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Human Rights and the 1978 Constitution

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If one takes 1978 as a landmark in dividing the post-independence history in Sri Lanka into two periods, three decades before (1948-1978) and three decades after (1978-2008), the latter may mark as satisfactory in human rights legal codification, the fundamental rights chapter in the 1978 Constitution as the forerunner, but abysmally horrendous in human rights violations in almost all spheres of national and international importance. The former was far better and salubrious, in comparison, although there was very little in terms of human rights codification. This irony indicates the importance of multitude of other socio-political factors as well as the overall constitutional conditions that affect a human rights situation in a country other than or irrespective of a fundamental rights chapter and other legal codifications which is the main message of this chapter. The overall constitutional conditions may mean the nature of the governmental system and whether the system is parliamentary or presidential to be more precise, other than the operation of the democratic rule of law in general.

Karel Vasak argued that *de jure* state is the first requirement for human rights to become a legal reality.[1] By legal reality, he didn't mean the mere existence of human rights in written law, but its actual legal practice through the whole gamut of rule of law. He explained that "Without entering into theoretical discussions, it may simply be said that a *de jure* State is one in which all the authorities and all individuals are bound by pre-established general and impersonal rules, in a word, by *law*." It may only be added that 'rule of law' should be 'democratic rule of law' as Filip Spagnolihas emphasised.[2]

There can be many arguments against the 1978 Constitution that created conditions to the detriment of the human rights situation in the country that was already fragile due to similar or other reasons.[3] But the 1978 Constitution can be unreservedly marked as a turning point in constitutionally diluting the democratic rule

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[1] K. Vasak, '*Human Rights: As a Legal Reality*' in K. Vasak (Ed.) (1982) ***The International Dimensions of Human Rights*** (Paris: UNESCO).

[2] F. Spagnoli (2003) ***Homo Democraticus: On the Universal Desirability and the Not So Universal Possibility of Democracy and Human Rights*** (Buckinghamshire: Cambridge Scholars Press): p.117.

[3] Among these reasons was the 1972 Constitution, which clearly diluted the independence of the judiciary among other infringements.

of law by instituting Presidential powers that cannot be challenged in courts of law.[4] With impunity for the President, or under his/her direct authority, 'all authorities' could not be considered as 'bound by the pre-established general and impersonal rules' that Vasak talked about. What started as seemingly a benign growth in 1978 increasingly spread as a malignant tumour and today constitutes one of the dangerous cancers in the body politic. That is primarily the breakdown of democratic rule of law.

Based on Karel Vasak and other sources, and primarily based on empirical evidence of the human rights trajectory since 1978, this chapter argues that there has been an inevitable dichotomy between human rights and the 1978 Constitution, which is one of the most authoritarian forms of presidential systems. As Vasak said:

> "Although in our time the law is hardly the expression of the general will, as Rousseau contended, it remains the most effective practical means for citizens to preserve the sphere of human rights from the executive, through the role which they play in choosing their legislative body. In other words, the law, insofar as it is the work of a parliament elected by the citizens, constitutes the sole possible legal basis for human rights. It is for this reason that human rights are bound to be more likely to exist in countries with parliamentary tradition."[5]

Political Background

The parliamentary general election in 1977 was already delayed by two years, the election that paved the way for the 1978 Constitution, which in itself signified a major aberration in the

[4] Article 35(1) governs the impunity of the President. More than its legality, the impression was created that the President is virtually above the law.

[5] Vasak (1982): p.6. Vasak implicitly of the view that human rights are more vulnerable under presidential systems than parliamentary democracies while also highlighting the importance of what he called 'political, economic and social democracy' for the human rights preservation. In a more critical study on the subject, M.S. Shugart & J.M. Carey (1992) ***Presidents and Assemblies*** (Cambridge: Cambridge University Press) offered the same conclusion but in a more analytical manner.

democratic system. The previous United Front (UF) government had already taken the advantage of the new constitution that they promulgated in 1972 to extend the tenure of the Parliament. Otherwise the election should have been held in 1975 and not in 1977, under the 1947 Constitution, which fairly supplied a framework for the country's democratic system and human rights to function for nearly two and a half decades. The opposition led by the UNP also did not oppose the extension strong enough as if there was an implicit agreement between the two major parties, the SLFP and the UNP, to manipulate the democratic system in order that they acquire and remain in power alternatively.

The ruthless suppression of the 1971 youth insurrection was in the background and the youth unrest in the North was on the ascendancy with emergency laws being used for its suppression almost continuously until the election time. The traditional left, the LSSP and the CP, and the trade union movement had become virtually impotent by that time as a viable democratic opposition to the two major parties by being accessories to the UF and the 1972 Constitution. From the beginning of the democratic system in Sri Lanka, if the introduction of the universal franchise in 1931 could be taken as the main landmark, the left and the trade union movement played a decisive role in safeguarding democracy and people's rights, but in the 1970s this was not the case any longer.

The election and election results in 1977 also had a direct bearing on human rights. It was the last general election held under the first-past-the post (FPP) system. In the election results, what could be seen is a major imbalance created in the competitive party system. The UNP received 50.92 per cent of total votes polled and 140 seats in the 168 member parliament, gaining a 5/6 majority, while the previous ruling party, the SLFP, being reduced to 8 seats irrespective of receiving 29.72 per cent of the votes polled. Apart from the FPP system, sharp de-legitimisation process of the previous government due to unpopular and anti-rights policies were responsible for this major shift. The SLFP failed to become the alternative government or the official opposition in Parliament and the leader of the opposition was selected from the TULF, winning 18 seats but only 6.75 per cent of votes. The TULF was not aiming at an alternative government

but a separate state or self-autonomy to the regions that they represented as declared in 1976.[6]

The 1977 election was a classic example of a hegemonic political party (UNP) ingeniously utilising the people's unarticulated grievances on human rights issues to come into power but not fulfilling the underlying aspirations as these aspirations themselves are not firmly held by the civil society due to multitude of reasons. By this time, the notions of human rights were quite new to Sri Lanka except the rights advocated by the labour or the minorities. The rights of the labour or the minorities, on the other hand, were formulated in terms of left wing or other ideologies (i.e. nationalism) and not so much on the basis of universal human rights. The first human rights organisation, the Civil Rights Movement (CRM), was formed in 1971 aftermath of the youth insurrection, first as purely a humanitarian organisation. Most of the civil society organisations by this time were of welfare or religious nature. If intelligentsia could be considered as a major or necessary catalyst for human rights, they have not yet been attracted by this new philosophy of human rights on a professional basis.[7]

Sri Lanka saw major postelection violence in July-August 1977 with considerable death, casualties and property destruction. During the elections, the UNP leader declared that he would give 'one week holiday for the police in order that the people could celebrate the victory' to mean that the winning party could take revenge against the defeated.[8] Obviously, the UF supporters had taken revenge from their UNP opponents when they were in

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[6] See Vaddukoddai Resolution, 1976; S.I. Keethaponcalan (2009) ***Conflict and Peace in Sri Lanka: Major Documents*** (Colombo: Kumaran Book House): pp.38-45.

[7] One exception, however, was the request of the Ceylon Rationalist Association (CRA) to incorporate fundamental rights as laid down in the Universal Declaration of Human Rights in the proposed 1972 Constitution in a Memorandum sent to the Minister of Constitutional Affairs in September 1970.

[8] University Teachers for Human Rights (Jaffna), '*July 1983: Planned by the State or Spontaneous Mob Action?*': http://www.uthr.org/Book/CHA11.htm (accessed 30th December 2014); Also see for electoral violence S. Pinnawala, '*Damming the Flood of Violence and Shoring Up of Civil Society*' in S.H. Hasbullah & B.M. Morrison (Ed.) (2004) ***Sri Lankan Society in an Era of Globalization*** (London: Sage Publications): p.262.

power (1970-77). Ironically the leftist supporters of the UF were the major casualties in the initial days facing arson attacks, which spread against the Tamils in the hill country for not so obvious reasons. What was underneath was the Sinhalese resentment that the main Tamil organisation, the TULF, was asking for a separate state and had won 18 seats becoming the main opposition party in Parliament. The riots also commenced in Jaffna when the police started clashing with the civilians on 21 August triggered by a carnival incident. During the spate of violence throughout the country, 300 were killed mainly Tamils and over 1,000 became injured with homeless over 4,000.[9]

Most tragic was what the new Prime Minister, J. R. Jayewardene, who became the President later, told in Parliament on 18 August 1977 in response to what was happening particularly in the Jaffna Peninsula: "If you [Tamils] want to fight, let there be fight. If it is peace, let there be peace."[10] He added that "It is not what I am saying. The people of Sri Lanka will say that."

Philosophy Behind 1978

There was some idealism behind the 1972 Constitution, but in contrast, the 1978 Constitution was more pragmatic or crafty. The idealism of the 1972 was drawn from a mixture of tradition, socialism, nationalism and utilitarian constitutionalism. While the 1978 Constitution incorporating most of these aspects for convenience, turned the main governing structure upside down placing it on its head. If "what the 1972 Constitution did was to strengthen the legislature," as Nihal Jayawickrama has asserted,[11]

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[9] R. Kearney, '*Ethnic Conflict and the Tamil Separatist Movement in Sri Lanka*' (1985) ***Asian Survey*** 25: p.9.

[10] Quoted by D.L. Horowitz (2001) ***The Deadly Ethnic Riot*** (Berkeley: University of California Press): p.91. Jayewardene was paraphrasing the Kandyan King Vimaladharmasuriya against the Dutch in early 17th century.

[11] N. Jayawickrama, '*The Philosophy and Legitimacy of Sri Lanka's Republican Constitution*', Keynote Address, Dr Colvin R. de Silva Lecture, Ministry of Constitutional Affairs (1st March 2008): http://www.sangam.org/2008/03/Republican_Constitution.php (accessed 30th December 2014).

the 1978 Constitution strengthened the Executive; and that was a new type of an Executive.

To understand this 'constitutional coup,' rendering constitutional idealism to the backburner within six years, one needs to focus on the historic speech made by its creator J. R. Jayewardene on 14 December 1966 before the Ceylon Association for the Advancement of Sciences (CAAS) proposing a presidential system of government for the first time.[12] The title of his speech was "Science and Politics," if that were any indication of the approach. He said that "I am advocating a scientific approach to the study of some of our political questions." "Though there are different spheres of scientific study, science has a common method and approach to the subjects under its review. The scientific approach always seeks to gain and verify knowledge by exact observation and correct thinking," he further elaborated.

What were his exact observations and thinking? The main observation was in relation to Ceylon's failure to achieve economic progress or more precisely economic growth. "When we look back in retrospect over these 18 years [since independence in 1948] we find a record of achievement in some and failure in others," he noted. Then he said, "Yet the rate of growth of our population exceeds the rate of growth of our material resources so that, in very broad terms, the per capita wealth of our people has not kept pace with similar progress among the peoples of the developed nations of the world." There is no question that his observation was by and large correct but not necessarily his prescribed solution. There are many interpretations as to why Sri Lanka failed in its economic progress compared to, for example, Singapore or Malaysia, and there was a failure on his part to look at the conditions necessary for economic progress as a comprehensive package.[13] Instead, he was looking at or exaggerating some of the weaknesses in the

[12] J.R. Jayewardene (2000) ***Selected Speeches of Hon J. R. Jayewardene, 1944-1973*** (Colombo: Jayewardene Centre): pp.89-93. This speech was delivered a few days after a major pruning of a welfare measure (rice ration cut). Jayewardene was the Minister of State in an uneasy cabinet of four parties. All quotations in this section are from that speech.

[13] In the same year a prominent economist perceived the country's economic problems in a more structural context. D.R. Sondgrass (1966) ***Ceylon: An Export Economy in Transition*** (Homewood: R. D. Irwin).

democratic structure mainly based on his own liking as a conservative and authoritarian politician and this particular thinking had many adverse future consequences on the human rights situation in Sri Lanka.

J. R. Jayewardene had clear misgivings about popular democracy in the country. He said "It is argued that the politicians in power know what is wrong in the economy, they are aware of the remedy, but the desire to be popular and to secure a majority of votes at a general election prevents them taking the correct remedial measures." He added that "It should, however, be remembered that among the emerging nations in the continents of Africa and Asia, only two countries, India and Ceylon, have preserved the democratic system of Government intact…" He said the following questioning the relevance of human rights in terms of 'human satisfaction.'

> "A democratic system of Government includes what are termed democratic freedoms, the freedom to vote, freedom of opposition, freedom of speech and writing, and the rule of law, among other freedoms. Do these freedoms alone satisfy the people? I do not think so."

His question and answer were most important: 'Do these freedoms alone satisfy the people?' He very clearly stated that 'he didn't think so.' The answer could mean, under a different context, that he was emphasising the economic and social rights instead of purely civil and political rights. But that was not completely the case.[14] Apart from his emphasis on 'per capita wealth' he did talk about "the failure to provide material comforts" in which he included "lower cost of living, employment, housing facilities and adequate leisure." However, his road map for achieving them was rigmarole and doubtful. Instead of ensuring those rights to the people, he was advocating a restricted democratic system where in the long run those 'material comforts'

[14] The controversy over the primacy of economic/social rights vs. civil/political rights was very much alive during this time. However, H. Shue (1980) ***Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*** (Princeton: Princeton University Press) disputed the strict dichotomy and A. Sen (1999) ***Development as Freedom*** (Oxford: Oxford University Press) offered a new dimension to the understanding.

might be achieved but not necessarily on an equitable basis. What he emphasised was economic growth on the basis of pure or unfettered 'free economy, private enterprise and profit making.'[15]

As a senior politician, he was however careful not to reject democratic freedoms altogether. He summarised to say, "While counting the preservation of democratic freedoms as one of our achievements since Independence, we have not achieved the economic freedom that our people are entitled to. This has been our major failure." The following was his blue print for constitutional reform.

> "If then the democratic government has failed in some aspects, we should not hesitate to think of changes and amendments in that system where necessary. Parliament intends to examine the whole system of democratic government in our country, and while maintaining the *basic freedoms of democracy*, which in my opinion have not failed and need no change, adopt such reforms as would help the nation to solve its problems *effectively and expeditiously*." (My emphasis)

This was the first time that a national leader proposed to dilute the democratic system in the country. The reason given was the 'failure of democratic government,' and as he said, 'in some aspects.' He wanted to maintain only the 'basic freedoms of democracy' but not all. Even that was quite reluctantly, as it is clear from the language that he used. The dilution of democracy, in his opinion, "would help the nation to solve its problems effectively and expeditiously."

Jayewardene proposed more precisely two major changes that became the cornerstones of the 1978 Constitution. First was the dilution of the representative system through an ambiguous PR system and the second was the introduction of an executive presidential system instead of the prevailing parliamentary system, both with considerable repercussions on the human rights

[15] A major casualty when this policy was applied in 1977 was the trade union movement. L. Fernando, '*The Challenge of the Open Economy: Trade Unionism in Sri Lanka*' in R. Southall (Ed.) (1988) ***Trade Unions and New Industrialization of the Third World*** (London: Zed Press).

situation in the country. On the issue of representation he first said, "Universal franchise and free exercise of the vote are necessary prerequisites of democracy" and then added "however." He was not happy that the electors elect their representatives directly. He instead wanted the voters to vote for a party and then the party decides whom to select from a list. "The electoral system which prevails here today, where the electors elect his legislator according to defined electoral areas, is not necessarily the best for our country," he said. Then he focused on a different system saying, "In some democratic countries political parties put forward a list of names of candidates seeking election; the legislators are then chosen from this list, the number depending on the votes cast for each party."

As it was correctly understood those days, his proposal was a 'list system' and proportional representation was only an appendage or an icing to the cake. He wanted to abolish the 'electorates' and that abolition eventually spelled disaster to the democratic system that the people were accustomed to since 1931. More precisely, he wanted to unplug the legislators from the voter base saying "There are no electorates. The voter votes for the Party and not for a particular candidate." He did have a particular logic or a concern when he said, "Today's electoral system in our country precludes the best equipped men and women from taking part in our political life." However, the proposed 'solution' was worse than the existing problem. The introduced PR system under the 1978 Constitution, with preferential voting for party candidates on the district basis, in fact produced a breed of legislators who were neither responsible to the voters nor even to the political parties.

Jayewardene saw, more importantly, fault with the cabinet system of government that Sri Lanka has been used to since 1947 and even before in a prototype.[16] "Our Cabinet, the executive government, is chosen from the Legislature and throughout its life is dependent on it maintaining a majority therein," he said. Then

[16] In 1931, a Committee System was introduced primarily for internal self-government. The Chairmen of these Committees, seven in number, were Ministers and the Council of Ministers evolved quite akin to a modern Cabinet system after 1936. See I.D.S. Weerawardena (1951) ***The Government and Politics in Ceylon, 1931-1946*** (Colombo: Economic Research Association).

he contrasted that with the systems in the USA and France. He concluded the following which became the philosophy and the blueprint of the 1978 Constitution.[17]

> "Such an executive is a strong executive seated in power for a fixed number of years, not subject to the *whims and fancies of an elected legislature*; not afraid to take correct but unpopular decisions because of *censure from its parliamentary party*. This seems to me a very necessary requirement in a developing country faced with grave problems such as we are faced with today." (My emphasis)

Jayewardene was not only talking about 'whims and fancies of an elected legislature' but also the undesirable 'censure from its parliamentary party.'

Fundamental Rights

The 1978 Constitution attempted to assure what Jayewardene considered as 'basic freedoms of democracy' in a fundamental rights chapter (Chapter III). From a legal or a constitutional point of view, the rights enshrined in the chapter appeared quite impressive primarily in the sphere of civil rights except in certain areas.[18] For example, the most fundamental of all rights, the right to life was not covered in this chapter. One may argue that it is obvious or implicit in the recognition of other rights. But a clear recognition as an individual as well as a 'collective right' could have delivered a potent message in a country where the right to

[17] During an interview with President Jayewardene by the present author in April 1993, he pointed out that the idea of having a strong rule, or 'Gaullist System' as he said, first became prominent during the race riots in 1958. This is confirmed by T. Vittachi (1958) ***Emergency '58: The Story of the Ceylon Race Riots*** (London: Andre Deutsch). 'Do a de Gaulle, do a de Gaulle' was the outcry for Bandaranaike while Oliver Goonetilleke, the Governor-General, in fact acting like an executive president or a 'de Gaulle' during the riots.

[18] Even the formulations could be considered quite advanced or refined compared to for example the fundamental rights chapter in India.

life became so easily extinguished in hordes even menial to the rights of animals.[19]

In addition to the fundamental rights chapter, there was a chapter on language (Chapter IV) purported to cover 'language rights' but not so much of other cultural rights. It was assumed that the political rights would be covered in the chapter on 'the people, the state and sovereignty' (Chapter 1) in addition to the chapter on franchise and elections (Chapter XIV). There was no explicit attempt to cover economic, social or even cultural rights as fundamental rights in the 1978 Constitution, except the 'free choice for an occupation' in Article 14 (1) (g). Nevertheless, some general formulations in this respect appear under the 'directive principles of state policy' along with 'fundamental duties' in Chapter VI.

There cannot be much doubt that incorporation of human rights as fundamental rights in a national constitution emerges primarily from international obligations of countries today as members of the United Nations although in the initial stages of human rights development in the world, for example in France (1789) or the United States (1791), they were national developments.[20]The incorporation of fundamental rights under international influence, however, cannot succeed unless there are commensurate national processes.[21] What could be seen by the time of the 1978 Constitution is an immense contradiction between these two processes, the international influence and the national commitment or processes. It has also to be noted that although the two international covenants on 'civil and political rights' (ICCPR) and 'economic, social and cultural rights' (ICESCR) were adopted by the United Nations in 1966, they became enforceable only in 1976 and Sri Lanka acceded to them only in January 1980. The two covenants also prescribed the state

[19] An individual killing of a person is well covered in law, but 'collective killings' of people are almost unnoticed without remedy. In 1971, the killings were in thousands, in 1983 or 1987/89 in ten thousands, and thereafter, the cumulative killings in the war well exceeded hundred thousand on the part of both parties to the ethnic conflict, the armed forces and the LTTE.

[20] S.I. Skogly (2006) ***Beyond National Borders: State's Human Rights Obligations in International Cooperation*** (Oxford: Intersentia).

[21] L. Fernando (2002) ***Human Rights, Politics and States: Burma, Cambodia and Sri Lanka*** (Colombo: SSA).

obligations to human rights differently and therefore the leaving of economic and social rights to a chapter on directive principles was understandable particularly in 1978 although this is no longer the case currently. The traditional view that economic and social rights are not justiciable is not held by many experts today.[22] Leaving that argument aside, there was no justification at all not to address the issues of 'cultural rights' or the rights of communities or minorities in a more positive fashion in the constitution unless there were particular reasons to neglect them or simply apply different standards to different communities and religions.

The fundamental rights chapter with Article 10 began saying "Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice." There is no question that as passive individuals, every citizen was guaranteed freedom of religion, including adopting a religion of his or her choice. However, the said article or the article on the 'right to equality' (Article 12) failed to guarantee the much controversial equality between religions as communities or freedom therein. The latter article said "All persons are equal before the law and are entitled to the equal protection of the law" and "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds." Even here the 'equality before and protection of the law' was guaranteed to the individual but not to the religious community. The only feeble guarantee was in the article on 'freedom of speech, assembly and association' (Article 14) where it stated that "Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching."

Like in many other countries, there had been a close connection between the State and religion in traditional Sri Lankan society. Buddhism as the predominant religion in society was often accorded the foremost place by the State or the King. It was

[22] See Y. Ghai & J. Cottrell (Ed.) (2004) ***Economic, Social and Cultural Rights in Practice*** (London: Interights). This study particularly focuses on South Africa.

almost the state religion. What could be seen in the 1978 Constitution, in fact beginning with the 1972 Constitution, was a resurrection of this tradition. The Constitution has a single article chapter on Buddhism (Chapter III) which very clearly sates "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana" adding at the end "while assuring to all religions the rights granted by Articles 10 and 14(1)(e)." As we have seen before, Article 10 or Article 14 (1) (e) intends to protect an individual's right to practice religion and not so much of protecting the religious freedom on an equal basis. This cannot be the case while granting the 'foremost place' to one religion.[23]

It is a controversial matter whether Buddhism is strictly a state religion or not in Sri Lanka. It is usually classified as an ambiguous state on the issue of state religion. The formulation is more subtle than in countries where there is an explicit state religion but the state's religious affiliation is undeniable. The thinking behind the foremost place for Buddhism appears to be that this special position derives from 'history' and Buddhism being the 'religion of the majority.' Both notions however are irreconcilable with 'universality' and 'equality' of modern human rights.

The controversy regarding individual rights and group rights have many dimensions. When human rights became a major challenge for many developing countries which were still largely traditional, human rights were rejected or questioned as promoting individualism.[24] In Asia, including Sri Lanka, it was argued that the Asian values were different based on communitarian concerns. Therefore, group rights were emphasised instead of individual rights. In Sri Lanka, there is an extremely peculiar ideology that governs the human rights landscape which enthrones the group rights of the majority while relegating only individual rights to the minorities. In some growing opinion, even

[23] For a critical study of state religion relationship in contemporary societies from a human rights point of view see J. Temperman (2010) ***State-Religion Relationships and Human Rights Law*** (Leiden: Martinus Nijhoff). This study raises the question of a 'right to religiously neutral governance.'

[24] For a general penetrating discussion see Spagnoli (2003). For the particular issue see, ibid: p.230.

individual rights are not fully accorded to the minorities except that they could live rather submissively. A recent most statement in this respect has come from Ven. Kirama Wimalajothi Thera, Head of the Bodu Bala Sena (BBS) expressing their opposition to the provincial council system, saying "This is a Sinhala Buddhist country and others can also live here."

> "The provincial council system was forced upon us. Now certain foreign groups and NGOs have started to pry on us and introduce the system to the North where there are Tamil and Muslim nationals. If this power is given to these people it will be very dangerous. Even your children and the next generation will be affected badly by this. So we are telling the President, ministers and foreign forces that we are against the Thirteenth Amendment. *This is a Sinhala Buddhist country and others can also live here*. If in case they go ahead with it then they will have to introduce these powers to these areas over our dead bodies."[25](My emphasis)

In the first Independent Constitution of 1947, there was recognition of 'religions' and 'communities' as relevant rights holders within the democratic polity, although not in an elaborated fashion. This is clear from Article 29 (2). However, in that constitution which in fact was drafted even before the Universal Declaration of Human Rights (1948), there was no fundamental rights chapter. There is no doubt that even that constitution or the said Article 29 failed in defending the rights of the minorities in respect of the disenfranchisement of the Tamil plantation workers (1949) or the Sinhala Only Act (1956) due to the weaknesses of the judiciary. However, if we take the principles of Article 29 (2) seriously, it is very clear that both the chapter on Buddhism and the chapter on language are contrary to those principles. While Article 29 (1) saying "Parliament shall have power to make laws for the peace, order and good government of the Island" it also prescribed the following.

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[25] Political Editor, ***The Sunday Times***, 7th July 2013: http://www.sundaytimes.lk/130707/columns/rajapaksa-regime-bows-to-india-and-world-community-51931.html (accessed 30th December 2014).

> "No such law shall -(a) prohibit or restrict the free exercise of any religion; or(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions."

The original 1978 Constitution, exactly like the 1972 Constitution, conferred that "The Official Language of Sri Lanka shall be Sinhala" in Article 18. Only difference from the previous constitution was that it conferred a national language status to the Tamil language saying "The National Languages of Sri Lanka shall be Sinhala and Tamil" in Article 19. However it was not clear that what would constitute a 'national language.' It was initially confined mainly to the use of either Sinhalese or Tamil in parliamentary proceedings and the administrative use of both languages. It was the Sixteenth Amendment to the Constitution that clarified the matter to a great extent. The rights related to language however is an area where a considerable progress could be seen under the 1978 Constitution. There were 14 insertions and substitutions to the chapter on language. In contrast, there had been no amendments at all to the chapter on fundamental rights. However, some of the insertions were not only ambiguous but also demeaning. For example, the initial constitution said "The official language of Sri Lanka shall be Sinhala" and then the Thirteenth Amendment added that "Tamil shall also be an official language."[26]

Practice of Fundamental Rights

There is no dispute that there were good things in the fundamental rights chapter and for example, "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." However, torture is the most prevalent day to

[26] It was like saying, 'this is my wife' and saying with a chuckle 'this is also my wife.' There was still a hierarchical order between the languages of Sinhala and Tamil.

day human rights violation in Sri Lanka according to a number of human rights reports and irrespective of the fact that there is other legislation prohibiting the same, not to speak of 'cruel, inhuman or degrading treatment.' [27] The main perpetrator identified is obviously the police. In the implementation of the right to freedom from torture what could be mostly seen is the lack of political commitment on the part of political authorities in charge of the police and the armed forces. The efforts of the judiciary in this respect are largely hampered or circumscribed because of the negative interference and the defence of the perpetrators by the Attorney General's Department. This is irrespective Sri Lanka being party to the Convention Against Torture (CAT) since 1994 and has its own Convention Against Torture Act (1994).

The same goes for the "freedom from arbitrary arrest, detention and punishment." The article on the subject (Article 13), to appear in any constitution, is most comprehensive with seven sections. The principles enunciated are very close to what appears in the ICCPR or other international instruments. However, arbitrary arrest and detention are other two prevalent human rights violations in Sri Lanka apart from and leading to torture even after the end of the war in 2009. During the period of war between 1983 and 2009, there were legally sanctioned possibilities under the emergency laws and the much controversial Prevention of Terrorism Act (PTA) that made the provisions in the constitution only theoretical and abundantly redundant. The same Article 13 also prohibited 'retroactive penal legislation' which by and large Sri Lanka has complied with. However, on the other hand Article 16 validated the operation of "all existing written law and unwritten law…notwithstanding any inconsistency with the preceding provisions of this Chapter" to mean the fundamental rights chapter. Most of the legal ambiguities regarding the cases of torture or arbitrary arrest/detention came about because of the above 'indemnity.' The existing Police Ordinance for example allowed many

[27] Asian Human Rights Commission (AHRC) compiled a report of 1,500 cases of torture between 1998 and 2011, '*A Review of Sri Lanka's Compliance with the Obligations under CAT*', 8th July 2011. See other publications of AHRC including *Torture* magazine.

arbitrary actions including coerced treatment in the process of law enforcement.[28]

Article 14 of the fundamental rights chapter was quite wide ranging to include not only the 'freedom of speech, assembly and association' but also as it declared the "the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise," which in fact touched on economic rights. However, as it was couched within the other civil rights associated with the freedom of expression or association, its importance or relevance escaped the attention of even the judicious commentators. The article most importantly recognised (a) the freedom of speech and expression including publication; (b) the freedom of peaceful assembly; (c) the freedom of association; and (d) the freedom to form and join a trade union.

In all these areas, Sri Lanka had a strong tradition and even practice until these rights became increasingly impinged due to political circumstances or expediency in fact associated with the introduction of the presidential system. Otherwise Sri Lanka was one of the best countries that respected and allowed the entertainment of these rights unimpaired. The lives of governments previously largely depended on the acceptance of these rights. Two examples could be given conveniently. In 1953, a Prime Minister opted to resign consequence of 13 lives lost during trade union protest and civil disobedience. In 1964, a government was defeated in a parliament when it attempted to nationalise a major newspaper establishment, the Lake House.[29] On the other hand, these are the kinds of predicaments that J. R. Jayewardene wanted to terminate by introducing a presidential system in the country.

The major merit of the fundamental rights chapter of the 1978 Constitution was its justiciability compared to the 1972 Constitution, and according to which "every person shall be entitled to apply to the Supreme Court, as provided by Article

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[28] L. Fernando (2005) ***Police-Civil Relations for Good Governance*** (Colombo: SSA).

[29] For the general character of democracy during the period see J. Jupp (1978) ***Sri Lanka: Third World Democracy*** (London: Frank Cass).

126, in respect of the infringement or imminent infringement, by executive or administrative action." Article 126 in addition allowed the same procedure for the language rights recognised in Chapter III although this procedure has not been very much used.[30] The fundamental rights implementation procedure was obviously limited to the 'executive or administrative action' in the public sector (private sector excluded) although extended to the 'infringement or imminent infringement.' While there was no redress given if any fundamental or language right was infringed by the judiciary, the collective human rights violations related to events or incidents (i.e., burning of the Jaffna Library, July 1983 riots, Anuradhapura massacre by the LTTE or election violence) were completely beyond the purview of judicial investigation and determination.[31] In initial judgements it was also determined that only persons and not entities such as media institutions, companies or trade unions that could apply for redress. This was made flexible later.

Under the prevailing provisions, the most operational fundamental rights jurisdiction was related to the 'right to equality' under Article 12. Petitioners applied to the Supreme Court when their rights became infringed due to punishments, transfers, denial of promotion or other discriminatory action in the public sector including the police service, which could easily be handled by an Equal Opportunity Commission or even the current National Human Rights Commission, if it is constituted impartially and professionally.[32] Discrimination or denial of opportunity in education also became a prominent form of fundamental rights cases before the Supreme Court in recent times. The major fall out as a result was the escape of most important human rights violations from the judicial scrutiny. Media Reform Lanka linked to the Institute of Commonwealth Studies, University of London, however recorded selected 26

[30] See T. Rajan (1995) ***Tamil as Official Language: Retrospect and Prospect*** (Colombo: ICES).

[31] This author believes that constitutional provisions could be formulated to initiate compulsory judicial investigations into collective or mass killings or similar human rights violations.

[32] Although the appointments to the Human Rights Commission were done on an impartial basis prior to around 2005, in recent times partisan affiliations have become the main criteria of appointment.

cases related to the freedom of speech and expression and the following Table 1 gives a summary of these cases.[33]

Table 1

Selected Fundamental Rights Cases on Freedom of Speech and Expression 1983-2003

Case	Year	No	Violation	Verdict
1.Dr Neville Fernando et al vs. Liyanage et al	1983	SLR 214	Sealing of Press	Dismissed
2.Jayantha Finance et al vs. Liyanage et al	1983	SLR 111	Sealing of Press	Dismissed
3.Visualingam et al vs. Liyanage et al	1983	SLR 311	Prohibition to Print (Saturday Review)	Dismissed with Dissent
4.Visualingam et al vs. Liyanage et al	1984	SLR 305	Sealing of Press (Saturday Review)	Dismissed
5.Malalgodavs Attorney General and another	1982	SLR 777	Seizure of Book	Dismissed with Cost

[33] '*Excerpts from Relevant Sri Lankan Case Law on Freedom of Expression and freedom of the Media*': http://mediareformlanka.com/Cases.pdf (accessed 30th December 2014).

6.Hewamanne vs. De Silva and another	1983	SLR 1	Contempt of Court/Freedom of Expression	Mitigated
7.RatnasaraThero vs. Udugampola	1983	SLR 461	Speech and Expression	Upheld with Compensation
8.Mallawarachchi vs. OIC Kollupitiya	1992	SLR 181	Arbitrary Arrest/Freedom of Speech	Dismissed
9. Mahinda Rajapaksa vs. Kudahetti et al	1992	SLR 223	Freedom of Speech	Dismissed
10.Mohittige et al vs. Gunatilleke et al	1992	SLR 246	Freedom of Speech	Upheld with Compensation
11.Amaratunga vs. Sirimal at al (Jana Gosha)	1993	SLR 264	Speech and Expression	Upheld with Relief
12.ChannaPieris et al vs. Attorney General et al	1994	SLR 1	Illegal Arrest/Freedom of Expression (Ratawesi Peramuna)	Upheld with Relief

13.Abeyratne vs. Gunatilake et al	1994	SLR 294	Freedom of Speech	Upheld with Relief
14.Deshapriya et al vs. Municipal Council (N'Eliya)	1995	SLR 362	Freedom of Speech (Yukthiya)	Upheld with Relief
15.Wickremasinghe vs. Edmund Jayasinghe (Sec. Media)	1995	SLR 300	Freedom of Expression (Newspaper)	Leave to Proceed Refused
16.De Silva et al vs. Jeyaraj Fernandopulle et al	1996	SLR 22	Freedom of Occupation (Taxi at Airport)	Upheld with Dissent
17.Fernando vs. SLBC et al	1996	SLR 157	Speech and Expression	Upheld
18. Gamini Atukorala et al vs. IGP et al	1996	SLR 280	Speech and Expression (UNP May Day)	Upheld

19.Marian and another vs. Upasena	1998	SLR 177	Freedom of Expression	Upheld
20.Victor Ivon vs. Attorney General and another	1998	SLR 230	Freedom of Expression/Contempt of Court	Leave to Proceed Refused
21.Sumith Dias vs. Ranatunga et al	1998	SC 98/97	Speech and Expression	Upheld and Compensation Granted
22.Karunatilaka and another vs. Elections Commissioner	1999	SLR 151	Speech and Expression (Vote)	Upheld with Relief
23.Rathnayake vs. SLRC et al	1998	SC 867/96	Expression and Equality	Upheld with Compensation
24. Sunila Abeysekera vs. Competent Authority et al	2000	SC 994/99	Expression and Discrimination	Dismissed (under emergency)
25. Leader Publications vs. Competent Authority	2000	SC 362/2000	Expression/Publication	Upheld with Compensation
26.	2003	SC	Freedom of	Upheld

Sothilingum Thavaneethan (five applicants) vs. Elections Commissioner et al		20/2002	Expression (Vote)	with Compensation

Source: *Media Reform Sri Lanka*

The fundamental rights issues and cases have undoubtedly been a learning process for the country and the judiciary alike. Initially, there was a failure to grasp the fundamental rights within the broader framework of international human rights, or the organised entities as relevant rights holders. However, this position substantially became altered later. The Saturday Review was disadvantaged in 1984 on the basis that only individuals and not entities who could apply when it filed two petitions against the sealing of the press. But The Sunday Leader benefitted when the prohibition of publication by the Competent Authority was challenged in 2000. As our list shows, the first decade (1980s) shows a dismal prospect for fundamental rights cases perhaps due to the political climate as well judges being quite conservative or not so knowledgeable about human rights issues. Even their determinations were quite scanty and contradictory if you go through the determinations.

The situation however improved in the second decade (1990s). Although the involvement of the highest executive authorities in the infringements were continued to be the case, it did appear that the judiciary was quite confident in delivering their determinations independently. Some of the politically prominent cases of Jana Gosha, Ratawesi Peramuna, Yukthiya or the UNP May Day (Case Nos. 11, 12, 14 and 18 respectively in Table 1)

were determined in favour of the petitioners. Another positive development was to interpret the freedom of speech and expression as broadly as possible even to include the right to vote within its purview. The determinations of the judges also were quite extensive, yet these cases were an extremely small fraction of the incidents of systemic human rights violations going on in the country during the period.

Moreover they confined mainly to the rights of certain sections or individuals in the South as if the Northern parts of the country were completely debarred from the fundamental rights process. For some reason, not a single known case was filed under the language rights. As a whole, it appeared that the fundamental rights procedure was like trying to fish (or not to fish) big sharks with a small net. The major incidents of rights violations in July 1980, July 1983, 1987-89 or during the four Eelam wars including the last stages in 2009 have completely escaped any judicial scrutiny inside the country. No other mechanisms or devices were installed, except for few efforts such as the Commissions on Disappearances in 1995, as a way of ameliorating the on-going saga. None of the cases listed or others, as they were part of systemic and endemic nature, could be considered 'pilot cases' where the causes of violations were identified and instructed the state authorities to prevent those in the future suggesting necessary measures.[34] The reason for this situation was largely determined by the connection between the system of government and the human rights violations. No need to repeat that the Presidential System was by and large responsible.

[34] Since 2004 the European Court adopted a procedure to take up only 'pilot cases' or deliver 'pilot judgements' focusing on causes as well as recommendations to curtail systemic violations. See P. Leach et al (2010) ***Responding to Systemic Human Rights Violations*** (New York: Angus and Robertson). A similar procedure could have been or could be adopted by the Supreme Court in Sri Lanka leaving other cases for example to the Human Rights Commission or any other court.

Failure of a System

There was some flexibility in the state system before the 1978 Constitution or more precisely before the 1972 Constitution in dealing with the ethnic question or any other human rights issue. Moreover, the major violations during the period were few and far between.[35]But the state now became restrictively defined as a 'unitary state,' to mean centralised, vertical and even authoritarian.[36] The 'unitary state' has also become a frenzied slogan on the part of the extreme Sinhala nationalists. What became precluded were the development of horizontal democratic institutions and processes and even the implementation of devolution under the Thirteenth Amendment becoming subjected to continuous upheavals as a result.

On 'the people, the state and sovereignty,' (Chapter I) first the state was defined as 'free, sovereign and independent.' This may be necessary, though obvious, as freedom could exist only in a free state as Rousseau argued. Sri Lanka as a former colony, this was also necessary to assert its sovereignty and independence from the former colonial master or any other similar source. But the definition of the state as 'unitary' placed an untold internal restrictions from which it would be extremely difficult to extricate itself. The 1978 Constitution also added that Sri Lanka is a 'democratic socialist republic' whatever it meant. Even the 1972 Constitution did not have this characterisation although drafted by a group of socialists. The economic path that was taken in 1977 with the inauguration of an 'open economic policy' was hardly akin to any type of socialism. Only reason that can be adduced to this characterisation was that perhaps the founder of the constitution wanted to pass the message that democracy under the 1978 Constitution was only a qualified one. It was a known

[35] If the number of killings, unfortunately, were an indication of major human rights violations, then until 1971 it was relatively a period of calm. At a general strike in 1947, one was killed and 18 injured. In a Hartal in 1953, 13 were killed and over 200 were injured. During two racial riots in 1956 and 1958, 158 and over 500 were reported to be killed respectively. But in contrast, 1971 saw over 5,000 killed and 12,000 arrested. It was a story of escalation.

[36] For a discussion on the unitary state and for its evolution see A.J. Wilson (1988) ***The Break-Up of Sri Lanka: The Sinhalese-Tamil Conflict*** (London: C. Hurst).

fact that the 'democratic socialist' countries in Eastern Europe were prominently authoritarian not to speak of the East Asian socialist countries.

One of the advantages for any human rights movement in the country, however, was the broad and popular definition given to the notion of sovereignty. In the 1972 Constitution it said "In the Republic of Sri Lanka sovereignty is in the people and is inalienable" and then the 1978 Constitution added that "Sovereignty includes the powers of government, fundamental rights and the franchise." The new inclusion of 'fundamental rights and the franchise' within the purview of sovereignty perhaps indicated that the drafters of the constitution, including President Jayewardene, didn't consciously anticipate that the system of government that they were installing might go against the fundamental rights in the constitution. In addition to the inclusion of fundamental rights in the people's sovereignty it further said "the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

In view of the strong recognition of fundamental rights in the constitution it is puzzling to see how did the executive branch of the government (i.e. the police, the armed forces, the bureaucracy, competent authorities, attorney general's department etc.) could trample on human rights of the people or why did the other branches of the government (primarily the legislative and the judicial) or even the people allowed major violations to take place committed by both the state and non-state actors.[37] The answer to this question may need to take into consideration a host of factors and primarily, political,

[37] Some of the initial studies were: N. Jayawickrama (1976) ***Human Rights in Sri Lanka*** (Berkeley: University of California); P. Hyndman (1992) ***Human Rights Accountability in Sri Lanka*** (New York: Human Rights Watch). For a bibliography for the initial period, see K. Rupesinghe & B. Verstappen (1989) ***Ethnic Conflict and Human Rights in Sri Lanka: An Annotated Bibliography*** (Oslo: Hans Zell). There are extensive reports available from UTHR (J), CRM, INFORM, Amnesty International, Human Rights Watch, ICJ, Minority Rights Group, Article 19 etc.

constitutional and social. That kind of a broader analysis also requires different approaches encompassing ideological and even psychological. Then the question remains as to the failure of the international institutions and primarily the UN in protecting the rights of the people in Sri Lanka when the gross human rights violations took place.

To highlight one facet in respect of the social, it appears that major violations continued unopposed by the people depending on the ethnic, political, religious, class and even caste affiliations or biases. The passivity of the people in the midst of gross violations cannot be explained merely by the repressive nature of the government or the armed forces. While some of these biases encompassed the ideological sphere, some others were psychological. For example, when violations took place in the North, the people in the South were indifferent or rejoiced and vice versa. The same partialities or silence occurred on religious, political or other distinctions.[38] The same partialities or biases remained within the governing institutions and among the personnel who were manning those institutions. However, our effort in this chapter has been limited and primarily to identify the discernible constitutional factors in relation to the major violations of human rights during the period. All these factors together constitute a systemic failure in its broadest sense of the term.

There was a major dislocation in the representative democracy in Sri Lanka when the executive was separated and elevated from the Parliament with considerable implications on human rights. A widely elected parliament on the basis of universal franchise should not only be the legislative branch but also the base and 'mother' of the executive. The executive should sit in parliament and should answer, responsible and be accountable. Separation and full independence are necessary only for the judiciary to safeguard the constitutional rights of the people and administer justice. It may be argued that Baron Montesquieu got the priorities mixed up when he proposed a strict system of separation of powers in the mid-18th century. His reading of the English

[38] It is possible to speculate that many of the partialities and discrimination based on hierarchical thinking is a reincarnation of archaic caste system in the Sri Lankan society and tradition.

constitutional system was erroneous for the evolving reality than for the archaic past.[39] When the United States applied the separation of powers in its constitution, the purpose was not to create a strong executive or president but to institute separation between the three branches and also to create checks and balances. The initial Presidents of America were liberal leaders and a strong presidential system evolved much later.[40] However, this was not the case when France devised its own presidential system in 1958 under General Charles de Gaulle. The purpose was to install an authoritarian rule like the 'future Sri Lanka' and in fact J. R. Jayewardene took inspiration from the Gaullist system.[41] Another trace of the 1978 Constitution was the ancient monarchical system as Mervyn de Silva argued and this trait of monarchical thinking still prevails in the country.

> "Its main feature was an unparalleled concentration of power in the presidency. While foreign scholars termed the new system 'Bonapartist-Gaullist' or a 'benevolent authoritarianism,' its architect rejoiced, saying that he was 'more powerful than King Parakramabahu the Great."[42]

The sovereignty of the people however was the catch word to install the authoritarian system and Article 4 was the basic framework for its architecture. First it said "the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum." It should be noted, however, that although 'referendum' was named as a devise of exercising 'legislative power' of the people, there had been only one referendum so far in December 1982 which was alleged to be fraudulent and ironically that was to extend the term of the incumbent

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[39] Chapter 6 of Book XI of ***The Spirit of the Laws***.

[40] Woodrow Wilson was a major critic of separation of powers and the presidential system. Both his amateur work *Congressional Government* and the mature *Constitutional Government* develops the same line of thinking in appreciation of parliamentary system.

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

[42] '*Repression in the Guise of Stability*', ***International Herald Tribune***, 23rd April 1986.

parliament for another six years without holding the due parliamentary election in 1983.[43] The Parliament also was unicameral without any possibility of allowing the electorally unrepresented and deserving people to serve the country in legislative matters in a second chamber. For democracy to operate properly, it is always better to balance the functions of a house of representatives with a second chamber. Under the devolution of power to the provinces in 1987, a second chamber could have served as a conduit for power sharing at the centre. The Senate that operated under the first independent constitution until it was abolished in 1971 was a centre where public issues were debated beyond partisan politics and almost served as an informal human rights council.[44]

The following was what the Constitution said about the executive branch of government in the framework section (Chapter I).

> "The executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People."

Here there was no mentioning of a Cabinet or a Prime Minister and those provisions came in Chapter VIII clearly implying they were subordinate to the President. The purpose of the Cabinet of Ministers was to serve the President not as an independent body but as a subordinate entity. It further explained that the President "is the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces."

There is no dispute that the 1978 Constitution retained certain aspects of a parliamentary system not as a mixture like in France but side by side. This is clear from the provisions in Chapter VIII. This has been more beneficial for the preservation of some semblance of parliamentary democracy than a mixed system like in France. During December 2001 and April 2004, when the

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[43] While no election was held for the Parliament between 1977 and 1988, the local government system also was frozen during the same period with major consequences for the representative democracy.

[44] I.D.S. Weerawardena (1955) ***The Senate of Ceylon at Work*** (Peradeniya: University of Ceylon).

Parliament was elected from a different political party to that of the President, the country could revert back to almost a cabinet system of government. This could happen as the incumbent President, opted not to use her immense executive powers until the last moment. This was also the period of the peace process and the Ceasefire Agreement (CFA) when gross human rights violations became reduced although one could argue that the uncertainty and conflict between the President and the Prime Minister contributed to the failure of the peace process in addition to the LTTE abusing the peace process for their military objectives. This supports our main argument, however, that a cabinet system of government is more conducive to human rights and peace, if unhampered by any semblance of a presidential system.

The presidential system in Sri Lanka has been more authoritarian internally than most the other presidential systems in the world, particularly the US or France, and given the long tenure of office it could easily be abused. The term of office is six years and initially the terms were limited to two, until the Eighteenth Amendment in September 2010. Compared to the four-year term in the US, this meant that a President in Sri Lanka could serve (if elected of course) for a period similar to three terms in the US. Now the term limit is lifted and in theory one could become a lifetime president. In France, the period was seven years earlier but now limited to five and also prohibiting anyone serving more than two consecutive terms. In the US, although there was no two-term limit until the Twenty-Second Amendment in 1947, only four Presidents attempted to contest for more than two terms and only Franklin D. Roosevelt succeeded under the special circumstances of the war. Although in Russia the period of term is six years like in Sri Lanka, the office is limited to two consecutive terms. Moreover, the Russian President is not the head of the executive branch. In almost all countries, while the trend has been to limit the terms and even powers of the President, Sri Lanka is a country which has moved in the opposite direction. The Third Amendment to the Constitution made the matters much worse by allowing the President to seek a new mandate after the expiration of four years, nevertheless continuing the previous term for the full period and then commencing the current after that if elected.

This virtually meant that eight year period could be mandated by one election.

The Presidents also have acquired glory and power through convention and ideology.[45] In a country where the traditional kingship was suppressed by colonialism and many people still yearn for that traditional glory and myth, the position of the President was the only institution that it could be invoked. The first President J. R. Jayewardene fully benefitted from this aura whether he truly believed it or not. He claimed to be more powerful than some of the most powerful kings of the past and said he could do anything other than 'making a man a woman or woman a man.' The same invincibility is resurrected under the current President as well. This is partly because of the almost complete immunity given by the Constitution itself in Article 35 (1) which says, "While any person holds office as President, no proceedings shall he instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity." Although constitutional analysts opined that this could not mean any immunity at least to breach the Constitution, in a situation of subdued judiciary it had extremely been difficult to challenge any of the actions of the Presidents in a court of law.[46] The President also cannot be removed during his/her tenure other than by an extremely difficult procedure of impeachment.

The main casualty under the presidential system was the independence of the judiciary with considerable human rights implications. The downturn started with the 1972 Constitution on a different trajectory. On the assumption of the supremacy of Parliament, the judiciary was made subordinate and even it retained some judicial power of its own. The retention continued under the 1978 Constitution although the Parliament was no longer supreme. The encroachment on the judiciary came in a different manner. In spite of the nominal Head of State, of course

[45] The situation is quite akin to Oriental Despotism that Wittfogel depicted. K. Wittfogel (1967) ***Oriental Despotism: A Comparative Study of Total Power*** (London: Yale University Press). See also L. Fernando, '*Karl Marx, Asiatic Despotism and Sri Lanka*', ***Colombo Telegraph***, 13th March 2013.

[46] See B. Fernando, '*Sri Lanka: The Need to Re-interpret the Executive President's Impunity under Article 35 (1)*', ***Asian Human Rights Commission***, 14th November 2012.

on the advice of the Prime Minister, appointing the judges of the superior courts, under the 1978 Constitution, the appointments of the Supreme Court and the Court of Appeal came under the direct discretion of the Executive President. Article 107 (1) said "The Chief Justice, the President of the Court of Appeal and every other Judge, of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand." It was under this article that all sitting judges of the superior courts had to resign and reappointed with a significant reshuffle. It was barely three years before in August 1985 that the UN enunciated the "Basic Principles on the Independence of the Judiciary" where the independence of the judiciary was emphasised in terms of rule of law and human rights in the Preamble as well as in the substantive articles. The most important principles were the following.

> "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[47]

Within months of the promulgation of the 1978 Constitution, the Special Presidential Commission Law no 7 of 1978 was enacted with the purpose depriving the former Prime Minister, Sirimavo Bandaranaike, of her civic rights. When the Court of Appeal declared, on an application, that the retrospective application of the law was null and void, the President decided to change the Constitution and make the purview of the Commission applicable retrospectively and also pruning the powers of the Court of Appeal. The deprivation of civic rights of Mrs Bandaranaike was the first major human rights issue under the 1978 Constitution. It is reported that President Jayewardene had said "the judiciary

[47] U.N. Doc. A/CONF. 121/22 Rev.1 at 59 (1985).

would pose difficulties for the executive if they are wholly outside anyone's control."[48]

There had been a trail of events since 1978 that accompanied the suppression of democracy, violation of human rights and silencing of the judiciary which went hand in hand. The attempt here is not to give a full record but highlight some initial key events. First it was the deprivation of civic rights of the foremost potential challenger to the presidential position in 1978 itself. Handpicked three judges were conveniently used in the exercise. In 1981, the Jaffna District Council election was blatantly manipulated with violence and that was a part and parcel of coercing the emerging minority opposition in the North.[49]Orders had been already given to General Tissa Weeratunga to 'eliminate terrorism completely from the Northern soil' with additional powers given under the draconian Prevention of Terrorism Act (1979). The confrontations continued with the full explosion of July 1983 violence against the ethnic Tamils with colossal damage to property, life and ethnic relations in the country. Nearly a million of Tamils were driven out of the country.[50] That was the beginning of the Eelam War I which lasted until 1985. The connection between the suppression of democracy, the violation of human rights and the silencing of the judiciary has continued until this day, the latest most example for the latter being the impeachment of the Chief Justice Dr Shirani Bandaranayake in 2012.

[48] A. Satkunanathan, '*Working of Democracy in Sri Lanka*', ***LST Monograph***: http://www.democracy-asia.org/qa/srilanka/Ambika (accessed 30th December 2014).
[49] See N. Murray, '*The State against Tamils*' (1984) ***Race & Class*** XXV: p.1.
[50] A.J. Wilson gave some direct evidence for the government involvement in the 1983 riots. Wilson (1988): p.173.

Conclusion

This chapter did not make any substantive effort to record the events and incidents of human rights violations during the period since the 1978 Constitution and these are available in a multitude of sources, national and international, as referred to before. Instead, the effort was to isolate the key constitutional factors that were primarily responsible, in author's opinion, for the protection and promotion of human rights violations within a context of increasing conflicts of ethnic and/or political nature.

If this chapter started with the hypothesis that parliamentary democracies in contrast to the presidential systems are more conducive to human rights protection based on the views of Karel Vasak, this hypothesis became substantially substantiated by the end of the chapter both on empirical and constitutional premises. The fundamental rights chapter in the 1978 Constitution could not hold water. On the empirical side of the equation, it is abundantly clear that major violations started to escalate under the Presidential rule, individual presidents making matters worse both by commission and omission although this second aspect was not pursued very much in this chapter given the space constraints. The Parliamentary period of the constitutional history of the country (1948-1978) in contrast was in fact was a 'golden age' except certain aberrations under the 1972 Constitution. This hypothesis again became confirmed by the fact that the period between 2001 and 2004 was largely favourable to human rights and peace when the system temporarily reverted back to the old system of Cabinet government as we have shown. This was also the period when the Independent Commissions existed under the Seventeenth Amendment.

Human rights violations primarily emerge in any country from the state apparatuses (or from movements driving towards creating such apparatuses i.e. the LTTE in Sri Lanka) if those apparatuses are not governed by democratic rule of law. Violators are not usually the civil society actors. As Karl Marx maintained:

> "Freedom consists in the conversion of the State from an organ superimposed on society into one completely

> subordinated to it, and today too, the forms of the State are more free or less free to the extent that they restrict the 'freedom' of the State."[51]

The state apparatuses encompass the armed forces, the police, the prisons and the bureaucracy in various forms and shapes. The handling of this 'monster' is primarily a task of the executive branch of the modern government and the best handling of this task conducive to human rights would be if the executive branch is directly and intimately responsible and accountable to an elected Parliament of the people and this means primarily a parliamentary system of government. While this is a necessary condition for the protection and promotion of human rights it is also not a sufficient condition. There are other socio-political, cultural, ideological and institutional conditions necessary although this study did not go into details of them.

As we could observe from our analysis and descriptions, when the executive branch of the government in the form of executive presidency became divorced from the legislator and in fact dominates both the legislator and the judiciary through various means that was not conducive to human rights. Much worse was the situation when the President received a separate mandate overriding the mandate of the Parliament and believed in authoritarian government for the sake ostensibly for developing the country economically in a situation where the understanding or resolve to defend human rights was not so high even within the civil society. This might not totally be the case if the presidential system was accompanied by extensive checks and balances and if the society or the economy is developed. But in a developing or a transitional country like in Sri Lanka, the presidential system did spell disaster for human rights and civil liberties as we could observe from the past experience. The main motivation to undertake this study was our observation of an evolving debate in Sri Lanka at present on the subject of whether the presidential or parliamentary democracy is the better system for human rights and democracy. However, as Matthew S. Shugart and John M. Carey said, "Most of the scholarly literature on the subject comes

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[51] Quoted by P. Anderson (1974) ***Lineages of the Absolutist State*** (London: Verso): p.11.

out quite squarely behind parliamentarism as the preferred alternative. However, among practicing politicians, the message is getting through slowly, if at all."[52]

[52] Shugart & Carey (1992): p.2.