government.⁶

Under the framework of the 1978 Constitution the executive comprises of the President, who heads the Cabinet of Ministers. The President is responsible to Parliament while the Cabinet is both responsible and answerable to Parliament. Following the substantial reforms introduced by the Nineteenth Amendment in 2015, the President no longer commands but must work in cooperation with a Cabinet of Ministers that is responsible to Parliament.

Parliamentary Questions and Ministerial Statements

Parliamentary Questions are a primary method of enforcing parliamentary oversight of the executive. Members of Parliament can put forward oral questions to members of the executive with regard to the public affairs according to the subjects and functions assigned to their Ministry.

The Standing Orders prescribe how oral questions may be asked and also prescribe what the general content of Questions can be. For example, there are restrictions on asking questions on matters before committee proceedings or under adjudication by the

⁵ Ibid.

⁶ David Monk, ‘A Framework for Evaluating the Performance of Committees in Westminster Parliaments’ (2010) *The Journal of Legislative Studies*, 16: 1-13.

judiciary.⁷ Oral questions fall under two main categories: Questions to Ministers and Questions to the Prime Minister (PMQs). With Questions to Ministers, an MP can ask only two oral questions per day and the duration for Questions itself is limited to one hour per day.⁸ In comparison, other legislatures such as the UK have more time and slots allotted for Questions. With Questions to the Prime Minister (PMQs), four Questions in total (two for the Government and two for the Opposition) can be asked during a half hour set aside during Questions for oral answer on the Wednesday of the first week of the sitting of every month.⁹ This is relatively low compared to PMQs in other legislatures. For example, in the UK, PMQs are taken every sitting Wednesday for 30 minutes, and the Leader of the Opposition is permitted to ask up to six questions. The onus on the Prime Minister in Sri Lanka is therefore very light.

The Sri Lankan Parliament does not entertain written questions in a formalised manner like a number of other Commonwealth Parliaments.¹⁰ However, the Standing Orders provide for Ministerial Statements which function, in effect, as written questions. Ministerial Statements can be made by Ministers on matters of public importance, policy matters, and to correct

⁷ Standing Orders 31-37.

⁸ Ibid.

⁹ Standing Order 38.

¹⁰ See, for instance, the Australian and New Zealand Parliaments: Parliament of Australia Information Sheet 1, *Questions*, <<https://www.aph.gov.au/About Parliament/House of Representatives/Powers practice and procedure/00 - Infosheets/Infosheet 1 - Questions>> accessed 19 October 19, 2019 (Australia); Parliament of New Zealand, *Hundreds of written questions asked every week, even when Parliament isn't meeting* <<https://www.parliament.nz/en/get-involved/features/hundreds-of-written-questions-asked-every-week-even-when-parliament-isn-t-meeting/>> accessed 19 October 2019 (New Zealand).

inaccurate information placed before the House for which the Ministers have responsibility.¹¹ Ministerial Statements depend on the prior approval of the Speaker; no questions are allowed at the time the statement is made but a debate may be allowed on a subsequent day.¹²

An obvious benefit of Questions and Ministerial Statements is to compel the government to put certain information on the public record. The introduction of the Right to Information Act in 2016 has made this a function that is no longer exclusive to Parliament, however, parliamentary questions are a matter of immediate public record, being published online in the Hansard (whereas an RTI requester and/or responding public authority may or may not choose to make a request public).

An existing limit to Questions and Ministerial Statements in Parliament is the fact that the President, who heads the executive and also holds a number of ministerial portfolios, is not subject to them. The Nineteenth Amendment created a change in Sri Lanka's semi-presidential executive where the Prime Minister and Cabinet are collectively accountable only to Parliament (and not the President and Parliament as before). This state of affairs is reflected in the Questions to Ministers and PMQs. However, the President, who is also part of the executive and holds several ministerial portfolios, is exempt from Parliamentary questions. This makes Parliament's oversight over the executive through Questions relatively weak.¹³

¹¹ Standing Orders 27(2) and (7).

¹² Ibid

¹³ Note that this situation will be somewhat alleviated following the election of the next President, who will not be permitted to hold any ministerial portfolios but will still head the Cabinet: Articles 42 and 43 of the Constitution read with section 51 of the Nineteenth Amendment Act 2015.

Control and Oversight Over Public Finance

Control and oversight over public finance is a major aspect of Parliament's scrutiny over the executive. In general, control refers to how much power Parliament has in determining how revenue is collected and how public funds are expended by the various bodies of the government. Oversight refers to how Parliament can observe and inspect the collection of this revenue and expenditure of these public funds.

The Constitution provides Parliament with the authority for control and oversight over public finance. First, Article 148 states that:

Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.

In addition, Articles 149 and 150 set out the parameters of the Consolidated Fund, to which funds of the state which are not already allocated for a particular purpose must be credited.¹⁴ Further, Article 151 authorises Parliament to set up a Contingencies Fund for urgent and unforeseen expenditure.

Parliamentary control and oversight over public finance works under the principle that Parliament is the 'custodian of the public purse'. Parliament constitutionally exercises oversight in the financial performance of the public sector institutions and is the sole authority to approve spending of people's money and collection of taxes from the people. It generates upon Parliament the responsibility to scrutinise how Ministries, Departments, and other government agencies spend money approved by the Parliament. Parliamentary control and oversight over public

¹⁴ The Constitution Sri Lanka (1978): Articles 149 and 150.

finance can be evaluated by taking into account two main elements: the Budget process and the Finance Committees.

Budget Process

The passage of the Appropriation Bill, or the Budget, is one of the primary roles of a government, and of Parliament. The Budget sets out the revenue and expenditure proposals of a government, allocating funds for all programmes and projects of the government's departments and state enterprises.¹⁵ The Budget process has three distinct phases: the preparation phase, the approval phase, and the implementation phase. Of these phases, Parliament plays a clear role in the approval phase, a limited role in the implementation phase, and virtually no role in the preparation phase.

¹⁵ Parliament of Sri Lanka, *Appropriation Bill (The Budget)* <<https://www.parliament.lk/en/how-parliament-works/appropriation-bill-the-budget?showall=&start=2>> accessed 19 October 2019.

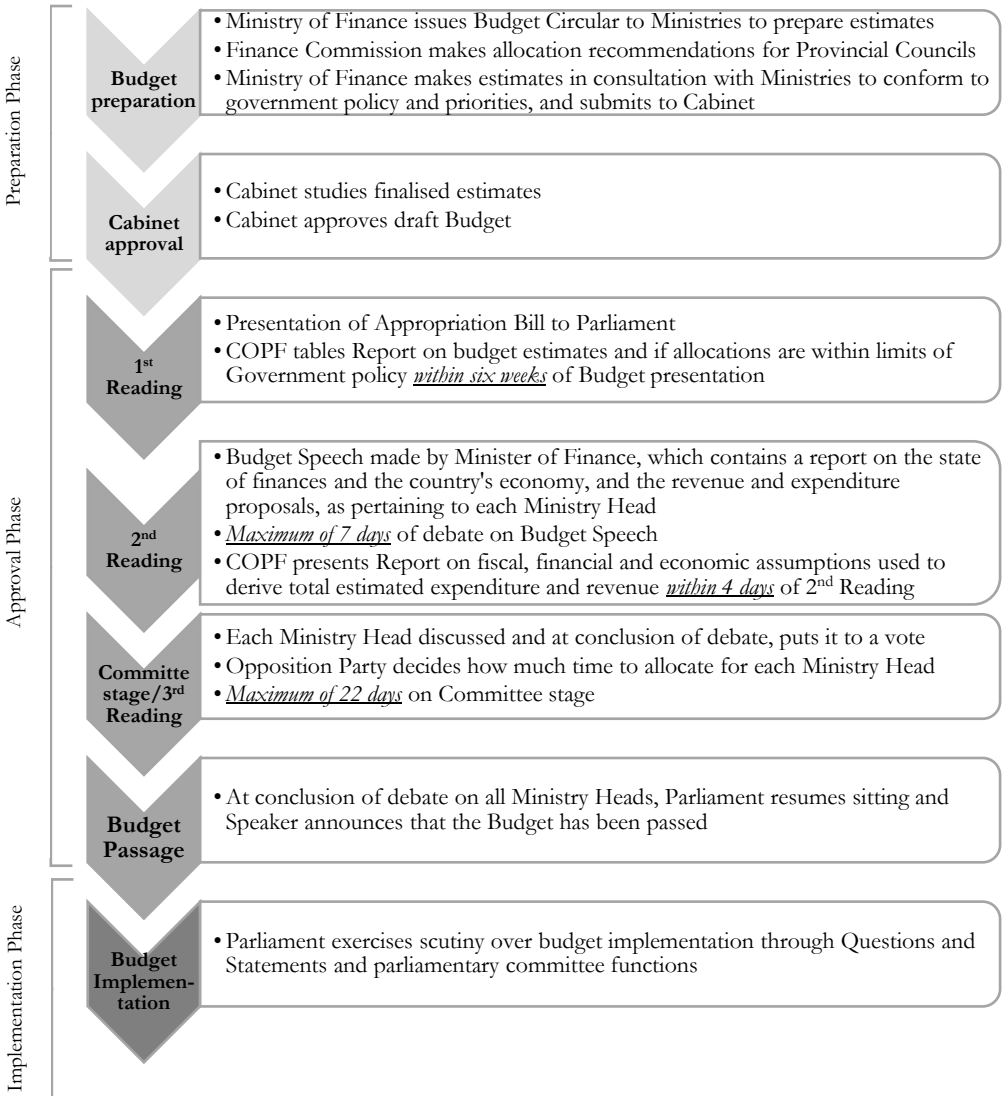


Figure 1. The Budget Process

Budget Preparation

The Budget's preparation is undertaken primarily by the Ministry of Finance and its Department of National Budget (DNB). Under the DNB's Budget Circulars No. 03/2015 and No. 02/2017, the government now undertakes a “zero-based budgeting approach” to budget formulation which targets a performance-based budgeting approach. The result of this is a more regimented and time-sensitive budget preparation process.

First, the DNB issues budget call or budget letter to secretaries of line ministries, chief secretaries of provincial councils, and heads of departments setting guidelines and directions for annual budget preparation. Next, Cabinet approves the initial Cabinet Memorandum on the budget indicating the government's overall revenue and expenditure position, and thereafter budget discussions are held with spending agencies, revenue departments, and other stakeholders in relation to allocations to sectors, ministries, other institutions, programming, and projects, based on priorities within the government's overall development framework.

The Ministry of Finance's other key departments—including those of National Planning, Fiscal Policy, Public Enterprises, External Resources, Management Services, Treasury Operations, State Accounts, Legal Affairs, Foreign Aid and Budget Monitoring, and Development Finance—and the Departments of Customs, Inland Revenue, and Excise as key revenue departments, are additionally involved in the budget preparation process.¹⁶

¹⁶ Ministry of Finance, *What Are the Departments of the Treasury That Facilitate the National Budget Making Process?*
<<http://www.treasury.gov.lk/web/guest/government-budget2>>
accessed 19 October 2019.

There is no parliamentary involvement in the budget preparation process as the Ministry of Finance is solely responsible for it. In a growing number of jurisdictions worldwide, the budget preparation process is supplemented by a budget or finance committee located in the legislature. These bodies work to provide analysis of public finances and fiscal policies on an independent and non-partisan basis, providing budget-preparation advice to both public representatives and public officials.¹⁷ These bodies also engage in long-term financial policy planning and forecasting. The lack of such an institution in the Sri Lankan framework means that there is no link between the executive and Parliament in budget preparation.

Constitutionally, the Finance Commission which is established under the Thirteenth Amendment to the Constitution to give effect to the allocation of central funds to the Provincial Councils, must be consulted. In addition, the Ministry of Finance ostensibly undertakes a consultation process prior to preparing the budget, which consults technocrats, the private sector, trade unions, interest groups, donors, lending agencies, and rating agencies.¹⁸ There are, however, no rules or set frameworks under which this consultation is to occur.

The budget as prepared, then, is almost entirely a product of the executive. In practice, it is specifically an exercise that is carried

¹⁷ M. R. M. Beetsma, M. X. Debrun, X. Fang, Y. Kim, V.D Lledo, S. Mbaye, and X. Zhang (2018) *Independent Fiscal Councils: Recent Trends and Performance*. International Monetary Fund <
<https://www.imf.org/en/Publications/WP/Issues/2018/03/23/Independent-Fiscal-Councils-Recent-Trends-and-Performance-45726> >
accessed 19 October 2019.

¹⁸ Ministry of Finance, *Who are the Stake Holders Involved in the Budget Consultation Process?*
<<http://www.treasury.gov.lk/web/guest/government-budget4>>
accessed 19 October 2019.

out by senior civil servants within the Ministry of Finance and other Ministries.¹⁹ The lack of parliamentary involvement over budget preparation renders Parliament's constitutional duty to have "full control over public finance" contestable.

Budget Approval

In contrast, Parliament has a much more definite role in how a budget is approved. Following Cabinet approval of the prepared budget, the presentation, debate over, and passage of the Appropriation Bill all takes place in Parliament. The Standing Orders prescribe not more than a total of 26 days for the total budget process.²⁰

The presentation of the Budget is followed by a maximum of seven days of debate on the Second Reading. Time is allocated to the Government and Opposition for speaking when the Committee of the Business of the House meets. The respective Whips of the Government and the Opposition must allocate time to constituent parties and their members who wish to intervene in the debate. At the end of the allocated seven days the Appropriation Bill is put to a vote. There is, however, no debate in Parliament on budget policy prior to the tabling of the Appropriation Bill.

The Committee on Public Finance (COPF) plays a role in the budget process as well. Within four days after the presentation of the Budget and the Second Reading of the Appropriation Bill, COPF must present before Parliament a Report on the fiscal, financial, and economic assumptions used as the basis in arriving at total estimated expenditure and revenue.²¹ COPF must also

¹⁹ Muttukrishna Sarvananthan, 'The Government Budget: A Critical Appraisal with reference to Transparency and Accountability' [2017] Point Pedro Institute of Development Working Papers. 9-10.

²⁰ Ibid.

²¹ Standing Order 121(5).

table a Report on the budget estimates and whether the allocation of money is within the limits of government policy within six weeks of the tabling of the Appropriation Bill.²²

Once Parliament votes for the Bill, it is referred to a Committee of the Whole House which constitutes the committee stage of the Appropriation Bill or the Third Reading. Not more than 22 days may be used for the Third Reading or Committee Stage.²³ The presentation of the Appropriation Bill is also customarily accompanied by all Ministries distributing Progress Reports of activities undertaken by the respective agencies functioning under their Ministries to all MPs. In practice, this is not done by all Ministries in a consistent manner. Some Ministries make annual, detailed Progress Reports whilst others do not, or do so poorly and inconsistently.

During the committee stage of the Appropriation Bill, Parliament must move through the Appropriations for each Ministry (also referred to as a Ministry's Head or Vote) by going through amendments under discussion of a Head, then government amendments to that Head, and then the Question necessary to dispose of the Head and move onto the next.²⁴ At the conclusion of the discussion on each Head, the question is put to the House for their vote. Parliamentary convention has developed in Sri Lanka where a division is not called by the Opposition on each Head and the vote is taken only at the conclusion of the debate on all Heads.²⁵

²² Standing Order 121(4).

²³ Standing Order 75(5).

²⁴ Ibid.

²⁵ Parliament of Sri Lanka, *Appropriation Bill (The Budget)*

<<https://www.parliament.lk/en/how-parliament-works/appropriation-bill-the-budget?showall=&start=2>> accessed 19 October 2019.

The Opposition is able to decide how much time the House should devote to each Ministry Head. Thereafter, time on debate is allocated between the Government and Opposition, with the Opposition receiving more speaking time.²⁶ Once all Ministry Heads have been passed in a Committee of the Whole House, Parliament resumes sitting at the House immediately thereafter. At this point, the Speaker announces that the Appropriation Bill for the particular year has been passed by Parliament, with or without amendments.

Budget Implementation

Upon the allocation of funds itself following passage of the budget, Parliament can exercise oversight over the disbursement and use of the funds through the implementation phase through Questions and Statements, parliamentary committees and the scrutiny of expenditure by the finance Committees.²⁷ Aside from parliamentary procedure, a number of pieces of legislation supplement oversight over budget implementation and give Parliament some further avenues of control and scrutiny over public finance. These include:

- Finance Act No.38 of 1971
- Sri Lanka Accounting and Auditing Standards Act No.15 of 1995
- Fiscal Management (Responsibility) Act No.3 of 2003
- the Annual Appropriation Act
- National Audit Act No.19 of 2018

In general, these laws impose reporting requirements on public authorities in terms of how public finances have been disbursed and controlled.

²⁶ Ibid.

²⁷ Standing Orders 125 and 126.

For instance, the Fiscal Management (Responsibility) Act No.3 of 2003 seeks to enhance the transparency and accountability in how public funds are used and to reduce government debt and the budget deficit. It imposes a responsibility upon the Minister of Finance and the Treasury to table a Mid-Year Fiscal Position Report in Parliament, in addition to the Budget Economic and Fiscal Position Report which accompanies the presentation of the Appropriation Bill.²⁸ However, this provision has been routinely ignored over the years, and there are no mechanisms built into the Act to enforce the presentation of these reports.²⁹

Compounding this is the fact that in practice, as the budget is implemented, Parliament is not consulted before the government shifts funds between administrative units specified in the enacted budget; if it spends unanticipated revenue; or if it reduces spending due to revenue shortfalls. This makes Parliament's role in the budget implementation phase one of mixed oversight.

Finance Committees

The finance committees of Parliament comprise of the Committee on Public Finance (COPF), the Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE). Each Committee performs a distinct role in the control and oversight Parliament has over public finances and the government's management thereof. These roles cover parts of the budget process as well as other aspects of public finance. Broadly, COPF performs aspects of both control and oversight over public finance, by being involved in how the Appropriation Bill is drafted and overseeing its implementation, as well as the

²⁸ Fiscal Management (Responsibility) Act No.3 of 2003, s 10-13.

²⁹ Sarath de Silva, 'Control Over Public Finance,' *The Daily News* (Colombo, March 12 2019)

<www.dailynews.lk/2019/03/12/features/179976/control-over-public-finance> accessed 19 October 2019.

collection of revenue and application of public funds. COPA and COPE act more exclusively as oversight bodies by examining the activities of government bodies responsible for public accounts and of public enterprises.

The Committee on Public Finance

COPF was one of the new parliamentary committees introduced in 2015. It is mandated to examine:

- (a) the collection of revenue under Article 148 of the Constitution;
- (b) the payment from the Consolidated Fund;
- (c) the utilisation of public funds for specific purposes by law;
- (d) the application of public funds;
- (e) the recessions of appropriations contained in the Appropriations Act for the current year, the transfer of appropriation and the unexpected balance;
- (f) the implementation of the Appropriation Act for the current year;
- (g) public debt and debt service; and
- (h) reports and statements under the Fiscal Management (Responsibility) Act, No. 3 of 2003³⁰

With regards to the Budget process, COPF must present before Parliament within four days after the presentation of the budget and the Second Reading of the Appropriation Bill, a Report on the fiscal, financial, and economic assumptions used as the basis in arriving at total estimated expenditure and revenue.³¹

³⁰ Standing Order 121(1).

³¹ Standing Order 121(5).

COPF must also table a Report on the budget estimates and whether the allocation of money is within the limits of government policy within six weeks of the tabling of the Appropriation Bill.³² The Report is based on Draft Budget Estimates provided to Parliament through the presentation of the Appropriation Bill; the numbers provided in the Budget Speech (the First Reading of the Appropriation Bill); and the Revised Estimates which follow; and further documents provided by the Ministry of Finance to COPF.³³ COPF works with the macro-economic framework (relating to debt management, inflation, interest rates, exchange rates, fiscal deficits, and GDP growth) and economic assumptions of the government.³⁴

While the COPF's mandate is significant, it faces a number a number of constraints and challenges in executing its functions. First, by COPF's admission, the task of accessing the information it requires to carry out its work, particularly from the Ministry of Finance, is "onerous".³⁵ COPF has noted the significant variances between the draft Budget Estimates and the Budget Speech which hampers its analytical duties.³⁶ Further, because expenditure is not reported by sectoral classifications and only by ministerial portfolios, and because those portfolios are excessively fluid and subject to re-organisation with changes in the composition of Cabinet, tracking spending in relation to specific sectors is made difficult.³⁷ All these factors render the COPF's, and by extension

³² Standing Order 121(4).

³³ Committee on Public Finance, *Committee on Public Finance Report on the Budget 2019*

<<https://www.parliament.lk/uploads/comreports/1554455725098505.pdf#page=1>> accessed 19 October 2019. Page 3.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, page 4.

³⁷ *Ibid.*

Parliament's, oversight functions over public finance more challenging.

The Committee on Public Accounts

The task of COPA is to examine the managerial efficiency and financial discipline of the government, its Ministries, Departments, Provincial Councils and Local Authorities.³⁸ The committee is established at the beginning of each parliamentary session and reflects the party composition in Parliament, with a quorum of four MPs.³⁹

COPA's duty is to examine the sums voted by Parliament along with the report of the Auditor-General. It obtains evidence from the Secretaries to the respective Ministries, who are the Chief Accounting Officers, Heads of Departments, and other responsible Officers. The Committee also regularly summons the Heads of Department of Public Finance, State Accounts, and National Budget or their nominated representatives. The recommendations of the committee may contain directives to Departments and Ministries and such directives are deemed to be those of Parliament.

The scope of COPA's responsibilities is enormous—over 800 state institutions (which include 50 ministries, 91 departments, 25 District Secretariats, 45 Provincial Ministries, 23 Municipal Councils, 41 Urban Councils and 271 Pradeshiya Sabhas) come under its purview.⁴⁰ Given this, by COPA's own admission,

³⁸ Standing Order 125.

³⁹ Ibid.

⁴⁰ Udita Kumarasinghe, 'Accounts of 831 State institutions : COPA to present comprehensive report' *The Sunday Observer* (Colombo: November 12 2017)

<<http://www.sundayobserver.lk/2017/11/12/news/accounts-831-state-institutions-copa-present-comprehensive-report>> accessed 19

October 2019.

examining all the state institutions in a timely manner and conducting thorough examinations of them is not practicable.⁴¹ COPA has committed to a Computer Networking Programme from 2018 onwards to introduce electronic questionnaires to assess the performance and accounting practices of state institutions in a continuous manner.⁴²

Committee on Public Enterprises

COPE ensures the observance of financial discipline in public corporations and other semi-governmental bodies in which the government has a financial stake. It is established at the beginning of each parliamentary session, the chairperson is elected by the Members of the Committee at its first session, and it has a quorum of four.⁴³

COPE's mandate is to report to Parliament on accounts examined, budgets and estimates, financial procedures, performance and management of corporations and other government business undertakings. The accounts of these organisations are audited by the Auditor-General and form the basis of the investigations of COPE. It has the power to summon the relevant officials and such other people as it thinks fit to obtain evidence and call for documents. COPE reports to Parliament and the recommendations contained in its reports are deemed to be directives to the respective corporations or statutory boards for due compliance.

⁴¹ Committee on Public Accounts, The Report of the Committee on Public Accounts on the Evaluation of State Institutions by Computer based Management Information System (Financial Year 2017) <https://www.parliament.lk/uploads/comreports/156197616304444_2.pdf> accessed 19 October 2019. p. 1.

⁴² Ibid, 3.

⁴³ Standing Order 126.

COPE's responsibilities are less than COPA's, because the number of state enterprises is smaller than state institutions. During the current Parliament, it has also instigated a number of special investigations, for instance by functioning as a Special Committee to look into financial irregularities which have occurred in the issuing of Treasury Bonds from February 2015 to May 2016 by the Central Bank of Sri Lanka.⁴⁴ COPE has on multiple occasions stated the fact that insufficient attention is paid to its reports by the relevant Ministers, public authorities, and the media.⁴⁵ The opening of COPE (and COPA) proceedings to the media and provision of livestreaming facilities in August 2019 is an important remedy to this.⁴⁶

Shortcomings in Parliament's Control and Oversight Over Public Finance

Taking stock of Parliament's role in the budget process and the functions of the finance committees as a way of maintaining its scrutiny over the executive, there is a clear discrepancy between the level of authority Parliament has in controlling public finances over its oversight functions. Control here refers to how much power Parliament has in determining how revenue is collected and how public funds are expended by the various bodies of the government. Oversight refers to how Parliament can observe and

⁴⁴ Committee on Public Enterprises, Report of the Committee on Public Enterprises which functioned as a Special Committee to look into financial irregularities which have occurred in issuing of Treasury Bond from February 2015 to May 2016 by the Central Bank of Sri Lanka, October 28, 2016, <<https://www.parliament.lk/uploads/comreports/1478667396060758.pdf#page=1>> accessed 19 October 2019.

⁴⁵ Ibid.

⁴⁶ Ashwin Hemmathagama, 'COPE Proceedings Open to Media from Today' *Daily FT* (Colombo: August 9 2019) <<http://www.ft.lk/news/COPE-proceedings-open-to-media-from-today/56-683674>> accessed 19 October 2019.

scrutinise the collection of this revenue and expenditure of these public funds.

The discrepancies between Parliament's control and oversight functions over public finances are most notable at the budget preparation stage, which has no parliamentary involvement. In contrast, Parliament plays a heavier role during the budget approval and implementation stages. Again, however, this role is weighted more heavily towards oversight functions than control of public finances. Even across these oversight functions, there is a lack of consistency in that the legislative oversight mechanisms are not properly utilised and the finance committees are overburdened in carrying out their duties.

A primary shortcoming that emerges through this evaluation with respect to Parliament's scrutiny over public finance is the lack of a dedicated budget office or committee in Parliament. Proposals for a Parliamentary Budget Office (PBO) have been mooted since 2015, when the current parliamentary committee system came into being. Legislation has evidently been prepared to introduce an Office populated by representatives from academia, think tanks, consulting firms, and external experts to provide authoritative, independent analysis of fiscal policy and the budget, which will report to COPF.⁴⁷ However, the Office has not been created yet.

A PBO can go a long way towards strengthening Parliament's oversight over public finances, as it would provide direct monetary and fiscal expertise to MPs (particularly those in the

⁴⁷ Chandani Jayatilleke, 'Parliament Budget Office to Control Public Finance' *The Sunday Observer* (Colombo: July 23 2017) <<http://www.sundayobserver.lk/2017/07/23/news/parliament-budget-office-control-public-finance>> accessed 19 October 2019.

finance committees) who may not possess such expertise.⁴⁸ It would also, over time, streamline the budget process by creating a stronger feedback loop between the executive and Parliament across successive budget cycles. This is a benefit to both the Government and the Opposition, because it allows both sides to keep track of what expenditures have been committed to and the policy basis behind them, over a longer period of time.

As presently constituted, the three finance committees perform an appreciable role in Parliament's scrutiny over the executive through their control and oversight over public finance. In particular, the recent introduction of COPF has added to the work and dynamics of COPE and COPA. However, there is a limit to this enhanced function due to the large mandates of the finance committees combined. As a result, Parliament's scrutiny over the executive with regards to public finance is incomplete. This can be addressed first by providing adequate resources and time for these Committees to perform their functions⁴⁹; and second by promptly establishing a CBO.

Conclusion

This chapter examined the various mechanisms and conventions Parliament uses to exercise oversight over the executive, paying particular attention to Parliament's control and oversight over public finance. These include Questions and Ministerial Statements as procedural mechanisms, as well as the conventions used through the budget process, and the operations of the finance committees. The picture of parliamentary oversight over

⁴⁸ Raja Wickramasinghe, 'Parliamentary control of Public Finances' *The Sunday Times* (Colombo: January 29 2019) <www.sundaytimes.lk/article/1066332/parliamentary-control-of-public-finances> accessed 19 October 2019.

⁴⁹ For more information on parliamentary services, see Chapter 10 of this book.

the executive that emerges is one where there are definite mechanisms and conventions in place to give effect to the concept, but where its execution in practice is inconsistent. The examination of Parliament's control and scrutiny over public finance in particular illustrated how these inconsistencies play out.

PARLIAMENTARY OVERSIGHT OF STATES OF EMERGENCY AND COUNTER TERRORISM POWERS

This chapter describes the constitutional and statutory framework governing states of emergency and anti-terrorism powers in Sri Lanka, and the special role of Parliament in holding the executive to account in the exercise of these extraordinary powers.

The Constitutional and Statutory Framework: Chapter XVIII and the PSO

The constitutional framework governing states of emergency is set out in Chapter XVIII of the Constitution, which primarily concerns procedural requirements and the oversight role of Parliament. The substantive powers brought into operation by a state of emergency are set out in the Public Security Ordinance No. 25 of 1947 as amended (the PSO). The power to promulgate emergency regulations (i.e., the grant of legislative power to the executive) is provided under Part II of the PSO.

A state of emergency is brought into being by a Proclamation made by the President,¹ which brings into operation the provisions of the PSO.² This includes the power to make emergency regulations by the President having the legal effect of overriding, amending, or suspending the provisions of any law

¹ The Constitution of Sri Lanka (1978): Article 155 (3).

² Ibid, Article 155 (1).

except the Constitution.³ The same applies to statutes of Provincial Councils, which may be overridden, amended or suspended by emergency regulations.⁴

The sole discretion in issuing a Proclamation declaring a state of emergency is vested in the President, but such a declaration must forthwith be communicated to Parliament.⁵ The Proclamation is at first instance valid for a period of fourteen days and any continuation in force is subject to the approval of Parliament.⁶ If Parliament does not approve a Proclamation made under Article 155 (3), the declaration of emergency immediately ceases to be valid or of any force in law (but without prejudice to anything lawfully done thereunder).⁷

Chapter XVIII sets out detailed rules as to how the approval of Parliament is to be obtained including provision for its immediate summoning if it stands adjourned, prorogued, or dissolved. Subject to parliamentary approval, a Proclamation of a state of emergency operates for a period of one month, and may be further extended by one month at a time, although it may be revoked earlier.⁸ Before their repeal by the Tenth Amendment to the Constitution in 1986, the original paragraphs (8) and (9) of Article 155 provided that where a state of emergency has been in operation for a period of ninety consecutive days, or ninety days in aggregate within a period of six months, a resolution passed by a majority of two-thirds of members was required for a valid parliamentary approval of the continuing state of emergency. This safeguard is no longer available.

³ Ibid, Article 155 (2).

⁴ Ibid, Article 155 (3A) introduced by the Thirteenth Amendment to the Constitution (1987).

⁵ Ibid, Article 155 (4).

⁶ Ibid, Article 155 (6).

⁷ Ibid, Article 155 (8).

⁸ Ibid, Article 155 (5).

There is no provision for judicial oversight or review over the declaration or anything done in good faith under a state of emergency in Chapter XVIII, which makes Parliament the sole oversight and control mechanism of the executive during an emergency.

The Proclamation bringing Part II of the PSO into operation (i.e., the declaration of a state of emergency) is at the discretion of the President under Section 2. Under this provision, the President may issue such a Proclamation where, in view of the existence or imminence of a state of public emergency, he is of the opinion that it is expedient to do so, in the interests of public security and the preservation of public order, or for the maintenance of supplies and services essential to the life of the community.⁹

Section 5 (1) is a general grant of law-making power to the President to make emergency regulations and Section 5 (2) enumerates, without prejudice to the generality of the power conferred under Section 5 (1), the various purposes for which emergency regulations may be made. These include provision for the detention of persons, commandeering and acquisition, entry and search, hearings, appeals and compensation for those affected by the regulation, and to require application, amendment or suspension of the operation of any law. Section 5 (3) is significant, in that it empowers Parliament to add to, alter, or revoke any emergency regulation by resolution.

In terms of Section 7, emergency regulations and any decision, order, or rule made thereunder prevails over any other law. Part III of the PSO provides other rules, as special powers of the President, in matters connected with the exercise of emergency powers including calling out the armed forces in aid of the civil power, procedure for arrest, detention and executive review of

⁹ See J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi 1995) 752.

detention, and the suspension of certain provisions of the Code of Criminal Procedure.

Special Anti-Terrorism Powers: The PTA

Special anti-terrorism powers are provided in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended (the PTA). The sweeping powers given to the executive by the PTA are in the nature of emergency powers, but the exercise of those powers is independent of and not subject to the oversight framework of conventional emergency powers (such as proclamation and periodic parliamentary approval) under Chapter XVIII and the PSO.

The PTA was enacted in 1979 as a temporary measure, as an element of the then government's political and military strategy in dealing with the early stages of the low intensity insurgency in the north of the island. Section 29 of the original enactment expressly provided that it would be in force only for a period of three years, but this was repealed by the Prevention of Terrorism (Temporary Provisions) Amendment Act No. 10 of 1982, thus making the PTA permanent.

The PTA gives the executive a wide range of powers in combating terrorism, including detention without charge for extended periods of time at irregular places of detention, the limitation of detainees' rights, the admissibility of confessions in judicial proceedings, the shifting of the evidential burden of proof to the defendant, and severe penalties. The detention powers, special trial procedures, the powers to restrict the freedom of expression, and the inadequate provision for legislative and judicial review of executive, have been cause for concern.

Conclusion

The Constitution gives Parliament a major responsibility in holding the executive to account during states of emergency.

While Parliament's role over the oversight of counter-terrorism powers is less explicit in the PTA, it is implicit according to the general principles of the Constitution that those powers must be subject to legislative scrutiny. In protracted conditions of war and insurrection in the past, Parliament has found it difficult to effectively hold the executive to account, partly as a result of the vast powers of the presidential executive, and partly due to the pressures of public opinion: defending individual liberty is often not a popular cause when society is under the threat of terrorism. However, as Parliament assumes a more prominent role in scrutiny and oversight after the Nineteenth Amendment and the new committee system, this is an area where it must act much more effectively than in the past. The failures that led to the Easter Sunday terrorist attacks in April 2019 highlight the vital importance of Parliament assuming a greater role in order to ensure both accountability as well as prevention.

9

PARLIAMENT AND FOURTH PILLAR INSTITUTIONS

Introduction

This chapter describes the development and powers of the Constitutional Council, as the apex body of the framework of Fourth Pillar Institutions (FPIs), including the various independent commissions that are part of the Constitution. FPIs in modern Constitutions are designed to promote good governance in public appointments. The relationship between good governance and public appointments will therefore also be discussed. This chapter concludes with some comparative example of FPIs in other Commonwealth jurisdictions.

Good Governance and FPIs

What is Good Governance and What Does it Look Like in Public Appointments?

The Constitutional Council was designed to promote good governance in the process of public appointments. This section will describe what this means, why it is important, and how FPIs like the Council promote it.

‘Good governance’ is a method of governing that upholds certain principles. Because what is ‘good’ will vary from society to society, so will the concept of ‘good governance’ slightly vary

depending on its context.¹ Nonetheless, there are certain principles that offer universal appeal. These are:

- Openness
- Participation
- Accountability
- Efficiency
- Coherence²

Good governance can be illustrated with reference to its antithesis which, in the public appointments process, is ‘patronage’. Although public appointments involve elected politicians and therefore have a political dimension, good governance requires that officials use their powers of appointment in the interest of certain institutional values rather than for personal gain. This distinction is referred to as the ‘depoliticisation’ of public appointments. Although politicians may be involved in the process, they must elevate their decision making above the level of every-day politics and personal ties. Whereas patronage has come to be associated with appointments based on a candidate’s party-political allegiances and personal relationship with their appointer, good governance requires appointments based on

¹ See discussion of different views in Haroon A. Khan *The Idea of Good Governance and the Politics of the Global South* (Routledge 2016) 7-8.

² The EU Commission, “The White Paper on European Governance” (2001) <https://ec.europa.eu/europeaid/european-governance-white-paper_en> accessed 19 October 2019. Page 8. See also the Nolan Principles – Seven Principles in Public Life (UK) <https://www.bristol.gov.uk/documents/20182/33439/nolan_principles.pdf/a8d2cbcb-cc62-4ec8-9bf5-422dac71a73b> accessed 19 October 2019.

individual merit and broader democratic goals for the relevant institution.³

Good governance is particularly important in the field of public appointments because the growing number of official appointments entails higher public spending on those that are chosen and an increase in the influence of public appointees.⁴ Furthermore, widespread distrust in the process of public appointments in many countries suggests that this is an opportunity to significantly improve public perception of governance.

Why are Fourth Pillar Institutions Required to Meet the Principles of Good Governance in the Public Appointments Process?

FPIs show hope for developing good governance in the public appointments process. They can enhance engagement with the principles of good governance:

- Openness

By their nature, FPIs remove the tradition of absolute ministerial discretion in public appointments. Whereas, previously, processes tended to be informal and secretive, FPIs create procedures for decentralising appointment powers and introducing transparent selection criteria. Instead of one individual making appointments without explaining their decision-making, FPIs create clear application processes and successful candidates will have been vetted by a range of stakeholders.

³ See, for example, Alessandro Sancino et al., 'Between patronage and good governance: Organizational arrangements in (local) public appointment processes' (2018) *International Review of Administrative Sciences*, 84(4): pp.785–802, 787.

⁴ M. Denton, 'The Impact of the Committee on Standards in Public Life on Delegated Governance: The Commissioner for Public Appointments' (2006) *Parliamentary Affairs*, 59(3), 491–508, 491-493.

- Participation

FPIs increase public participation, an essential element in ‘public’ appointments. A range of political actors from the legislature and the executive, as well as civil society, must be involved to achieve the fairest decision in these appointments. Participation through FPIs is therefore both a means to an end and a good in itself. Expert panellists can also strengthen the image of representative democracy, however this should not usurp the importance and position of the representatives from the legislature.

- Accountability

Although FPIs are effective at holding others with public appointment powers to account, their independent status necessarily means that they themselves will, at most, only be indirectly accountable through general elections. This democratic deficit must be compensated for through high performance in the other principles of good governance. Nonetheless, FPIs may increase media scrutiny of public appointments, at least in the short-term, thus rendering them more accountable. If they are oversight bodies with ‘naming and shaming’ powers for malpractice, this also increases media scrutiny.⁵ In Sri Lanka, the process of recommending or approving appointments by the Constitutional Council to the President generates media attention and thereby a measure of public discussion on these issues.

- Efficiency

FPIs can boost the efficiency of government by selecting the ideal candidates and increasing competition in the public sector. Membership for experts makes it easier for FPIs to identify the right candidate for the right position. Furthermore, by removing

⁵ Ibid, pp 499.

patronage and nepotism FPIs boost hope, and thus competition, for the top jobs.

- Coherence

FPIs develop codes to promote standards in public life through public appointments.⁶ This not only creates transparency, but also coherence in the process of public appointments. Candidates are not chosen simply on personal preference, but on their suitability for broader institutional goods.

In these ways, FPIs undoubtedly foster the principles of good governance in the process of public appointments. Nonetheless, there is a strong argument to be made that, in theory, simple legislative oversight of government action achieves the same aims. The popularity of FPIs can also, therefore, be explained with reference to their empirical success in promoting good governance – something that has grown more difficult for legislatures to achieve in scrutiny of public appointments. Part of the success of FPIs may be due to their historical development. They tend to be created after reports of malpractice. Resources are invested in them as a clean break from the past.⁷ Also, as already mentioned, the number of public appointments has grown over time and it has created a workload that is too big for the legislature alone. FPIs are an innovative way to share the burden. Finally, FPIs are more decentralised than simple

⁶ See, for example, the UK Commissioner for Public Appointments and the adoption of the Committee on Standards in Public Life's Seven Principles of Public Life, *Code of Practice for Ministerial Appointments to Public Bodies* <<https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2017/01/Order-in-Council-April-2012.pdf>> accessed 19 October 2019. At para 4.

⁷ Meredith Edwards, 'Appointments to public sector boards in Australia: A comparative assessment' [2006] Issues Paper Series no. 3, Corporate Governance ARC Project, University of Canberra. Page 2.

executive action and legislative oversight. This may reduce the scope for patronage.

It is argued that oversight of public appointments is an inappropriate role for the judiciary to perform. In any case, accountability through the judicial process for corrupt or inappropriate public appointments occurs after the fact, whereas FPIs are designed to avoid improper appointments being made in the first place. In short, although courts may be effective at identifying the worst cases of patronage – blatant bribery and appointment of wholly unqualified candidates – they cannot tackle all of the nuanced evils in between good governance and absolute patronage. Writing about the Israeli system, Amado notes: “justices run the risk of failing in their efforts to impose a narrower, rule-of-law outlook on a rambunctious and freewheeling political process that is far removed from it and failing. Alternatively, they run the risk of succeeding, but politicizing the legal process. In either case, judicial intervention is fraught with difficulty”.⁸ Therefore, the only alternatives are legislative oversight and FPIs.

The Constitutional Council

Composition and Powers of the Constitutional Council

The Council is composed of both nominated and *ex officio* members. The MPs automatically appointed to the Council by virtue of their office are the Prime Minister; the Speaker (who is also the Council’s chairman); and the Leader of the Opposition.⁹ The President also selects one MP to be appointed to the Council.¹⁰ The Prime Minister and the Leader of the Opposition

⁸ Rivka Amado, ‘Checks, Balances, and Appointments in the Public Service: Israeli Experience in a Comparative Perspective’ (2001) *Public Administration Review*, 61(5): 569–584, 577.

⁹ The Constitution Sri Lanka (1978): Article 41A(1).

¹⁰ *Ibid.*

further nominate five members of the Council. Two of these members will be MPs; three of them will be non-MPs who are “persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party”.¹¹ These non-MP nominees are approved by Parliament. When selecting these five nominees, the Prime Minister and the Leader of the Opposition “shall consult the leaders of political parties and independent groups represented in Parliament so as to ensure that the Constitutional Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity”.¹²

Also nominated, by agreement of the majority of the Members of Parliament, is an additional MP. This nominee will belong to political parties or independent groups, other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belong.¹³ Therefore, the Council is comprised of 10 members, 7 of whom are MPs and 3 of whom are non-MPs.¹⁴

The key weakness in the Eighteenth Amendment was that the President was merely required to ‘seek the observations’ of the Parliamentary Council in making appointments to the independent commissions and other high posts. This defeated the purpose of having a decentralised method of appointment, which

¹¹ Ibid, Article 41A(5).

¹² Ibid, Article 41A(4).

¹³ Ibid, Article 41A(1)(f). See also Dinesha Samararatne “The Constitutional Council and the Independent Commissions: The New Framework for Depoliticising Governance” Asanga Welikala (ed) *Nineteenth Amendment to the Constitution: Content and Context* (CPA 2016) 148.

¹⁴ This can be compared to the Constitutional Council under the Seventeenth Amendment, which was comprised of 3 MPs and 7 non-MPs, and the Parliamentary Council of the Eighteenth Amendment, which was comprised solely of MPs.

is designed to minimise the risk of patronage.¹⁵ Conversely, the Nineteenth Amendment places the appointment of most of the Council's members firmly in the hands of MPs. The President is given no choice but to appoint the individuals nominated to him. Even if he fails to do this, after 14 days nominees are deemed to have been appointed.¹⁶

A weakness of the Seventeenth Amendment, which partly contributed to its demise, was the power of the President or Parliament to stall the Council through inaction. By simply not appointing a member, the President could deprive the Council of the power to carry out its duties. The Nineteenth Amendment protects against this. Even if some of its members are not appointed, the Council can still form a quorum and can still carry out its business.¹⁷ Furthermore, it is the duty of the Speaker to bring the business of nominations before Parliament. This ensures that the Council will not fall into disuse.

The Seventeenth Amendment required the Council to consult both the Chief Justice and the Attorney General when making appointments to the appellate courts, whereas the Nineteenth Amendment only requires that the Chief Justice be consulted.

The Nineteenth Amendment empowers the Council to appoint members of commissions and gives it a veto power over the President's appointment of certain high-level officials. Although it is not essential for decisions to be unanimous, the Council must seek unanimity. If unanimity unachievable, then no less than five members present at the meeting must support a decision for it to be valid.¹⁸

¹⁵ Public appointments during this period were heavily criticised: Samararatne (2016) 148.

¹⁶ The Constitution of Sri Lanka (1978): Article 41A(6).

¹⁷ Ibid: Article 41E(8). See also Samararatne (2016) 155.

¹⁸ Ibid: Article 41E(4).

The independent commissions that the Council nominates the chairpersons and members of are:

- The Election Commission
- The Public Service Commission
- The National Police Commission
- The Audit Service Commission
- The Human Rights Commission of Sri Lanka
- The Commission to Investigate Allegations of Bribery or Corruption
- The Finance Commission
- The Delimitation Commission
- The National Procurement Commission¹⁹

The Council's nominees and the Council's nominees only must be appointed by the President.²⁰ As with the Council's members, if the President fails to appoint a nominee within 14 days of their nomination, that nominee is deemed to have been appointed, regardless of the President's inaction.

The public offices that the Council exercises a veto over appointments to are:

- The Chief Justice and the Judges of the Supreme Court
- The President and the Judges of the Court of Appeal
- The Members of the Judicial Service Commission, other than the Chairman
- The Attorney-General
- The Auditor-General
- The Inspector-General of Police

¹⁹ Ibid: Article 41B Schedule.

²⁰ Ibid: Article 41B(1).

- The Parliamentary Commissioner for Administration (Ombudsman)
- The Secretary-General of Parliament²¹

The President cannot appoint candidates to these posts without Parliament’s approval.²²

The decisions, approvals, and recommendations of the Council are “final and conclusive”. Subject to the provisions of Article 126 of the Constitution (i.e. the fundamental rights jurisdiction of the Supreme Court), they cannot be judicially challenged.²³

Comparative FPIs

Fourth Pillar Institutions Across the Commonwealth

It could be said, from the comparative design of FPIs across the Commonwealth, that there are five main stages in public sector appointments. These are:

- (1) Preparation—the process and vacancy profile: The needs of the board are considered and the “gaps that need to be filled” are identified.
- (2) Locating suitable candidates: Suitable candidates are actively invited to apply and public advertisements are also made.
- (3) Assessing and vetting potential candidates: A selection committee uses set criteria to compare candidates fairly. Conflicts of interest are evaluated.
- (4) Selection and appointment: This stage needs to comply with “pre-determined, merit-based procedures and all applicable legal requirements”.

²¹ Ibid: Article 41C Schedule.

²² Ibid: Article 41C(1).

²³ Ibid: Article 41I.

- (5) Audit: An internal or external group thoroughly examines the preceding appointment process.²⁴

On the specific issue of judicial appointments, the Commonwealth Latimer House Principles identify ingredients of a good judicial appointment process. The process should identify individuals that are “independent, impartial, honest and competent”²⁵ and they should be appointed “on the basis of clearly defined criteria and by a publicly declared process”.²⁶ The Bingham Centre for the Rule of Law identifies the commitment amongst Commonwealth countries for an independent process and it is therefore uncommon for appointment to be the privilege of the executive alone: “Only 19% of Commonwealth jurisdictions have executive-only appointment systems in this sense (appointments to the highest court are reserved for the executive in another 8% of jurisdictions, and the appointment of the Chief Justice in a further 23% of jurisdictions)”.²⁷ Where such systems exist, there must be legal safeguards and political conventions in place. Whatever the system, independent scrutiny is a “central part of the process”, and the current trend is towards FPIs.²⁸

²⁴ Edwards (2006). 4.

²⁵ Commonwealth Latimer House Principles on the Three Branches of Government report < <https://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf> > accessed 19 October 2019. Page 28.

²⁶ Ibid.

²⁷ The Bingham Centre for the Rule of Law, ‘The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice’ < https://www.biicl.org/documents/689_bingham_centre_compendium.pdf > accessed 19 October 2019, para 1.4.

²⁸ Ibid.

Conclusion

The Nineteenth Amendment and the Constitutional Council mark a significant move in Sri Lanka towards good governance. The Council is more independent than the Parliamentary Council, which obtained under the Eighteenth Amendment, and filled some of the gaps that rendered the Seventeenth Amendment ineffective.²⁹ Through its oversight of appointments to the independent commissions and other significant public offices, the Nineteenth Amendment framework will strengthen the values of good governance in the Sri Lankan political process.

²⁹ See Samararatne (2006).

10

PARLIAMENTARY SERVICES

Introduction

Most Commonwealth Parliaments have found it necessary to create a parliamentary service. The parliamentary service performs a range of functions, from catering and building maintenance to research and legal advice. The legislature, rather than the executive, employs the staff. They are Parliament's own civil service. In Sri Lanka, the Parliamentary Staffs Act No. 9 of 1953 provides for the independent administration of Parliament. The Secretariat and its departments – Sri Lanka's parliamentary service – provide important services in a way that upholds the separation of powers. This chapter begins by explaining the importance of an independent parliamentary service. It then discusses three aspects of Sri Lanka's service: the Secretary-General, the Staff Advisory Committee, and the Parliament Library. This chapter concludes with some comparative examples from across the Commonwealth.

Why Have a Parliamentary Service?

The Commonwealth Parliamentary Association and World Bank Institute, in a research group that included then-Secretary-General Priyaneer Wijesekera, have emphasised the ways in which an independent parliamentary service can ensure good governance that is appealing to all the branches of government:

“Given that one of the key purposes of Parliament is to hold the executive to account, there is a compelling argument that Parliament should be able to discharge its

constitutional responsibilities free from government interference. The drive for independence should not be seen as an aggressive action, but a necessary prerequisite to good parliamentary governance. Also operational autonomy should not act as a barrier to the fostering of good relations with the executive, which is essential if legislation and public sector policies are to be fit for purpose”.¹

Therefore, an independent parliamentary service is an important part of Parliament’s own independence, and this structure is wholly in keeping with the values of a parliamentary democracy.

Not only does an independent parliamentary service make sound theoretical sense, but the report also draws attention to how corporate bodies in parliamentary services have improved parliaments’ administrative autonomy, and therefore self-determination, in practice.²

In The Gambia, the Constitution itself provides for the establishment of the parliamentary service and corporate body of the National Assembly.³ This signifies the constitutional significance of support services for the national legislature.

The Secretary General

The Secretary General of Parliament is Parliament’s Chief Executive Officer. He is both the head of the Secretariat and, as the Parliament website notes, is also responsible for advising the Speaker and other presiding officers on “matters relating to

¹ Commonwealth Parliamentary Association and World Bank Institute Joint Study Group Report, ‘Administration and Financing of Parliament’ <<https://agora-parl.org/node/1315>> accessed 19 October 2019. Page 2.

² Ibid, 3.

³ The Constitution of the Republic of The Gambia (1997): Article 111.

Parliamentary procedure, constitutionality of Bills, Standing Orders, privileges and any other matters concerning the functioning of the Parliament”.⁴ The Secretary General therefore holds a powerful position within Parliament and exercises some of the most important functions of a parliamentary service.

The Secretary General is a constitutionally protected post. The President appoints him with the concurrence of the Constitutional Council.⁵ The Secretary General can only be removed from office by the President on the grounds of ill health or physical/mental infirmity or by the President upon an address of Parliament.⁶

The Parliament Secretariat consists of the Secretary General, Deputy Secretary General and the Assistant Secretary General. The Parliament Secretariat is responsible for eight departments:

- The Department of the Sergeant-at-Arms
- The Department of Administration
- The Department of Legislative Services
- The Department of Finance and Supplies
- The Department of Hansard
- The Department of Catering and Housekeeping
- The Co-ordinating Engineer's Department
- The Department of Information Systems and Management.

⁴ Parliament of Sri Lanka website, Secretary-General of Parliament.

Online:

<https://www.parliament.lk/en/component/organisation/dept/departments?depart=1&id=1&Itemid=107>

⁵ Constitution of Sri Lanka (1978): Article 41C.

⁶ Ibid. Article 65(5)(d) and (e).

The Secretary General, on the Speaker's approval, appoints staff to the service. The status of the Secretariat's staff as an independent service is codified in section 2 of the Parliamentary Staffs Act.

The Staff Advisory Committee

The Staff Advisory Committee (SAC) gives the House direct input into the parliamentary service. The SAC was first established by the Parliamentary Staffs Act. The membership consisted of the Speaker, the Leader of the House, and the Minister of Finance. The Leader of the Opposition is now also a member. The Speaker is chair, and the Secretary-General is the secretary to the SAC.

The SAC helps to develop the Secretary General's staff. Its current role is therefore concerned with human resources rather than contributing to the wider policies of the Secretariat.

The Parliament Research Service

Parliament's library can track its roots back to the 1830s and it was officially established in 1927⁷. This makes it one of the oldest parliamentary libraries in Asia, predating those of the Republic of Korea (1952) and Japan (1948).

The library provides both reference and research services. The Parliament Research Service was established in the 1990s. It provides vital support for Members when conducting parliamentary diplomacy and scrutinising bills. The Service can compile impartial speeches, statistical analyses, and reports on any issue that may arise in the course of parliamentary business. A 2011 *Parliament Research Journal* describes the importance of the

⁷ Parliament of Sri Lanka > library
<<https://www.parliament.lk/en/component/organisation/sect/sections?depart=14&id=41&Itemid=107>> accessed 19 October 2019.

parliamentary library as the “think tank” for legislators.⁸ The journal also identifies some areas for improvement, such as developing existing training programmes. It also notes the relatively small size of Sri Lanka’s library service compared to other Parliaments⁹. The last section of this chapter describes features from other Commonwealth parliamentary libraries that Sri Lanka could incorporate.

Parliamentary services across the Commonwealth

The Corporate Body

As in Sri Lanka, the Speaker is an *ex officio* member of the corporate body in most Commonwealth Parliaments. It is standard for the Speaker to chair the body. The Speaker chairs the Canadian Board of Internal Economy and, in the UK, the Speaker chairs the House Service.

The Commonwealth Parliamentary Association report cited above notes that it is imperative an ‘unambiguous’ relationship exists between the Speaker, the corporate body, and the head of the parliamentary service.¹⁰ Sri Lanka has an unusual arrangement in this regard. The Secretary General (who is appointed by the President but removable by Parliament) is head of the House’s administration. Furthermore, the Staff Advisory Committee is largely concerned with human resources matters, whereas the corporate bodies of other Commonwealth parliaments are also concerned with the operations of their parliamentary services.

Many legislatures do not include a government minister in their corporate bodies, whereas in Sri Lanka the Minister of Finance is

⁸ Mohammed Ajiwadeen, ‘Parliament research nucleus: the think-tank for effective policy making’ (2011) *Parliamentary Research Journal: Sri Lanka: Policy Issues in the Post-Conflict Era*, 1(01) 136.

⁹ *Ibid*, 140-141.

¹⁰ *Supra* note 1. At page 13.

a member. Furthermore, jurisdictions such as the UK have included additional members in their committees. These members are MPs handpicked by the House. It is convention to appoint senior backbenchers of the main parties and a representative of the smaller parties. This ensures that the corporate body listens to backbench concerns and increases its independence from the executive.

Clerks and Secretary-Generals

In the UK, the Clerk originally bought his office and the King paid his salary. The Clerk occupied a strange position between the Crown and the Commons and neither side was quite sure where his allegiances lay. When he was dissatisfied with the Commons, the King would restrict the Clerk's pay.¹¹ In modern times, although the Crown still officially appoints the Clerk of the House, he is in practice selected by the Speaker. Furthermore, Parliament pays his salary, he is a member of the House Service, and he unambiguously owes his duty to the House.

In Australia, the Speaker appoints the Clerk of the House of Representatives. He officially does this after consultation with the House but, in practice, he only consults the party heads. Canada offers a mix between executive and legislative appointment. The Governor-in-Council (executive) proposes a candidate. A committee then reviews this proposal and the House votes on it.

Therefore, Commonwealth Parliaments tend to exercise significant, if not exclusive, control over the appointment of chief clerks. This ensures that the office maintains its place as a part of the parliamentary service. Many systems also provide the Clerk with a protected status after his appointment, ensuring he can

¹¹ Reginald Palgrave, 'The Clerk of the House of Commons'. (1897) *The Youth's Companion* (1827-1929).

maintain his integrity and impartiality when fulfilling his duties to the legislature, or the Speaker, as the case may be.

Library Research Service

According to a report by Canada's parliamentary library, there are three needs of MPs (and other parliament staff) that a library must be capable of meeting: "finding information quickly; understanding tabled legislation; and accessing critical information and analysis on annual spending budgets".¹² Research librarians, lawyers, and economists respectively can meet these three needs. MPs can request quick briefings on bills and other policy matters from library staff, who are experts in tailoring the vast quantity of information available to the MPs' specific needs. The library must provide impartial and confidential advice.¹³ This provides MPs with the tools they need to hold the executive to account, which necessarily has extensive machinery of its own in the modern world.

To provide this broad service, parliament research libraries must employ a wide range of staff, all with their own area of expertise. Of course, there needs to be a host of research staff who understand different areas of public policy and the regulations that relate to it. This includes social scientists and experts in the natural sciences. The Canadian Library even has a separate centre for experts on economics and financial matters. Data librarians and statisticians are also invaluable staff, and Geospatial Information Systems help the library publish clear and easily digestible information¹⁴. If a Parliament is going to hold an

¹² Sonia L'Heureux, 'The Library of Parliament's Research Service: Adding Value for Parliamentarians.' (2013) *Canadian Parliamentary Review* 36(4): 17-19, 18.

¹³ David Menhennet, 'Information for Members of Parliament: The Service Provided by the House of Commons Library.' (1973) *Aslib Proceedings* 25(12): 477-483, 479.

¹⁴ L'Heureux (2013). 19.

executive to account, it must have access to the experts that can interpret the vast span of modern government activity.

Library researchers provide other services, too. They can perform functions such as long-term research on important issues (rather than simply furnishing Members with immediate analysis) and they can inform the wider public about the work of Parliaments. Some Parliaments have a specific communications department.

Libraries can organise information sessions for newly elected MPs and brief them on the session's upcoming issues. The US Library of Congress has shown that there does not have to be a limit on the way that libraries inform members. It organises podcasts and short films and its website has over a million views from members of Congress and their staff.

In-House Legal Advice

Most Commonwealth parliamentary services also have specialist legal and procedural advisors to guide members and, particularly, the Speaker with impartial advice. They are part of the service and, therefore, owe duty to their Parliament only. Parliaments require legal expertise at every stage of the law-making process to deliver quality legislation, hold the executive to account, and maintain their independence. The UK has developed two innovations that boost the House of Commons' legal expertise: The Speaker's Counsel (including the Legal Services Office) and the Scrutiny Unit. Beyond this, the UK's Parliamentary Counsel (a branch of the executive) has combined duties to the executive, the House, and the concept of legal policy.

- Speaker’s Counsel and the Legal Services Office

In the UK, the first Speaker’s Counsel was appointed in 1838.¹⁵ In the modern Parliament, the Counsel heads the Legal Services Office, which helps him perform his wide-ranging duties. The Counsel has two specific duties: to provide advice on private business, and the implications of European Union law. Counsel also has a general duty to advise the House’s Speaker, Officers and Departments on “legal questions arising in the course of public business or arising out of the administration of the affairs of the House and in relation to legal proceedings in which the House may be concerned”.¹⁶ This general duty is deliberately broad. These actors can seek legal advice on any situation arising in the course of their work. Such work will naturally include “privilege, employment, contracts, information law, charities, land law, intellectual property and the criminal law”.¹⁷ Therefore, the organs of Parliament uphold legal standards as they perform duties. Furthermore, should there be disagreement between the branches of government concerning the constitution, the Speaker (representing Parliament) will have access to his own source of independent legal advice. This protects the separation of powers while disagreements are resolved.

The permanent committees of the House require specialised advice. Permanent staff from the Legal Services Office provide this. For example, the Joint Committee on Human Rights (of both Houses of Parliament) and the Regulatory Reform Committee (of the House of Commons) both have two

¹⁵ Andrew Kennon “Legal Advice in Parliament” in Alexander Horne, Gavin Drewry and Dawn Oliver (eds) *Parliament and the Law* (Oxford: Hart Publishing 2013) 123.

¹⁶ UK Parliament, Erskine May Online (paragraph 6.18) < <https://erskinemay.parliament.uk/section/6396/speaker%27s%20counsel/> > accessed 19 October 2019.

¹⁷ Kennon (2013) 124.

permanent staff from the Legal Services Office. Staff can also be provided to select committees when necessary. Like the other members of parliamentary services mentioned in this chapter, the purpose of the Speaker's Counsel and Legal Services Office is to match the capabilities of the executive with specific parliamentary staff. Speakers, clerks, and committees perform crucial functions in their Parliaments, and if they are to carry out these functions to the highest standards, then they need advice that identifies legal issues and legal solutions to the situations they face.

- The UK Parliament Scrutiny Unit

The UK Scrutiny Unit shares the duty of providing legal advice to committees with the Legal Services Office. Whereas the Legal Services Office has the general duty to provide legal advice to a range of House departments, the Scrutiny Unit is a small team of around 14 experts specifically tasked with helping committees scrutinise Bills.¹⁸ Like the Legal Services Office, the purpose of the Unit is to provide Parliament with equal resources to those of the executive. However, unlike the Legal Services Office, the Scrutiny Unit can provide a mixture of financial and legal advice to put a Bill in a broader perspective. Furthermore, the Unit conducts training of new committees and members to help improve their information gathering and analysis skills. This provides the Commons with a line of continuity to develop existing committee methods.

- Parliamentary Counsel

The Parliamentary Counsel is the only body discussed in this chapter that is not normally part of a parliament's support service. Nonetheless, despite being a part of the executive, in practice, the role of the Parliamentary Counsel enhances the legislative

¹⁸ UK Parliament, Scrutiny Unit < <https://www.parliament.uk/mps-lords-and-offices/offices/commons/scrutinyunit/about-us/>>. accessed 19 October 2019.

process. In the UK, Parliamentary Counsel's first duty is undoubtedly to the ministers requiring its services. It has the joint task of subjecting government policy to "rigorous intellectual analysis"¹⁹ and converting it into a legislative format. Nonetheless, the nature of Parliamentary Counsel's work gives it two further duties: one is to the House and the other is to legal policy. In Ellis's words, Parliamentary Counsel draft Bills in a way that will not interfere with the procedures of the House or Parliament's debating function more generally.²⁰

The Counsel's duty to legal policy is that of "internal guardians of values customarily regarded as integral to the legal order, such as those of non-retrospection, proper use of delegation, and respect for the liberties of the subject".²¹ Counsel will advise departments against Bills that interfere with the legal system's fundamental values, and it has the power to refer its instructions to the Law Officers. Examples of this include Bills that are framed in unacceptably partisan language.²²

Therefore, although Parliamentary Counsel is a part of the Civil Service, its unique role also demands responsibilities towards Parliament and legal policy.

Conclusion

The parliamentary service is a vital part of the separation of powers. It maintains Parliament's independence from, and effective oversight of, the executive. The Sr Lankan Secretariat is

¹⁹ Geoffrey Bowman, 'Why Is There a Parliamentary Counsel Office?' (2005) *Statute Law Review* 26(2): 69-81.

²⁰ Ellis, 'The Making and Form of Bills' (1949) *Parliamentary Affairs*, 2(2): 176-77, 175.

²¹ Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999) 254.

²² Bowman (2005).

different from the parliamentary services of other Commonwealth nations in some important regards. The Secretary-General is closely linked to the President, whereas in countries such as Canada and Australia the parliamentary clerks are much more closely aligned to the legislature. Also, the Secretary-General is the head of the whole secretariat, whereas other Commonwealth Parliaments reserve this position for the Speaker. The Staff Advisory Committee has less involvement in the running of the parliamentary service than other corporate bodies. The Parliament Research Service is well placed to help MPs with their work, and it may benefit from recent developments in other parliamentary libraries. Westminster is a good model to examine for in-house legal advice. A range of departments provides the UK Parliament with specialised legal advice that enables it to match the quality and range of advice available to the Government, and thereby ensure effective scrutiny and oversight of the executive.

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