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Parliament in a Presidential System

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The most significant innovation introduced by the 1978 Constitution is that of the President who does not owe his office either to the Prime Minister or the legislature but is elected directly by the people for a fixed term. It represents a radical departure from the pre-1978 post-independence constitutions, which were designed adopting the Westminster model having a popularly elected legislature as its dominant characteristic, and the head of the executive acting as a ceremonial figure with no real power to exercise.

This chapter will focus on the transformation of the Parliament as it functioned within the Westminster system to that of the Presidential system and examine Parliament's position and role within the latter system.

The Soulbury Constitution

The Order-in-Council of 1946, otherwise known as the Soulbury Constitution, the first post-independence constitution, was the culmination of the process of constitutional reform initiated by the British colonial government with a view to transferring power to the Ceylonese. In 1943, His Majesty's Government issued a Declaration[1] on the question of constitutional reform in the island and invited the Ceylonese Ministers to draft a constitutional scheme for consideration by the British Government. The Soulbury Commission which was subsequently appointed to visit the island and report on constitutional reform gave its

[1] The Declaration of 1943 in *The Report of the Commission on Constitutional Reform*, Cmnd.7667 (1945) (HMSO) (hereafter "*The Soulbury Commission Report*"): para.83. The Declaration set out the principles to which the proposed constitution of Ceylon was expected to fully conform. It identified some subjects as falling within a category reserved for Governor's assent. They included any measure that would "have evoked serious opposition by any racial or religious community which in the Governor's opinion are likely to involve oppression or unfairness to any community".
The proposed constitution would need to be approved by three-quarters of all members of the State Council of Ceylon, excluding the officers of State and the Speaker or other presiding officer. This would have required the support of the minorities for any constitution to gain approval.

consideration to the Minister's Draft,[2] treated it as the main basis of its work,[3] and substantially adopted the contents of that draft in its recommendations.[4] The Soulbury Constitution may have had its formal origins in the United Kingdom, was British in its

[2] See *The Soulbury Commission Report*: paras.7 & 99. *The Soulbury Constitution* was largely based on the Minister's Draft Constitution of 1944 prepared at D.S. Senanayake's initiative with Sir Ivor Jennings' assistance. D.S. Senanayake dominated the final phase of the transfer of power to the Ceylonese. He had hoped that the British Government would examine immediately and accept the scheme he had proposed. Instead, the British Government appointed a commission to visit Ceylon whose terms of reference included the consultation of various interests, including the minority communities concerned with the subject of constitutional reform in Ceylon. The widening of the terms of reference was the result of criticisms from minority representatives about not being consulted in the preparation of the Minister's draft. See K.M. de Silva, '*A Tale of Three Constitutions*' (1977) ***The Ceylon Journal of Historical and Social Studies*, New Series** VII, 6. In the Ceylonese Ministers' view, the Commission's terms of references went beyond the scope of the 1943 Declaration and the condition that the constitution needed approval by three quarters of all members of the State Council afforded sufficient protection to the minorities.
The Ministers decided to boycott the Commission officially but D.S. Senanayake, although he did not give evidence before the Commissioners in any of its public sessions, gave them the benefit of his views in a series of private meetings with them. See *Soulbury Commission Report*: para.7 & Appendix 2 (list of witnesses).
The Commissioners met Senanayake and the Ministers unofficially and socially and D.S. Senanayake personally took the Commissioners on an extensive tour of the country. See on this C. Jeffries (1962) ***Ceylon - The Path to Independence*** (London: Pall Mall Press); See also D.T. Aponso-Sariffodeen, '*From 'half a loaf' to Independence*' ***The Sunday Times***, 4th February 2011; D.B. Dhanapala (1962) ***Among Those Present*** (Colombo: MD Gunasena): pp.30-31 refers to the boycott as 'the strangest kind known in history. Officially the Ministers did not make representations to the Commission. But no commission that came out East ever had such lionizing. They were wined and dined entertained and mused in a series of unofficial private functions that left them exhausted.' According to Dhanapala, each Commissioner in turn was promised the Governor-Generalship if the Commission would recommend dominion status for the country.
[3] See on this A.Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How Procedural Entrenchment led to Constitutional Revolution*' in A. Welikala (Ed.) (2013) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): p.155.
[4] See Jennings (1951) ***The commonwealth in Asia*** (OUP): p.74: "the constitution of 1947 is fundamentally the Minister's scheme of 1944 with a weak Senate added and the restrictions of self-government deleted."; See also Welikala (2013): p.157.

context and texture, and operated on the basis of British constitutional principles; but in all its essentials it was a Ceylonese product.[5]

The Soulbury Constitution conferred legislative power on a bicameral Parliament.[6] A cabinet of ministers headed by the Prime Minister situated within Parliament was charged with the general direction and control of the government and was collectively responsible to Parliament.[7] The Governor General represented the British sovereign as the nominal head of the executive[8] but was appointed on the advice of the Prime Minister and by convention acted only on the latter's advice,[9] although in exceptional circumstances the Governor General had a margin of discretion based on his independent judgment.[10] Parliament's

[5] Jennings (1947) ***Comments on the Constitution*** (Colombo: Lake House): p.1 states: "The precedents were taken not merely from the United Kingdom, but also from Northern Ireland, Eire, Australia, South Africa, India and Burma. It is an adaptation of the British system of government … but the adaptation was done in Ceylon."

[6] The Donoughmore Commissioners had considered the creation of an upper house with a view to ensuring representation to minority communities but rejected the idea saying it would be a potential source of friction. They thought it would be impracticable to invest the upper house with powers over measures dealing with finance and taxation, and they doubted whether an upper house without those powers would placate the minority communities, whose chief concerns related to financial favouritism or discrimination. See *Donoughmore Commission Report*, at p 40. Such reservations did not deter the Soulbury Commissioners who were in favour of having a second chamber to act as a check against hasty and ill-considered legislation to which a unicameral legislature would be prone; it would be easier to provide representation to minority communities in a second chamber. See *The Soulbury Commission Report*, Ch.XIV.

[7] *The Soulbury Constitution*, section 46.

[8] Section 45 provided: 'The executive power shall continue vested in Her Majesty and may be exercised on her behalf by the Governor General in accordance with the provisions of this Order in Council and of any other law for the time being in force.'

[9] See section 4(2): "All powers, authorities and functions vested in Her Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty".

[10] See A.J. Wilson, 'The Governor-General and the two dissolutions of parliament' (1960) The Ceylon Journal of Historical and Social Studies 187.

power to make laws was defined in the widest possible terms,[11] but it was also limited[12] to the extent that it could not enact legislation that was discriminatory against minorities.[13]

The Soulbury Constitution met with opposition right from its inception. Critics of the Soulbury Constitution made jibes at it, calling it a 'fake', and referred to its alien origins.[14] Many including Colvin R. de Silva were critical of the Soulbury Constitution from the time of its introduction, in particular of its entrenchment clause (Section 29) and the power of the courts to review legislation. They had advanced the idea that the Soulbury Constitution was an alien model foisted on the people of Sri Lanka by the British, and that once elected to power, they would devise a constitution that would be 'home grown' or

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[11] "Section 29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island." The phrase 'peace, order and good government' was adopted from the constitutions of other dominions. See Jennings ***The Constitution of Ceylon*** (OUP): p.20; ibid.: p.72, explained the phrase as the lawyer's way of stating complete or absolute power but it had to be read subject to the limitations in the Order in Council of 1946.

[12] Section 29 (2) provided as follows:

"S 29 (2) 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; or

(d) …"

[13] Section 29 was taken from section 8 of the Minister's Draft which was inserted at D.S. Senanayake's initiative as a gesture of 'generosity and re-assurance to the minorities'. See K.M. de Silva, '*Sri Lanka in 1948*' (1974) ***The Ceylon Journal of Historical and Social Studies*** 2. See also Jennings (1951): p.80 to the effect that s 29 was based on the Minister's draft; To K.M. de Silva, '*The Constitution and Constitutional Reform since 1948*' in K.M. de Silva (Ed.) (1977) ***Sri Lanka: A Survey*** (London: Hurst): p.313 the rights of the minorities did not appear to have received adequate protection but the time of the transfer of power the constitution guarantees against discriminatory legislation seemed sufficiently reassuring to the minorities.

[14] See de Silva (1977): pp.312, 313; See also K.M. de Silva, **'***A Tale of Three Constitutions*' in (1977) ***The Ceylon Journal of Historical and Social Studies, New Series*** VII, 1 at 6.

autochthonous.[15] The idea of an autochthonous constitution[16] took shape seemingly as a reaction to certain statements made by the Privy Council doubting the competence of the then Ceylon Parliament to alter the provision in the Soulbury Constitution giving minorities their protection, and Parliament's authority to replace the British Crown as the source of legal authority.[17] In reality, the comments made by the Privy Council on Section 29 of the constitution and its effect on Parliament's ability to legislate without hindrance merely gave impetus to its critics to put their long desired programme of constitutional change into effect.

The Privy Council on the Constitution

In *Ranasinghe v. The Bribery Commissioner*, Lord Pearce said, *obiter*, that,

> "… religious and racial matters shall not be the subject of legislation. They represent the solemn balance between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution."[18]

The principal issues that arose in *Ranasinghe* concerned the extent to which the plenary power of the legislature was compatible with

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[15] The idea of establishing a constituent assembly to draft a new constitution was first put forward by the LSSP. The SLFP and the UNP were also in favour of revising the Constitution. During the Prime Ministership of SWRD Bandaranaike, a Joint Parliamentary Select Committee was set up to prepare the basis of a new constitution. See K.M. de Silva, **'***Constitution and Constitutional Reform Since 1948*' in de Silva (1977): p.312 et seq.

[16] On autochthony see K.C.Wheare (1960) ***The Constitutional Structure of the Commonwealth*** (OUP): Ch.4.

[17] See J. Wickremaratne, '*The 1972 Constitution in Retrospect*' in T. Jayatilleke (Ed.) (2010) ***Sirimavo*** (Colombo: Bandaranaike Museum Committee)**.**

[18] *The Bribery Commissioner v Ranasinghe* (1964) 66 NLR 73, 78. See also *Ibralebbe v The Queen* (1963) 65 NLR 433, 450 per Viscount Radcliffe: "By section 29 there is conferred upon Parliament power to make laws for the peace, order and good government of Ceylon subject to certain protective reservations for the exercise of religion and the freedom of religious bodies". Geoffrey Marshall identified the judgement in *Ranasinghe* as "one of a handful of decisions which helped to make clearer what was left obscure in Dicey's exposition of Parliamentary Sovereignty." See G. Marshall, '*Parliamentary Sovereignty: A Recent Development*' (1966-67) ***McGill LJ*** 12, 523.

the 'manner and form' prescription imposed on the exercise of such power. The Supreme Court quashed the finding of guilt for bribery made by a tribunal because the legislation under which the appointment to the tribunal had been made was inconsistent with the constitution. The state's position was that even if such inconsistency existed, Parliament as the sovereign body must be held to have amended the constitution to the extent of such inconsistency. Lord Pearce stated that the English rule that the courts may not look behind the Speaker's certificate applied to a situation where there was no instrument prescribing the law-making powers and the manner in which they were to be exercised. Lord Pearce followed the view expressed by the Board in *Trethowan*[19] that "where a legislative power is given subject to certain manner and form that power does not exist unless and until the manner and form is complied with."[20]

Having regarded a 'manner and form' restriction to the legislature's power to make laws as not affecting its sovereignty, Lord Pearce went further and declared *obiter* that the restrictions in Section 29 (2) of the constitution as laying down "matters which shall not be the subject of legislation". Lord Pearce's *dictum* was construed as implying that the limitations envisaged by Section 29 (2) were not merely procedural but also substantive in character, which in effect meant that what Parliament could do was subject to the limitations spelt out in Section 29 (2). Following *Ranasinghe*, C.F Amerasinghe[21] read the words in Section 29 (namely "in the exercise of its powers under this section") as implying that Parliament under the Soulbury Constitution had to legislate in the capacity set out in Section 29 as it stood, and that Parliament had no power to give itself a capacity that was not intended by that section.

Geoffrey Marshall[22] disagreed with Amerasinghe's view, arguing that the powers of Parliament under the particular section included the power to amend by the appropriate majority all the provisions in the constitution. If it was intended that this power

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[19] *AG for NSW v Trethowan* [1964] 2 All ER 785.
[20] ibid.: p.1312.
[21] C.F. Amerasinghe, '*The Legal Sovereignty of the Ceylon Parliament*' [1966] ***Public Law*** 65, 74.
[22] See Marshall (1966-67).

did not include the power to amend Section 29 (2), then it could have been made obvious by the addition of the words "except for the matters included in s 29(2)".

H.L de Silva expressed a view similar to that adumbrated by Marshall. In de Silva's opinion, the absence of a clause in Section 29 (4) to save Section 29 (2) implied that the words in the former provision that Parliament "may amend or repeal any of the provisions of this Order" meant just what they said. In any event, Parliament would have been free to amend Section 29 (2) or pass legislation repugnant to it by first exercising its powers of amendment to Section 29 (1) by the deletion of the opening words "Subject to the provisions of this order".[23]

Although Section 29 (2) did not impose an absolute impediment on Parliament's legislative power,[24] the 'opportunistic elites' regarded it as standing in the way of 'naked majoritarianism' and advanced the need for change. People with different political motivations came together to promote a political executive with unimpeded power to implement their respective agendas.[25] The justification for a legal revolution was based on erroneous legal premises, both with regard to the interpretation of the Privy Council decisions and the legitimacy of the electoral mandate[26]

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[23] See H.L. de Silva, '*Some Reflections on the Interpretation of the Constitution of Ceylon and its amendment*' (1970) ***The Journal of Ceylon Law*** 233, 250-251.

[24] See on this A. Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How Procedural Entrenchment led to Constitutional Revolution*' in A. Welikala (Ed.) (2013) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives).

[25] See on this Welikala (2013). See also The Constitutional Court decision on the *Sri Lanka Press Council Bill* (1973) ***Decisions of the Constitutional Court of Sri Lanka*** Vol.1, p.4 in which the Court echoed some of these views: 'Although we saw the sunset of foreign domination nevertheless its twilight remained, and although we were independent we still continued to owe allegiance to a foreign sovereign… We were also not sure whether our legislature was supreme, because time and again the legislature was told that it had not the right to enact certain laws'. They continued: 'Experience therefore showed that in many fields of governmental activity the Constitution itself was an obstacle to solving the problems of the people"'

[26] The Constitution produced by the Constituent Assembly was based on the proposals of the ruling party, the ULF, which had at its disposal an overall majority in Parliament. As was pointed out by S. Nadesan Q.C., a mandate for

for change, but that did not stop Colvin R de Silva and others desiring constitutional change to seize upon the pronouncements of the Privy Council to embark on a course leading to constitutional change.

The critics of the Soulbury Constitution blurred the distinction between external and internal sovereignty. As was observed by Neelan Tiruchelvam, the decision in *Ranasinghe* was interpreted as a restriction on the external sovereignty of the state by those desiring to change the constitution.[27] The provision in question was incorporated to protect the minorities, but politicians were affronted that the Privy Council, seated many miles away, should dictate to the Ceylon Parliament what it could and could not do. Their response to *Ranasinghe* also meant that the " idea of restrictions on the legislative sovereignty of parliament based on the sovereignty of people themselves, through a concept of individual human rights, was not conceivable to those imbued in the Westminster tradition."[28]

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changing the constitution had not been sought by the other parties; therefore, the mandate would have been given only for the MPs elected on the UF manifesto. The House consisted also of six members who were appointed subsequent to the elections and no mandate was given to the appointed members to engage in the task of constitution making. Nevertheless, the opposition was too weak to oppose and despite the strong reservations it had about the necessity for change and the process enacted at Navarangahala, it participated tamely in that project. Public support for the process was lukewarm, even if it was supposedly undertaken in the name of the people.
When the draft basic resolutions were published, Dr Colvin R de Silva had stated that the resolutions were those of the Government and had been approved by the Cabinet of Ministers, and that they were in accordance with the United Front Manifesto and any amendment must not be contrary to its manifesto. This approach to drafting the constitution was criticised as one that made it in effect a party matter, as it meant that members of the United Front, while being members of the Assembly, would function as members of the party. In the event, it would have been unrealistic to have expected those outside the party to rise above their party affiliations. See S. Nadesan (1971) ***Some Comments on the Constituent Assembly and the Draft Basic Resolutions*** (Colombo: Lake House): p.8.

[27] See N. Tiruchelvam, '*Constitutional Reform: Principal Themes*' in C.Amaratunga (Ed.) (2007) ***Ideas for Constitutional Reform*** (Colombo: IBH Publisher).

[28] ibid.: p.20.

The First Republican Constitution

H.L. de Silva had suggested that, "a future Constitution of Ceylon which is not the lineal descendant of the 1946 Order need not contain the constitutional limitations of section 29(2)."[29] The 1972 Constitution was no lineal descendant of the Soulbury Constitution. As Colvin R. de Silva, the architect of the First Republican Constitution, said:

> "This is not a matter of tinkering with some Constitution. Nor is it a matter of constructing a new superstructure on an existing foundation. We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy."[30]

The end result was a constitutional structure with a powerful executive located in the legislature. Its dominant feature was the 'National State Assembly', which combined in itself all three aspects of governmental power. The powers of government were fused in the hands of the National State Assembly as the supreme instrument of state power.[31] In addition to exercising the legislative power of the people, the National State Assembly exercised executive power "through the President and the Cabinet of Ministers".[32] The Prime Minister appointed the President who, as the nominal head of the executive, held a ceremonial office in which he was required to act on the advice of the Prime Minister.[33] Henceforth, the courts would only interpret the laws. The Supreme Court's power to pass judgement on the

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[29] de Silva (1970).

[30] Cited by the Constitutional Court, *Sri Lanka Press Council Bill*, Decisions of the Constitutional Court of Sri Lanka, (1973) Vol.1 at p.5. See also *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221 SC; *Visvalingam v Liyanage* (1983) 2 Sri L R 311, 351 SC per Soza J: "The first Republican Constitution was a truly autochthonous Constitution rooted entirely in Sri Lanka's own native soil. In the enactment of the Constitution, the legal and constitutional link with the past was completely severed though Westminster traditions are still being drawn on as background material. The 1972 Constitution effected a break in legal continuity, a legal revolution as it has been called."

[31] *1972 Constitution*, section 5: "The National State Assembly is the supreme instrument of State power of the Republic."

[32] *1972 Constitution*, section 5(b).

[33] *1972 Constitution*, section 27 (1).

validity of legislation was replaced with a form of pre-legislative scrutiny: a 'Constitutional Court' was established with a limited power to review bills before they were passed by Parliament.

Under the first republican constitution the legislature provided the cabinet of ministers and the cabinet continued in office so long as it commanded the legislature's confidence. The Prime Minister determined the composition of the cabinet of ministers at any given time and assigned to ministers their subjects and functions.[34] As before, the cabinet of ministers was charged with the direction and control of the government and was collectively responsible and answerable to the National State Assembly.[35] The Prime Minister was *primus inter pares* and the real head of the government.

The Senate and the provision barring discriminatory legislation, both of which were intended to safeguard minorities, were not retained in the new constitution.[36] Critics of the Senate[37] pointed out that it had failed to satisfactorily perform its function of scrutinising bills in a non-partisan manner, that it acted as a brake to progressive legislation, and that Senators tended to serve party interests. The government in power was able to command the support of the majority in the Senate by virtue of the fact that they were appointed on the recommendation of the Prime Minister or selections through the House of Representatives. The desire to command a government majority in the Senate led to Senators being appointed principally on the basis of their affiliation to a particular party.

Despite its shortcomings, the idea of having a second chamber that would examine and revise legislation in an atmosphere free of

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[34] *1972 Constitution*, section 94(1).
[35] *1972 Constitution*, section 92 (1).
[36] The Senate was abolished by the *Ceylon (Constitution and Independence) Amendment Act, No. 36 of 1971* without any specific reference being made in the Act to abolish it. The Soulbury Commission made a case in favour of the establishment of a second chamber which would perform the following among other functions: (i) to provide adequate representation to minority communities (ii) to act a check against hasty legislation by the Lower House (iii) to facilitate controversial or inflammatory issues to be dealt with in a cooler environment.
[37] L.J.M. Cooray (1971) ***Reflections on the Constitution and Constituent Assembly*** (Colombo: Hansa) has recapitulated the arguments that were advanced at the time in favour of abolition.

party politics was a salutary one. Some important legislative measures had originated in the Senate, and important events and measures were dispassionately debated by that body.[38] J.A.L. Cooray made a case for reforming the Senate before a decision was taken to amputate it from Parliament.[39] The framers of the 1972 Constitution took a bludgeon to it instead of the scalpel. No consideration was given to reforming the Senate.

Cynics may argue that the real intention of the government in abolishing it was to remove what it considered was an inconvenient irritant that could have become an obstacle to the framing of a new constitution. The Senate did not endear itself to the government at the time by rejecting the controversial 'Ellawala Amendment.' The government had introduced the constitutional amendment to ensure that Nanda Ellawala, a government MP who had been convicted for a crime, would not lose his seat in Parliament, but the upper house rejected the Bill. It was passed eventually but its rejection sounded the death knell of the Senate.[40] If the Senate had remained, in all probability it would have debated the draft resolutions and made its own proposals quite different to those put forward by the government, and perhaps even opposed the latter. The drafters of the new constitution could not wait until the new constitution came into force to abolish the Senate.

The indefatigable C. Suntharalingam applied to the Supreme Court for an injunction to restrain the Clerk of the House from presenting the Bill for the Governor General's assent, but the court rejected it on the ground that a *prima facie* case had not been made out. Three Senators brought separate actions in the District Court against the Speaker of the House for a declaration that the Bill was *ultra vires* the constitution, and for an injunction restraining the Speaker from presenting the Bill to the Governor General for his assent. The District Judge refused the interim

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[38] For example, the *Muslim Mosques and Charitable Trusts Act* began its life in the Senate.
[39] J.A.L. Cooray, '*Revision of the Constitution*', Sir James Peiris Centenary Lecture (1957): pp.9-12.
[40] See N. Jayawickrama, '*Colvin and Constitution-Making - A Postscript*' ***The Sunday Island***, 15th July 2007.

injunction but, accepting the plaint, issued notice on the Speaker, who did not answer the summons.[41]

The Bill for the Senate's abolition was passed by the House of Representatives in contravention of the provisions in the constitution. Under the Soulbury Constitution, Parliament was defined to include the House of Representatives, the Senate, and the Governor General. For a Bill to have become law all three constituent elements of Parliament had to be involved for its approval. Even if both houses of Parliament had approved a Bill it would become law only upon the assent given to it by the Governor General. The Bill was never presented to the Senate for its approval and the House of Representatives acting together with the Governor General reconstituted and redefined Parliament in a manner contrary to what was contemplated by the constitution. The Senate was not allowed to take up the Bill to debate and decide on the Bill, as was required by Section 34 of the Soulbury Constitution. [42]

In the final analysis, despite the high-sounding rhetoric about creating a home-grown constitution, the Soulbury Constitution the 1972 Constitution was to a large extent an imitation of the British system as embodied in the Soulbury Constitution, to which

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[41] L.J.M. Cooray, '*Amputation of a Limb of Parliament*' (1971) ***The Journal of Ceylon Law*** 253, 263.

[42] C.F. Amerasinghe had expressed a view to this effect in '*The Legal Sovereignty of the Ceylon Parliament*' (1966) ***Public Law*** 65 in connection with the decision of *Bribery Commissioner v. Ranasinghe*. Cooray (1971), argued the case for the Act's validity and expressed the view that because the House could in certain circumstances pass a Bill into law only without the concurrence of the Senate, the Act merely carried this a step further and provided that in all circumstances legislation will be passed by the house with its concurrence. In his view, the Senate was not even an essential or integral part of Parliament. He argued further that s 29(4) did not require an amendment to the Constitution to be approved by the Senate. In his view L.J.M. Cooray all that s 34 required was for the Bill to be sent to the senate and not that it need not have been taken up for debate or passed by the Senate. For this view he relies on Jennings who had contemplated the possibility that a Bill may be sent for Royal Assent if the Bill were to "lie on the table" for the period specified by the Order in council. However, Cooray seems to have read too much into Jennings words. The point of the matter was that the Senate was not allowed to vote on the Bill. In any event, these views were never tested out in a court of law and not much interest appears to have been shown by constitutional scholars to discuss the issue or test its constitutionality in the Courts after its enactment.

its architect had read its last rites, declaring that it had been thrown in to 'the dustbin of history'.[43] It adopted a parliamentary system modelled on Westminster *sans* a second chamber, elected on the basis of the first-past-the-post system, and a nominal figurehead of an executive. Real executive power lay in the hands of the Prime Minister as head of the Cabinet of Ministers situated in Parliament. The Supreme Court could no longer scrutinise parliamentary legislation for constitutionality. In fact, the 1972 Constitution resembled the Soulbury Constitution "in little more than a formal way."[44]

The first act of the Parliament of the new republic was to give its members an extension beyond the five year term for which they were elected,[45] a move that led to the erosion of its credibility as an institution and loss of the remaining goodwill from the rest of the opposition, effectively rendering constitution-making a party affair, with the UNP voting against the adoption of the new constitution.[46]

The Second Republican Constitution

Even before the 1978 Constitution was enacted, by the Second Amendment, [47] changes were made hastily to the 1972

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[43] See C.R de Silva, '*The right to rule till 1977*' ***Ceylon Daily News***, 22nd May 1974. As a matter of fact, parts of the Soulbury Constitution managed to survive, for in *Dahanayake v de Silva* the Supreme Court held that s 75 of the *1972 Constitution* kept alive s 13 (3) (c) of the *Soulbury Constitution* which provided that a person shall be disqualified from being elected as a member of the NSA by reason of a contract between him and the State.

[44] See de Silva (1977) supra n 2 at p.9 for the view that the new constitution resembled the *Soulbury Constitution* and, through it, the draft constitution of 1944. See also A.J.Wilson, '*The Future of Parliamentary Government*' (1974) **The *Ceylon Journal of Historical and Social Studies*** 40, 42-43.

[45] See C.R de Silva, '*The right to rule till 1977*' ***Ceylon Daily News***, 22nd May 1974 justifying the extension.

[46] The NSA would carry on for a term of five years from the time the new constitution was adopted.

[47] *The Second Amendment to the 1972 Constitution*. The Second Amendment Bill was introduced as a measure urgent in the national interest and hurried through the NSA. The Bill was endorsed by the Constitutional Court as in conformity with the then constitution and most of the MPs became aware of its contents only after it was presented to the NSA. The Bill was passed by the NSA

Constitution for the introduction of an elected President who would be separated from Parliament and who held office for a fixed term.[48]

The Second Amendment abandoned the notion of the legislature as the supreme instrument of state power and made the executive and the legislature coordinate branches of government.[49] The President was not only the head of state but was also the head of government. The changes introduced by the Second Amendment [50] were transposed into the 1978 Constitution together with other important changes. The President was no longer required to 'act on the advice of the Prime Minister.'

A hybrid system

Unlike its predecessor, the 1978 Constitution did not engineer a legal revolution,[51] but the system of government that it introduced

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with the required majority but was brought into operation more than three months after.

[48] See *1972 Constitution*, section 26 as amended by section 9 of the Second Amendment.

[49] The sovereignty of the people would be exercised henceforth by the NSA and a President to be elected by the People, and both the NSA and the President were declared as "supreme instruments of State power", and executive power was exercised by the President.

[50] The Select Committee on the Constitution heard evidence from the public on reforming the Constitution after the changes introduced by the Second Amendment had become a fait accompli.

[51] In *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221 Colvin R de Silva argued that the changes effected by the *1978 Constitution* were so radical that there was in fact a revolution and that the repeal of the *1972 Constitution* terminated the legal order it embodied and the new Constitution began a new legal order. Justice Thamotheram, speaking for the majority, rejected this argument because, if accepted, it would cause confusion in the legal sphere. He held that the legal order under any Constitution does not change so long as the Constitution is changed or replaced by a new Constitution in accordance with the provisions of the old Constitution. It is only when the new Constitution is brought into operation in a way not provided for in the old Constitution that there occurs a break in all the norms under the old basic nor. According to Kelsen the 'validity of legal norms may be limited in time, and the end as well as the beginning of the validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.'

represented a radical departure from the Westminster model of parliamentary government that obtained under the two previous constitutions.

A principal feature of the parliamentary system is that the executive is located within the legislature and is dependant on, and answerable to, the legislature. In the presidential system, the executive is directly elected for a specified term and is not dependant on the legislature to remain in office for the duration of the term. The Second Republican Constitution followed the example of the French constitution, which has a hybrid system, with an executive combining features of the British and American systems.

The French political scientist Maurice Duverger introduced into the political discourse the idea of semi-presidentialism as a system distinct from the 'purely' parliamentary and presidential systems.[52] According to Duverger, the defining features of the semi-presidential political regime are:

- The head of state is directly elected by the people;
- He possessed considerable powers; and
- The government consisted of a prime minister and a cabinet of ministers who can be voted out by parliament.[53]

A semi-presidential system is a hybrid system, in which features borrowed from the presidential and parliamentary systems of government are forged together. Duverger viewed the constitution of the Fourth Republic as an example of the semi-presidentialism system. Duverger identified considerable differences within this model of government.[54]

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[52] See M. Duverger, '*A New Political System Model: Semi-Presidential Government*' in (1980) ***European Journal of Political Research*** 165-187; M. Duverger, '*A new Political system model: semi- presidential government*' in A. Lijphart (Ed.) (1992) ***Parliamentary versus Presidential Government*** (OUP).
[53] ibid. Duverger's definition of semi-presidentialism was criticised and also refined by various scholars, prominent among them being G. Sartori (1997) ***Comparative Constitutional Engineering*** (NY University): p.131.
[54] In a study Duverger undertook of seven countries having this system he identified three of them (Austria, Ireland and Iceland) as having figurehead

A defining feature of a semi-presidential system is that the President is independent of Parliament, but he is not entitled to govern alone, and therefore his will must be conveyed through Parliament. The executive headed by a prime minister will continue in office so long as it commands the legislature's confidence.

The semi-presidential systems or something akin to it were introduced mostly in countries that were coming out of authoritarian systems as the example of Latin American as well as Eastern and Central European countries would suggest.[55] The latter countries chose the semi-presidential system with a strong executive to manage the transition from authoritarian to democratic regimes and to ensure political stability on the assumption that only a powerful president would be able to unite the nation on divisive political issues.

In the Weimar Constitution of 1919-1939, drafted at the end of the First World War when there was domestic revolt and foreign threat, it was considered necessary to have a strong executive reflecting a mixture of the then French Republican and American constitutions. The authors of the Weimar Constitution intended to have a president who, as the people's representative, would intervene to prevent parliamentary absolutism and facilitate government decision-making.[56]

The Second Republican Constitution may be a hybrid model but, arguably, it was not made exactly in the semi-presidential mould as described by Duverger. Given a dominant executive and a Parliament subordinated to the President, it exhibits features which are more presidential than parliamentary. A.J. Wilson described the Second Republican Constitution as a Gaullist constitution.[57] According to Wilson, the essential criteria of this

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presidents, one (France) as having an all-powerful president and three (Weimar Republic, Finland and Portugal) as having a balanced presidency and government.

[55] See Y. Shen, '*The Anomaly of the Weimar Republic's Semi-Presidential Constitution*' (2009) ***Journal of Politics and Law*** 35.

[56] On the Weimar Constitution, see Skach (2005) ***Borrowing Constitutional Designs*** (Princeton)

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

model are: (i) the adoption of a powerful and independent executive, (ii) the continuation of parliament in an attenuated form and in a subordinate capacity, and (iii) there must be citizen participation with the chief executive engaging in a dialogue with them through the instrument of a referendum. In Wilson's view, the 1978 Constitution conformed to this model.

Even though the Gaullist constitution was described by Duverger as a semi-presidential constitution, the Wilson's description of the Sri Lankan constitution as a Gaullist system does not make the Sri Lankan version semi-presidential as conceptualised by Duverger. The Duverger model, and indeed the French constitution, provides for an executive headed by a Prime Minister who is the head of government and is answerable to Parliament. The rejection by the Sri Lankan Parliament of the statement of government policy or a vote of no confidence in the government would result only in a change in the players without a change in the team itself. The cabinet of ministers shall 'stand dissolved' and the President shall appoint a new Prime Minister and Cabinet Ministers but the President himself would remain in power. It did not matter that the cabinet was chosen by the President and implemented his policies. Even in the reconstituted cabinet, many of the same ministers may appear.

Undoubtedly, the Second Republican Constitution gave birth to a powerful and independent executive, and Parliament was made subordinate to the executive in an attenuated form, but the participation of citizens with the chief executive through a referendum is a fallacy. Governments have shown a reluctance to engage the people in a dialogue through the mechanism of a referendum in fear that the people might reject measures presented for their approval. The referendum was actually employed for the first time to extend the life of the first Parliament and to facilitate the ruling party to continue in power without going to the polls. It was conducted in an atmosphere dominated by violence[58] and justified as an exercise in democracy. It could

[58] See Priya Samarakone (Manel Fonseka), Sri Lanka's First Referendum: Its Conduct and Results, Bergen: CHR. Michelsen Institute: Programme of Human Rights Studies (Publication No. 6), 1988.

hardly have been described as an exercise in dialogue between the citizens and the chief executive.

The requirement of a referendum to enact certain measures into law has, on occasion, operated to prevent Parliament from over-reaching its powers as happened, for example, in the case of the Third Amendment Bill (or the 'Pilapitiya Amendment') the object of which was to seat a member of parliament who had been unseated following an election petition while a by-election was pending. The Supreme Court's decision that the Bill required a referendum forced the government to abandon the Bill.

The requirement that certain measures approved by Parliament to amend the constitution must be approved by the people at a referendum has enhanced the influence of the Supreme Court, which has the power to decide on whether a referendum would be required in respect of the measure in respect of which its opinion is sought. It has sometimes led the court on a collision course with the executive, especially when a decision unfavourable to the government has been given by the court.

The Rationale for the French Model

There is no doubt that the French Constitution served as a model for the drafting of the Second Republican Constitution. The framers of the constitution had before them the constitution of the Fifth French Republic, which provided for an elected executive president. The creation of a strong executive directly elected by the people for a fixed term was promoted as necessary to achieve stability to government and as a pre-requisite for economic growth.

J.R. Jayewardene, the principal architect of the constitution, first mooted the idea of an executive modelled on the French Constitution. To him, the Westminster model of choosing the executive from parliament produced unstable governments when it lost the support of the majority in parliament. Between 1947 and 1977, there had been 8 elections averaging one every three and a half years. There was constant competition for leadership of the party because it was the leader of the party who was

appointed as head of the executive.[59] The solution that he suggested was to have "a strong executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature."[60] To him, an executive unafraid to take unpopular measures was a necessary requirement for a developing country.

A similar rationale was advanced for the introduction of the French Constitution now in force. In the Third French Republic, the President, who was elected by the French Parliament for a seven-year term, played only a symbolic role. His main function was to propose a Prime Minister for election by the National Assembly before forming a Cabinet. The French President was a titular head of the executive, much like the British monarch. It was said that the fundamental premise of the French Constitution was for the President to hunt rabbits and not to govern.[61] Given the state of French politics, French cabinets did not last more than ten months on an average; from 1875 to 1925 there were more than fifty cabinets, largely due to the fact that the cabinets were coalitions, producing executive instability.[62]

The Fourth French Republic failed to bring about the desired stability that it was intended to promote. Under that constitution, the President designated the Prime Minister, who submitted to Parliament the cabinet that he proposed to form and also the policy that he would follow. The ministers were collectively responsible to Parliament and a no-confidence motion passed by Parliament would have resulted in their resignation.

The Fourth Republic was ill fated from its very beginning. It suffered from a lack of political consensus, and the presence of anti-democratic and anti-republican forces undermined effective government. Governments had short lives[63] and Prime Ministers

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[59] See J.R. Jayewardene (1996) ***Relived Memories*** (Navrang): p.15.
[60] ibid.: p.20.
[61] See J. Bell (1992) ***French Constitutional Law*** (OUP): p.14.
[62] A. Appadorai (1952) ***The Substance of Politics*** (OUP): p.296.
[63] Between 1946 and 1958, twenty governments were formed. Of the fifteen prime ministers who led them, only two survived more than a year. See E.N. Suleiman, '*Presidentialism and Political Stability in France*' in J. Linz & Valenzuela (Ed.) (1994) ***The Failure of Presidential Democracy***, Vol.I (John Hopkins): p.141.

were unable to embark on unpopular reforms. The unrest following the loss of Algeria and decolonisation speeded up the demise of the Fourth Republic. The system experienced considerable instability, made worse by the electoral system that made coalitions inevitable, and governing difficult. Thus, a major factor that led to the introduction of the hybrid system into the Fifth Republican Constitution was the distrust of political parties in France.[64]

De Gaulle's prescription to overcome parliamentary paralysis was to change the system of government and create a strong executive directly elected by the citizens[65] with powers to govern in consultation with a Prime Minister appointed by the President.[66] The President appointed the Prime Minister and on the latter's recommendation he appointed and dismissed ministers.

The Real Problem

The idea that the parliamentary system is inherently unstable is not a universal truth. The British and Indian parliamentary systems have operated without anyone calling them unstable, and the presidential system did not always produce stable governments.

The conditions that prevailed in Sri Lanka before the adoption of the 1978 Constitution were not comparable to those that obtained in the Third and Fourth French Republics. In fact, the Soulbury Constitution had worked well for over twenty-five years and the system was able to absorb the shocks produced by occasional disturbances and challenges.[67] Furthermore, radical social

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[64] See J. Linz, '*Presidential or Parliamentary Democracy*' in Linz & Valenzuela (1994): p.50.
[65] The president was initially elected by an electoral college, but in 1962 a change proposed by De Gaulle that the president be directly elected by the citizens was approved by a referendum.
[66] See Bell (1992): p.10-11.
[67] See A.J. Wilson, '*Politics and Political Development since 1948*' in K.M. de Silva (Ed.) (1977) ***Sri Lanka- A Survey*** (Colombo: Lake House): p.310.

changes were brought about within its framework.[68] The government that was elected in 1970 had an overwhelming majority in the National State Assembly and remained in power until 1977. The two elections held in 1960 were triggered by unusual circumstances.

The problem with the older Sri Lankan constitutional systems was not one of instability but of majoritarian excess[69] and inadequate protection of civil rights.[70] The absence of a legal barrier afforded by a fully enforceable bill of rights[71] in the Soulbury regime allowed Parliament to pass controversial legislation depriving a section of the population of their citizenship and making Sinhala the official language to enter the statute books.[72]

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[68] See L.J.M. Cooray, '*Constitutional Government in Ceylon*' ***Ceylon Daily News***, 5th September 1970. In the words of Dr Cooray 'the post 1956 revolution took place without the legal barriers which it would have had to face if a Bill of Fundamental Rights was in the constitution'.

[69] In a review of a felicitation volume on Mrs Bandaranaike, Asanga Welikala commented on the statist authoritarianism and a sectarian form of majoritarianism of her governments. He wrote: "Socialist and nationalist discourses, then enjoying their heyday in the states and societies of the emerging Third World and Non-Aligned Movement, were no doubt the essential mood music of her time at the top of Sri Lankan politics. But it seems too often to have been the case that these were eagerly embraced so as to lend a carapace of legitimacy to what were in reality parish-pump calculations of electoral advantage; and on the same impulse but with more deplorable consequences, the conscious abnegation of core democratic values including the freedom of the press, the liberty of the individual, the independence of the judiciary and civil service, and the protection of minorities." See A. Welikala, '*Shaping a post-colonial state and its constitutional evolution*' ***The Sunday Times***, 13th March 2011.

[70] See e.g. Civil Rights Movement, '*Working Paper on the Proposed Second Amendment to the Constitution*', 2nd October 1977.

[71] The Board of Ministers had wanted a bill of rights incorporated into the constitution but apparently Jennings, who held views which were antithetical to an enforceable bill of rights, opposed it. See J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Lake House): p.611; K.M. de Silva (1988) ***J.R. Jayewardene of Sri Lanka***, Vol.I (Anthony Blond): p.169.

[72] Colvin R de Silva himself queried rhetorically: '… [w]hat was the marvellous protection that s 29 purported to afford the minorities?' See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986**.** It must be noted that G.G. Ponnambalam and the Communist Party regarded the protection offered by s 29(2) as inadequate and

The effectiveness of Section 29 in the Soulbury Constitution came under scrutiny in a decision challenging the constitutionality of legislation which affected the population of Indian origin who were living largely in the plantation areas. They were represented in Parliament by seven members of the Ceylon Indian Congress, who had voted with the opposition against the D.S. Senanayake government. The Senanayake government reacted by enacting the Citizenship Act, No. 18 of 1948, which made citizenship depend on birth, thereby making a substantial segment of the people of Indian origin residing in the plantation areas stateless. The Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 was enacted to make the franchise dependent on citizenship. It was rather obvious that the objective of the legislation was to disenfranchise a segment of the population who had elected the seven members.

In *Mudanayake v Sivagnanasundaram*,[73] the Supreme Court had to decide whether Section 3(1)(a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, was void as offending against Section 29 of the constitution. Counsel S. Nadesan wished to introduce extraneous evidence to show that Section 29 was intended to protect the interests of minority communities.[74] The

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sought better protection for the minorities through a bill of rights. See B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.201.

[73] (1952) 53 NLR 25. On appeal, the Privy Council upheld the decision of the Supreme Court. See *Kodakan Pillai v Mudanayake* (1953) 54 NLR 433 PC. In that case, a person of Indian origin made a claim to have his name inserted in the register of electors alleging that he possessed the requisite residential qualification, that he was domiciled in Ceylon and that he was qualified to be an elector under the Ceylon (Parliamentary Elections) Order in Council, 1946. The Assistant Registering Officer who inquired into his claim decided that he was not entitled to have his name inserted in the register, as he was not a citizen of Ceylon within the meaning of the *Citizenship Act, No. 18 of 1948*. The revising officer, on appeal, decided that the *Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949*, which *prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship* Act, No. 18 of 1948, were invalid as offending against s. 29 (2) of the *Soulbury Constitution*. The Crown applied to the Supreme Court for certiorari to quash the decision of the revising officer alleging that he had acted in excess of his jurisdiction and had come to an erroneous decision on the law.

[74] Mr Nadesan moved to introduce the *Donoughmore Commission Report*, the *Soulbury Commission Report*, the Ministers' Memorandum, the Despatch of Sir

court refused to travel outside the language of the impugned enactments and to take evidence as to whether or not, in their ultimate effect, they are of a discriminatory character, and held that the legislation under challenge did not offend Section 29 of the constitution.

Colvin R. de Silva highlighted the chauvinism that underlined the enactment of the aforesaid legislation by the politicians of the majority community, who were not reluctant to use their voting strength against a minority. He subsequently adverted to the limited form of protection afforded by Section 29,[75] and boasted that his constitution, through the chapter on fundamental rights, offered greater protection than that given by Section 29, even though under his constitution the fundamental rights were not justiciable[76] and both Buddhism and Sinhala language were given constitutional status.

The incorporation in the 1972 Constitution of the doctrine of parliamentary supremacy without an effective system of checks and balances ensured the continuation of the politics of majoritarianism. Buddhism was conferred preferential status

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Herbert Stanley (Sessional Paper 34) (1929), and the Royal Instructions issued in consequence of the *Donoughmore Constitution Report*.

[75] C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986.

[76] The case of *Ariyapala Gunaratne v People's Bank* (1986) 1 SLR 338, argued by Colvin R de Silva many years after the *1972 Constitution* had been abrogated, offers an interesting exception. It involved the interpretation of s 18(1) (f) of the 1972 constitution. The plaintiff in that case was required to resign from membership of the Trade Union to which he belonged to qualify for promotion in the People's Bank, but he refused and filed a declaratory suit in the District Court. The Supreme Court held that the impugned clause in the proposed letter of employment was inconsistent with the guarantee of freedom of association contained in section 18(1) (f) of the *Constitution of 1972*. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. Fundamental rights are not infringed only by executive or administrative action but go beyond the provisions of Article 126. It is only a special and summary mode of relief in a particular kind of situation, namely violation of fundamental rights by executive or administrative action. Article 126 is therefore not exhaustive of the manner that courts could be approached for the violation of fundamental rights. The ambit of the fundamental rights has a much wider range.

requiring the state to protect and foster Buddhism.[77] Sinhala was made the official language. It has been said that the 1972 Constitution signalled the apotheosis of the Buddhist revolution set in motion in 1956 at the instigation of S.W.R.D. Bandaranaike and it became the vehicle of Sinhalese popular sovereignty.[78]

The 1978 Constitution adopted these features and perpetuated them.[79] Both the home-grown constitution and the one that was derived from it did nothing to curb the majoritarian tendencies that became a feature of politics during the period of the Soulbury Constitution.

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[77] See s 6 of the *1972 Constitution*: "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 Buddhism while assuring to all religions the rights granted by section 18 (1) (d)."
As Colvin R de Silva himself said in his Marga Institute lecture, strictly speaking, giving Buddhism the foremost place should not mean that it was the religion of the state as s 6 required the state to give equal treatment to all religions. See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.24. In reality, though, it has been made the state religion.

[78] See R. de Silva Wijeyeratne, '*Republican Constitutionalism and Sinhalese Buddhist Nationalism in Sri Lanka: Towards an Ontological Account of the Sri Lankan State*' in Welikala (2013): p.402. According to Wijeyeratne, in the process of drafting the constitution, Colvin R de Silva was outmanoeuvred by Sinhala nationalists. See id at 424. See also generally in the same volume B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.201. Back in 1955 Colvin had warned the country of the dangers of making Sinhala the only official language. See J. Wickramaratne, '*Remembering Colvin and Abolishing the Executive Presidency*' ***Colombo Telegraph***, 27th February 2014. In his Marga Institute lecture, Colvin R de Silva gave a disingenuous explanation for making Sinhala the official language when he said that at the time the *1972 constitution* was made the Sinhala Only Act and the Reasonable Use of Tamil Act were in force. Therefore, the best thing the government could do was at least to ensure that the rights already assured were incorporated in the Constitution. Therefore, both these Acts were put into the Constitution: See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.20; B. Schonthal, '*Buddhism and the Constitution*' in Welikala (2013): p.218 has suggested that Colvin would have preferred to have an entirely secular constitution but saw the religion clause as set out in s.6 as a compromise between secularism and Buddhist majoritarianism. Cynics might argue that when his desire for power came into conflict with his commitment to principle, Colvin allowed the former to prevail.

[79] See further H. Ludsin, '*Sovereignty and the 1972 Constitution*' in Welikala (2013): pp.295-299.

A Dominant Executive

Jayewardene fine-tuned the constitutional system that he had inherited and shifted the seat of executive away from the legislature, vesting in the President the powers which were hitherto exercised by the Prime Minister. The marriage of certain features of the French model with the Westminster model resulted in a divorce of Parliament from the executive. Nevertheless, the Jayewardene constitution is not a wholesale imitation but an adaptation of the presidential style of government to which some elements of the Westminster system were combined. In the process, Jayewardene craftily left out from his constitution some significant provisions from the French constitution, which would have qualified the President's powers. The re-configuration of the presidential powers created an office that is more powerful than that of the French President, thereby significantly altering the relationship between the President and Parliament.

The French President may appoint the Prime Minister and choose anyone he prefers for the post, but because the National Assembly can force the resignation of the government, the President is compelled to choose someone who will satisfy the parliamentary majority. The President's power to appoint a Prime Minster would be tempered by the need to carry the support of the Assembly for his nominee. He cannot dismiss the Prime Minister from office unless the latter presents the resignation of the government.[80] In the matter of appointment of the members of the government other than the Prime Minster and their termination, the President shall follow the recommendation of the Prime Minister.[81]

The Prime Minister is charged with directing the actions of the government, the responsibility for national defence, and the implementation of legislation. [82] The government shall be answerable to Parliament. [83] The Prime Minister, after deliberation by the Council of Ministers, may make the government's programme or possibly a general policy statement

[80] *1958 Constitution*, Article 8.
[81] ibid.
[82] *1958 Constitution*, Article 21.
[83] *1958 Constitution*, Article 20.

an issue of a vote of confidence before the National Assembly. The government is not obliged to present its programme to the National Assembly but if the programme is defeated when presented, it must resign. The National Assembly may pass a motion of censure or otherwise reject the programme or the statement of general policy of the government, and if that happens, the Prime Minister must resign.[84]

The Prime Minister may also, after consideration by the Council of Ministers, make the government's programme or a statement of general policy an issue of confidence in the legislature.[85] The Assembly's power to pass a motion of censure against a government in effect gives it the power of dismissal over the government, and acts as a check on the President's power to form a government. The President may dissolve the legislature in consultation with the Prime Minister.[86] There shall not be a further dissolution within a year of the elections following the dissolution.[87] Significantly, the French Prime Minister shall be responsible to Parliament and not to the President. A Prime Minister may stay in office so long as he and his government command the confidence of the Assembly.

Even if the French Constitution provided the design for a strong executive, the 1972 Constitution supplied its working model for the Second Republican Constitution in Sri Lanka. The dignified and the active parts of the executive power were combined in the hands of the President, without any thought to scaling down his powers and without sufficient checks on those powers.[88] One significant change that the 1978 Constitution introduced related to the position of the Prime Minister. His position is substantially different to that of the Prime Minister in France. In Sri Lanka, the

[84] *1958 Constitution*, Article 50
[85] *1958 Constitution*, Article 49.
[86] *1958 Constitution*, Article 12. The President is also required to consult the Presidents of the chambers.
[87] ibid.
[88] According to Article 30 of the SRC, 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.

President is the head of the government;[89] he is also the head of the Cabinet of Ministers.[90]

The President shall appoint as Prime Minister a Member of Parliament who in his opinion is most likely to command the confidence of Parliament.[91] The Prime Minister under the current constitution is appointed by the President and is dependant on the President to remain in office. The President shall appoint the ministers to the cabinet.[92] Unlike in the French Constitution, under which the members of the government are appointed and dismissed by the President on the recommendation of the Prime Minister, there is no obligation on the President of Sri Lanka to consult the Prime Minister in the appointment of his ministers. The President may determine the subjects and functions they are to be assigned,[93] and re-shuffle the cabinet at any time as well as change the assignment of subjects and functions of minister.[94]

At the core of the parliamentary system is the idea that the Prime Minister is answerable to Parliament and will continue to remain in power only so long as he is able to carry the parliamentary majority with him. A Prime Minister may be removed from office by the President.[95] Upon his removal, the cabinet shall stand dissolved and the President shall appoint another member as Prime Minister as well as other ministers.[96]

The President and his cabinet are answerable to Parliament,[97] but a motion of no-confidence in the Prime Minister or the cabinet of ministers will not result in the dismissal – or even the resignation – of the President. If Parliament were to reject the Statement of Government Policy or pass a vote of no-confidence in the government, it would result only in the dissolution of the cabinet of ministers, even though they are the President's nominees and

[89] Article 30 (1).
[90] Article 43 (2).
[91] Article 43 (3).
[92] Article 49 (2).
[93] Article 44 (1) (a) and (b).
[94] Article 44 (3).
[95] Article 47 (a). The French President has no formal power to dismiss the Prime Minister.
[96] Article 49 (1).
[97] Article 43 (1) and (2).

they may have been pursuing the policy formulated by the President. It would only result in the appointment of a new Prime Minister and a cabinet of ministers.

The Prime Minister and the cabinet of ministers are wholly dependent on the President for their survival and the President is under no obligation to consult the Prime Minister in the formation of the cabinet. The Prime Minister is no longer *primus inter pares*; he is just another minister wholly dispensable at the President's discretion.

Cohabitation or Conflict?

The balance of power between the President and French Parliament is said to depend on the support that the President can muster in Parliament. If the majority in Parliament and that which elected the President are the same, then it would make the President very powerful. Where the party to which the President belongs does not enjoy a majority in Parliament, then the President may face a hostile Parliament or come to terms with that majority resulting in the Prime Minister enjoying considerable influence. The French system promoted cohabitation between the President and the Assembly where they were political opponents. Where such cooperation exists, the Prime Minister's position and that of Parliament may come closer to the Westminster system. In 1986, President Mitterrand entered into an arrangement to cohabit with Jacques Chirac who he appointed as Prime Minister because the latter commanded the majority in Parliament.

In Sri Lanka, too, it was anticipated that a Sri Lankan President whose party does not enjoy the support of the majority in Parliament would similarly transform the office into Westminster mode and act on the Prime Minister's advice. According to Wilson, the framers anticipated the President to "function in the best democratic traditions" and when faced with a hostile parliamentary majority he would "either revert to the role of a

constitutional head of state or there will be a sharing of power…"[98]

The constitution was put to the test in this regard during the years 2001-2003 when President Chandrika Bandaranaike had to deal with Prime Minister Ranil Wickremesinghe who headed a United National Party led majority in Parliament. The President did not become reconciled to becoming a nominal head and allow the Prime Minister to function as the *de facto* head of government. In reality, this period was marked by conflict rather than cohabitation. The President took over three important cabinet portfolios after dismissing three of the ministers from their posts. She prorogued Parliament to pre-empt an impeachment motion against the then Chief Justice going ahead. What the President "wanted more than all else was a political showdown with the Prime Minister." Apparently, the President's show of power was perceived as a response to the Prime Minister bypassing her in key decision-making processes.[99]

In such situations, there is nothing in the constitution that expressly requires a President to act on the advice of the Prime Minister. The absence of a clear and express provision in the constitution to this effect is a "grave and inexcusable blunder" on the part of those who drafted the constitution.[100] The idea that a President would alter his status to that of a constitutional head and exercise executive powers on the advice of the Prime Minister is unrealistic.[101]

In any event, for cohabitation to work – and to work effectively – Parliament and the Prime Minister ought to be immune from

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[98] A.J. Wilson (1980) ***The Gaullist system in Asia: The Constitution of Sri Lanka (1978)*** (London: Macmillan): p.61.

[99] See G.H. Peiris, '*A Presidential Intervention*' ***The Island***, 18th November 2003.

[100] See H.L. de Silva, '*Constitutional non-provision of cohabitation: An inexcusable blunder*', Felix Dias Bandaranaike Memorial Lecture, ***Sunday Observer***, 13th July 2003.

[101] In August 1994 to November 1994 D.B. Wijetunge of the UNP was the Prime Minister with a UNP majority in Parliament while Chandrika Bandaranaike was the President. Between December 2011 and April 2004 Prime Minister Wickremasinghe and President Bandaranaike came from opposing parties and this period was marked by struggles rather than cohabitation. The President even took over three ministries from the Prime Minister's control.

dismissal by the President. In France, the President does not enjoy the same power to dismiss his Prime Minister as in Sri Lanka, in whose hands the power to summon, prorogue and dissolve Parliament is a very useful weapon to deal with a hostile Parliament.[102]

In so far as the President is concerned, it is virtually impossible to dislodge him from office. Not only is he immune from court proceedings, he is also immune from criticism in Parliament, as no discussion of the President is permissible under the Standing Orders except on a substantive motion. As will be seen below, periodic amendments to the constitution have further enhanced his position within the constitutional structure.

Immunity of the President from Suit

The President is immune from legal proceedings in respect of his official and personal acts as long as he is in office.[103] It has implications on the President's accountability to the courts and also to Parliament. The President was granted immunity on the basis that he would serve no more than two terms in office, but the ability of a President to serve more than two terms permitted by the Eighteenth Amendment in 2010 has disturbed the balance that was built into the 1978 Constitution when it was enacted and made a long serving President virtually unaccountable.

The 1972 Constitution granted immunity to the President,[104] which made sense given that he acted only on the advice of his Prime Minster, but it was retained in the 1978 Constitution to

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[102] The President may dissolve parliament acting under Article 70 (1). The only impediment to this power being exercised is the condition that 'when a General Election has been held consequent upon dissolution of Parliament by the President, he shall not dissolve Parliament until the expiration of a period of one year from the date of a general election'.

[103] *The Constitution*, Article 35.

[104] 23. '(1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.'

protect a President who not only acted on his own advice but wielded enormous power with a potential for abusing them.

In the Judges Case,[105] based on article 35 of the Constitution, the state raised a preliminary objection to the Court going into the actions of the President in relation to the appointment of the Judges. Justice Sharvananda, in his judgement, said that the actions of the executive are not above the law and certainly can be questioned in a Court of Law. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court in that he cannot be summoned to Court to justify his actions, but that is a far cry from saying that his acts cannot be examined by a court of law. Though the president is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that his acts are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.

The Supreme Court in *Mallikarachchi v Shiva Pasupathy*[106] explained that presidential immunity is essential to protect the holder of the office from being harassed by frivolous actions. Stating that the executive should be given immunity in the discharge of his functions Chief Justice Sharvananda said:

> "The process of election ensures in the holder of the office correct conduct and full sense of responsibility for discharging properly the functions entrusted to him. It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected but the smooth and efficient working of the Government of which he is the head will be impeded. That is the

[105] Visuwalingam v. Liyanage (1983) 1 SLR 203.
[106] (1985) 1 Sri L R 74 SC.

> rationale for the immunity cover afforded for the President's actions, both official and private." [107]

Chief Justice Sharvananda observed further, rather unrealistically, that persons occupying such high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office. In a judgement typical of the times, Chief Justice Sharvananda placed too much faith in the ability and willingness of the elected representatives of the people to hold the President responsible.

Impeachment of a President by Parliament is a virtually impossible prospect given the degree of control exercised by the President over Parliament.[108] The process involved in impeaching a President is so restrictive and qualified with conditions that are virtually impossible to achieve.[109] The broad interpretation given to presidential immunity would allow a President during his lifetime to avoid the consequences of the law in respect of his wrongful actions, even though they have nothing to do with his constitutional functions.

Justice Mark Fernando, in a couple of judgements, clarified the scope of this immunity. In *Karunatilleke v Dayananda Dissanayake, Commissioner of Elections*[110] ~~the Supreme Court~~ he clarified the scope of presidential immunity declaring that the immunity conferred by Article 35 is neither absolute nor perpetual.[111] Justice Fernando said:

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[107] ibid.: p.78.

[108] Koggala Wellala Bandula, (a pseudonym?) '*Unsuccessful impeachments and legal arguments*' ***Daily News***, 9th January 2013 recounts that extra-parliamentary measures, including the incarceration of parliamentarians in hotels, were taken by the President Premadasa camp to see off the impeachment motion against him.

[109] See Article 38(2) of *The Second Republican Constitution*. The process requires a notice of resolution signed by not less than two-thirds of the whole members of Parliament (or half of them if the Speaker is of the view that the allegations merit enquiry). The Supreme Court will have to inquire into and report on the allegations. The allegations must relate to the specific grounds enumerated in the Constitution.

[110] (2003) 1 Sri LR 157 per Mark Fernando J.

[111] The Court cited Art 35 (3) which excludes immunity altogether in respect of one category of acts and permitting the institution of proceedings against the

> "Immunity is a shield for the doer, not for the act … It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct."[112]

The nature of responsibility that the President owes to Parliament under the constitution is *political*.[113] The President is also responsible to act *legally* according to the constitution and the law.[114] Chief Justice Sharvananda failed to distinguish between the two types of responsibility; he resolved questions affecting the President's legal responsibility by relying on his political responsibility to Parliament.

In *Senasinghe v Karunatilleke*[115] Justice Mark Fernando touched upon the two aspects of the President's responsibility when he said:

> "The exercise of many powers, Constitutional and statutory, would have both legal and political aspects. While it is appropriate that the judicially should review only the legal aspects, the question arises whether the political aspects are reviewable at all, except by the People themselves at the next election. It appears to me that in that respect the role of Parliament – as the elected representatives of the People – has been recognised in Articles 42 and 43, which essentially ensure the

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President personally, and excluded partially in respect of another category of acts but the action in the second category shall be instituted against the Attorney General.

[112] In *Ramupillai v Festus Perera* (1991) 1 Sri L R 11 the acts of the Cabinet of Ministers including the President was reviewed. In *Wickremabahu v Herath* (1990) 2 Sri L R 348 and *Karunatilleke v Dissanayake* (1999) 1 Sri L R 157 the Presidents acts were reviewed.

[113] 'Article 42. 'The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.'

[114] Article (33)(f) empowers the President "to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do."

[115] [2003] 1 Sri LR 172.

> responsibility of the Executive to Parliament for the due exercise of all powers … questions of legality are for the Judiciary alone to determine, and political questions are left for the People and their elected representatives."[116]

Impeachment is a political solution to deal with a President who commits misconduct in office. It is a remedy of last resort. Impeachment might result in his removal but it will not remedy the wrongs committed by the President and leave unsatisfied those who may be aggrieved by his unlawful actions. It would take a very politically hostile parliament to carry an impeachment through and it is very unlikely to occur when the President and Parliament are from the same political party. The President's power to summon, prorogue and dissolve Parliament is a very useful weapon in his armoury to prevent a hostile Parliament from taking account of his conduct.

The personal immunity of the President from the normal legal process in respect of both official and private acts – however wrongful – is not in accord with the interests of justice or the rule of law, and has strengthened and consolidated his position in relation to Parliament and the courts. The principle of law that where there is a right there is a remedy (*ubi jus ibi remedium*) is an ancient one.[117] There is no legitimate reason as to why a President should be immunised from the normal legal process in respect of his private – or even official – actions.

The President was granted immunity on the basis that he would serve no more than two terms in office but the ability of a President to serve more than two terms permitted by the Eighteenth Amendment has disturbed this finely tuned balance that was built into the 1978 Constitution when it was enacted and has made a long serving President virtually unaccountable both to Parliament and to Courts.

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[116] ibid.: p.187.
[117] *Ashby v White* (1703) 92 ER 126 per Holt CJ.

The Limits on President's Term

Power when left in the same hands for far too long tends to be abused. It is this fear that provides the rationale for limiting the presidential term. The corollary of this principle is that a change of rulers is desirable for the survival of democratic institutions. Periodic elections are the essence of constitutional democracies and elections are meaningless if they do not facilitate change. Otherwise, the country would be saddled with an elected dictatorship.

The 1978 Constitution created the office of a directly elected President and invested this office with unprecedented powers. Significantly, the President was given immunity from suit for the duration of his term in office, his term was fixed and the period when a poll could be called for presidential elections was clearly specified.

The rationale for the introduction of an elected president was to insulate his tenure from the vagaries of changing majorities in the legislature and to make it stable. The six-year term and the two-term limit were important elements of the constitutional arrangement pertaining to the terms of his office.

The head of state enjoyed immunity of suit under the 1972 Constitution, too, but he exercised only nominal powers; the Prime Minister, who was the real head of the executive, enjoyed no such immunity. In order to minimise the potential for abuse, the 1978 Constitution provided that a person could serve a maximum of two six-year terms and disqualified him from seeking office thereafter.

The creation of a strong executive president divorced from Parliament with a fixed term was justified as necessary to achieve stability to that office, and as a prerequisite to achieving economic growth. J R Jayewardene himself had stated in Parliament thus:

"When we are elected for six years, we have no right to change that without the people giving us a mandate to change it … and we do not intend to change that provision by one day."

Suriya Wickremasinghe drew attention to the grave misgivings that were entertained by many people about the Executive Presidency when it was first introduced. According to her, some of these fears 'were slightly assuaged by the two term limit' which somewhat assured them that a President would enjoy immunity from suit for no more than twelve years. 'This is already long enough for an injured party to wait for redress, for memories to stay fresh, for witnesses to remain available and healthy.'[118]

It is quite clear that the term of office was intended as a central part of the President's package and the six year term was prescribed as a conscious choice.

The Third and Eighteenth Amendments interfered with this delicate arrangement. The Eighteenth Amendment entrenched the worst features of the presidential system of government by removing the two-term limit along with the Constitutional Council introduced by the Seventeenth Amendment, which were the only, albeit somewhat weak, checks left on the already powerful President.

The Third Amendment and the Presidential Term

The creation of a strong executive president divorced from Parliament with a fixed term was justified as necessary to achieve stability to that office, and as a prerequisite to achieving economic growth.

Jayewardene himself had stated in Parliament thus:

> "When we are elected for six years, we have no right to change that without the people giving us a mandate to change it … and we do not intend to change that provision by one day."[119]

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[118] See S. Wickremasinghe, Civil Rights Movement Statement on 18th Amendment to the Constitution 5th September 2010.

[119] Hansard, Col.1229 (23rd September 1977).

It is quite clear that the term of office was intended as a central part of the President's package and the six-year term was prescribed as a conscious choice.[120]

Within a few years of the Jayewardene constitution coming into effect, the fixed term presidency was one of the first casualties of the Jayewardene government. The Third Amendment to the Constitution permitted the incumbent President at his discretion to call for presidential elections after the expiration of four years from the commencement of his first term of office. The Civil Rights Movement (CRM) petitioned the Supreme Court for a ruling that the Third Amendment Bill required approval by the people at a referendum because it affected the sovereignty of the people, which by definition encompassed their powers of government. S. Nadesan, Q.C.,[121] argued that the six year term had been deliberately chosen by the people after careful consideration to assure the executive a stable and fixed period in office.

The government's argument was that the more elections there are the greater must be the sovereignty of the people. The Supreme Court decided that no referendum was required because the amendment did not seek to cut down the period of office of the President, but empowered him to appeal to the people for a mandate to hold office prior to the expiration of his term. There was no compulsion on the President to do so and it enabled him only to limit his term of office of his own choice.[122] The constitution required approval by the people only if it extended the term of office of the President to over six years and not if it restricted the term.[123]

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[120] Even the transitional provision in Article 160 prescribed that the first President shall hold office for six years from 4th February 1978.

[121] Suriya Wickremasinghe and the writer assisted Mr Nadesan in this case.

[122] The Court said: "It thus left to the discretion of the President who has been elected by the people to voluntarily cut short his period of office and seek a fresh mandate from the people." It must be noted that Parliament too is elected by the people for a fixed term but it has no discretion to dissolve itself to seek a fresh mandate from the people. The President can send Parliament home and trigger fresh Parliamentary elections at a time of his own choosing.

[123] See *In Re Third Amendment to the Constitution Bill SC* decided on 23rd August 1982.

The court rejected the petitioner's argument that the Bill gave the incumbent President seeking re-election an electoral advantage by giving him the discretion to choose the most opportune time for election. The instability of the executive that Jayewardene wished to avoid was caused precisely by the power of dissolution of parliament that Prime Ministers acting under the parliamentary system were able to exercise before its term ended. The court, oblivious to this truth, based its conclusion on the questionable premise that it was an accepted convention of any democratic government that the Prime Minister as an incident of his office was entitled to choose the date of parliamentary election; therefore the President could do the same.

The premise is questionable because the Prime Minister's right to dissolve Parliament under the parliamentary system did not go uncontested.[124] Thus, it was argued that the Governor General under the Soulbury Constitution was not always obliged to accede to a request by the Prime Minister to dissolve Parliament. The Governor General could have brought his own judgement to bear in exceptional circumstances, as when he had to consider a Prime Minister's request to dissolve Parliament or had to call upon the person who in his opinion had the confidence and backing of a majority of his colleagues in Parliament to form the government.

In 1959, Sir Oliver Goonetilleke was criticised for giving in to the advice of W. Dahanayake to dissolve Parliament after he had lost the confidence of his colleagues in the cabinet and his own parliamentary party. The proper course, it was submitted, would have been that Dahanayake should have tendered his resignation and left it to the Governor General to call upon some other person who commanded the confidence of the majority in Parliament to form the government. Sir Oliver was criticised once again for acting unconstitutionally when he dissolved Parliament on the advice of Dudley Senanayake following his defeat in Parliament, instead of calling upon the Sri Lanka Freedom Party led by C.P. de Silva to form the government.

The court's opinion failed to appreciate that the President himself was not given the discretion to alter the terms of his office except

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[124] See A.J. Wilson, '*The Governor-General and the two dissolutions of parliament*' (1960) ***The Ceylon Journal of Historical and Social Studies*** 187.

in very limited circumstances.[125] If Parliament can confer on the President the right to prematurely terminate his office without a referendum, then Parliament can confer the same right upon itself. It would also enable Parliament to curtail its own term to less than six years. One of the odd consequences of the Third Amendment is that there would be no election if an incumbent President dies or is removed from office, but there would be an election if the incumbent President in his discretion decides to have one.

Responsibility of President to Parliament

The constitutional system is constructed on the premise that the President and Parliament would work together and for the President to be responsible to Parliament. As explained by Justice Wanasundara, the fact that the President is actively involved in the parliamentary process, is responsible to Parliament for the discharge of his duties, and that he shall be a member of the cabinet of ministers underscores the intention of the framers that,

> " … the President is an integral part of the mechanism of government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution … It could even be said that the exercise of Executive power by the President is subject to this condition. The People have also decreed in the Constitution that the Executive power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system. This follows from the pattern of our Constitution modelled on the previous Constitution, which is a Parliamentary democracy with a Cabinet system. The provisions of the Constitution amply indicate that there cannot be a government without a Cabinet. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. To take any other view is to

[125] See *1978 Constitution*, Article 38 (1) (b), (c) and (d).

> sanction the possibility of establishing a dictatorship in our country, with a one man rule."[126]

Parliament's control over the executive may be considered by reference to its four main functions.

The Legislative Power of Parliament

Parliament is the law-making organ of the state and its power to enact legislation includes the power to either amend or repeal the constitution.[127] Parliament has surrendered this function to the executive because in reality proposals for legislation are presented to Parliament by the executive, usually by the Minister responsible for the subject matter of the Bill. Parliament is mainly concerned only with the broad outlines of legislation, leaving the details to be filled out by subordinate legislation, the contents of which hardly receive Parliament's attention.

By virtue of the control that the executive is able to wield over parliamentary business, its principal function has turned out to be one of giving assent to proposals made by the executive. In theory, Parliament can either accept or reject any proposal; or it can accept them after making improvements. In fact, legislation is enacted by Parliament to rubber stamp government policies and the passage of government proposals is secured by members voting along party lines.

The executive exercises considerable control over the business of the Parliament and the time Parliament spends on Government Business. Government Business shall be set down in such order as the government shall think fit. It is provided in the Standing Orders that government business shall have precedence every day expect the first Friday sitting of each month when Private Members' Business shall have precedence over Government Business, although precedence may be accorded to Government Business even on a Friday on a Minister's motion approved by

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[126] See Justice Wanasundara, *In Re the Thirteenth Amendment to the Constitution and Provincial Councils Bill* (1987) 2 Sri LR 312, 341.

[127] The proviso to s 75 limits the competence of parliament to suspend the operation of the constitution or any part of the constitution; it cannot also repeal the constitution as a whole without enacting a new constitution.

Parliament.[128] Government may also by motion have the Standing Orders suspended in order to carry through its business.[129] The main work of criticising the government will have to be borne by the opposition. The opposition has limited means at its disposal to exercise effective influence on the outcome of action taken by Parliament.

In the United Kingdom, backbencher revolt against unpopular bills is not unknown and Ministers have been compelled to give concessions to ensure the passage of bills into legislation. Bills have been withdrawn in the face of such opposition but such happenings have been rare; and they have been even rarer in Sri Lanka.

Control over Public Finance

Parliament is the guardian of the public purse and shall have full control over public finance. Parliament's functions in respect of public finance are essentially fourfold. Parliament shall determine the taxes that may be imposed to raise money. The principle that 'there shall be no taxation without representation' is enshrined by the provision prohibiting the imposition of tax, rate or any other levy 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.[130]

Parliament has to maintain the government and its administration and without its support government cannot function. Thus, Parliament shall make appropriations annually but, in actual fact, Parliament does not make appropriations save at the request of the government. It grants to the executive what the latter demands. The budget is prepared by the Treasury and is presented by the President or on his behalf. Many of the proposals are presented for its approval by Ministers.

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[128] See Standing Order 20 (3) of Sri Lanka Parliament.
[129] See *1978 Constitution*, Article 78 (2) and Standing Order 135 of Sri Lanka Parliament.
[130] *1978 Constitution*, Article 148.

The fact that Parliament holds the purse strings arguably gives it some leverage over the executive. In reality, Parliament lacks adequate institutional arrangements to effectively carry out its functions over public finance. Parliament does not possess the same resources as the executive; without adequate resources and manpower Parliament lacks sufficient capacity to exercise effective control.

D.E.W. Gunasekera, the chairman of Committee on Public Expenditure (COPE) and a government minister, has been lamenting Parliament's inability to investigate institutions other than those audited by the Auditor General. Even where corrupt practices and waste have been revealed, little or no follow-up action has been taken. [131] He admitted that the national economy was in a mess because of Parliament's failure to act.

> "Parliament has failed the country. In fact, the Opposition should raise the issue in parliament at least now. We are wasting time on some insignificant issues, whereas a matter of national importance is not touched."[132]

Holding Government to Account

Parliament has the responsibility of keeping the President and his government responsible and to hold them to account. Parliament does not govern but its role is to ensure that those who govern do so in accordance with its wishes. Parliament must keep the executive in check and ensure that principles of good governance are adhered to. Scrutiny of policy and administration is a part of its core functions. It is expected to exercise its functions critically. Its role is that of examination, criticism, and approval.

The cabinet of ministers appointed by the President are collectively responsible and answerable to Parliament. The

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[131] S. Ferdinando, '*DEW urges state sector TUs: act now to save economy*' ***The Island***, 9th May 2013; C. Kirinde, '*Corrupt officials, politicians exposed (COPE) but committee lacks power: DEW*' ***The Sunday Times***, 4th December 2011.

[132] S. Ferdinando, '*Parliament failed to act, says DEW*' ***The Island***, 27th April 2012.

President is responsible to Parliament for the due exercise of his functions,[133] including those which he might have retained, and those which he has delegated to his cabinet of ministers. The cabinet of ministers is his creation and they pursue his government's policies.

In order to effectively discharge these functions, Parliament needs to keep the executive at arm's length. Parliament ought to act as a counterweight to the vast powers that the executive has. It is to ensure that Parliament does not become an extension of the executive that it is institutionally kept separate from the executive. In practice Parliament is either incapable of holding the executive to account or is prevented from doing so because of the considerable influence that the executive has over Parliament. By Parliament's own Standing Orders questions affecting his conduct cannot be raised in Parliament except upon a substantive motion.[134]

Beginning from Jayewardene, the trend has been to have a large number of ministers, both within the cabinet and outside it. Cabinet portfolios give access to powers and privileges denied to ordinary Members of Parliament. Successive Presidents have used the power of appointment to the cabinet as a source of patronage to secure the loyalty of Members of Parliament to him. Ministers who are beholden to the President would be deterred from criticising him and they are likely to have a vested interest in the cabinet's continuation in office.

As Parliament is made up of the people's representatives, it is supposed to be sensitive to the electorate's interests and concerns but in a system characterised by a strong executive, the legislature is more sensitive to pressures from the executive. The representatives are answerable to the electors once in about five years only, but the executive is seated in Parliament and its influence will be exerted on the legislature every day.

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[133] Article 42 of the Constitution reads as follows: "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security."
[134] See Standing Order 78 of Sri Lanka Parliament.

In reality, Parliament has become a body whose main function is to facilitate majority rule. It is unrealistic to expect the majority party to be critical of the government. The imposition of discipline on party members to hold the party line has made it virtually incapacitated Parliament from performing its critical function. If at all, that function has to be discharged by the opposition, but a weak opposition which does not offer any prospect of forming an alternative government cannot perform this function effectively.

The Representative Function

Parliament is a forum in which representatives ventilate the grievances of their constituents in the expectation that they will be remedied and debate matters of public importance. Members keep ministers abreast of public opinion. Even those who were opposed to the policies of the government need to be heard and that is the rationale in having an opposition in Parliament. An important function of Parliament is to function as a forum for debating and discussing important political, economic, and social issues affecting the country.

There has been a continuous deterioration in the quality of men and women who represent the electorate in Parliament. It is a notorious fact that parliamentarians do not always follow parliamentary manners. Writing about the British parliament, the well-known parliamentarian and humourist A.P. Herbert said that, "when you see Parliament being spoken of in the papers, you can be fairly sure that it will be spoken of in a pretty insulting way."[135] Some Sri Lankan parliamentarians have demonstrated that they are not averse to acting in a manner that would invite opprobrium from the public.

A former Speaker of Parliament lamented at the fact that Members of Parliament lacked the expertise and information to participate in specialised policy-making. He expressed the need for the improvement of the quality of the men and women who entered Parliament, and suggested that prospective members

[135] A.P. Herbert (1947) ***The Point of Parliament*** (London: Methuen).

should satisfy a minimum standard of education and experience to qualify for election to Parliament.[136]

Jayewardene had Second Thoughts

When Jayewardene was no longer the President, he acknowledged in public the need for reform and to curtail the presidential powers, especially in three areas: (i) the term of office, which he suggested be reduced to four years, (ii) the President's responsibility to Parliament, and (iii) and his immunity.[137]

G.L. Peiris highlighted the concentration of power in the executive president as a major weakness of the constitution. He also criticised the Jayewardene rationale that a strong executive unhampered by the whims of the Parliament was needed to implement the economic and social policies of the government of the day. In Dr Peiris' view, a constitution "is not meant to be an instrument to facilitate a particular political or ideological objective, or indeed a facilitator of strong government. On the contrary, the primary function of a constitution, particularly in a modern third world where the State inevitably wields considerable discretionary power, is to create regularized restraint or checks and balances on the exercise of political power."[138]

Many years prior to making this acknowledgement, Jayewardene had agreed to allow a free discussion within the government parliamentary group on the question whether to permit the President of the country to be brought before court. His action was probably prompted by Sarath Muttetuwegama MP's attempt to introduce a private member's motion asking leave to introduce

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[136] Speech made by K.B. Ratnayake, former Speaker, at the 40th Commonwealth Parliamentary Conference, ***Daily News***, 15th October 1994.
[137] See T. Sabaratnam, '*1978 Constitution in focus at seminar*', ***The Daily News***, 21st October 1994. JR Jayewardene made these remarks at a seminar on constitutional reforms organised by All Ceylon Moors Association held at the BMICH. According to the report of the seminar, G.L. Peiris followed J.R.Jayewardene and had demolished the latter's contention that the 1978 constitution embodied within itself liberal and democratic values.
[138] G.L. Peiris, '*Proposals by the Government on the abolition of the Executive Presidency*' ***The Sunday Observer***, 20th November 1994.

a bill to amend the constitution to make the President liable to legal action. The Speaker disallowed the motion.[139]

Successive presidents have promised to end the executive presidency and revert to the parliamentary system only to renege on their promise once elected to power. Promises to abolish the presidential system and revert to the Westminster model were made by Chandrika Bandaranaike, and her draft Constitution of 2000 envisaged the abolition of the executive presidency. It was acknowledged by her Minister of Constitutional Affairs G.L. Peiris that a consensus was emerging across the political spectrum for the re-introduction of the parliamentary executive model, and that the then government had received "overwhelming mandates at both the Parliamentary and Presidential elections for the abolition of the Executive Presidency."[140] Mahinda Rajapaksa made a similar promise before the 2005 elections only to renege upon it.

Recently, politicians have sought to justify the continuance of the executive presidency on the basis that it helped the defeat of terrorism, the implication being that it would not have been possible to defeat terrorism if a parliamentary system had been in place. Among those who expressed this view is G.L. Peiris who, contrary to the position he had taken as a Minister under the Kumaratunga administration and even before, argued that to have a strong executive was "an absolutely essential condition" to accelerate the country's economic development. In his view, "terrorism could not have been eradicated without the executive presidency and the strength which that institution imparted to the body politic."[141] This *ex post facto* rationalisation of the benefit of having an executive presidency is somewhat dubious. The

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[139] See '*Presidential immunity for group debate*' ***Daily News***, 6th November 1985.
[140] ibid.
[141] '*GL on Constitutional Amendment*' ***The Island***, 31st August 2010; Cf. G. Usvatte-Aratchi, '*Eighteenth Amendment: A Rush to Elected Tyranny*' ***The Island***, 6th September 2010 for an economist's view in rebuttal of the Peiris thesis that a strong executive is essential for economic development. Usvatte-Aratchi cited, among others, Nyerere of Tanzania and Mugabe of Zimbabwe as examples of strong executives who ruled countries with stagnating economies. In his view, 'no economist worth his salt' will say that a strong executive is 'absolutely essential for development to accelerate'.

executive presidency did not prevent the rise of the Liberation Tigers of Tamil Eelam (LTTE), which took place at a time when the executive presidency was in place and Presidents who came before Mahinda Rajapaksa failed to bring an end to the civil war.

J.R. Jayewardene came to power with a massive majority and had the opportunity to tackle the Tamil problem, which he failed to do, probably because it would have been unpopular with the majority community. The infamous events of 'Black July' 1983 happened when he was President. Yet, he espoused the executive presidency as a desirable model on the ground that it would enable government to take unpopular measures.

Shifting the Balance Further

The prospect of trading an office with virtually plenary powers for one that may be less powerful is something that Presidents have been unwilling to face, especially when they have got used to enjoying the powers that go with the office. The promised abolition of the presidential system has not occurred. Instead, what we have witnessed in the recent past is an enhancement of the powers attached to the presidential office.

The Seventeenth Amendment to the Constitution was passed by Parliament when Chandrika Bandaranaike was President. The objective of the amendment was to ensure good governance and to rid political interference in the administration. This was to be achieved through independent commissions, which were set up to supervise and monitor key areas of governance such as the police and the public services. The independent commissions were to consist of members selected by a Constitutional Council, which would be selected by the government and the opposition acting in a bi-partisan manner. Unfortunately, appointments to the Constitutional Council were not made in the intended manner, thereby defeating the purpose for which it was established.

The arrangement adopted in the constitution in regard to the distribution of the powers of government and the terms on which they were to be exercised were disturbed further by the Eighteenth Amendment. By this amendment the constitutional bar against a person holding the office of the President for more

than two terms was removed. The Eighteenth Amendment further enabled President Rajapaksa to appoint key officials to important positions in the judiciary, the electoral administration, and the police.

The fear that power concentrated in the hands of a person for too long might be abused is the reason why in presidential regimes the term that a person could serve in that office is limited to one or two years.[142] By definition democracy requires periodic elections in order that the electorate is given an opportunity to change governments. Authoritarian rulers find term limits an obstacle to their desire to remain in power for as long as possible.[143]

Article 30(2) in its original form was intended as a safeguard against abuse of power. The Eighteenth Amendment removed this safeguard and also extended the period that a person enjoyed legal immunity. [144] The Eighteenth Amendment shifted the balance of power in favour of the executive even further, and as in the case of the Third Amendment, Parliament willingly cooperated with the government to push through this amendment.

When the Eighteenth Amendment Bill was referred to the Supreme Court for an opinion on its constitutionality, several persons petitioned the Supreme Court for a ruling that the Bill required approval at a referendum. They argued that the Bill required such approval because several of its provisions were inconsistent with basic provisions in the Constitution which engaged the referendum. It was argued in particular that the removal of the term limit would affect the manner in which the executive power of the people would have to be exercised.

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[142] See Linz, '*Presidential or Parliamentary Democracy: Does it make a difference*' in Linz & Valenzuela (1994): p.17.

[143] The South Korean strongman Syngman Rhee engineered an extension of his term by changing the Constitution to allow a direct popular vote for the presidency. To push through the revision he repressed all political activity by declaring martial law. The Assembly's vote for the constitutional revision was taken in the middle of the night. A second constitutional revision enabled Rhee to enjoy an unlimited term as president. Ultimately, Rhee's constitutional manipulations triggered a popular revolt resulting in his downfall.

144 See S. Wickremasinghe, *Civil Rights Movement Statement on 18th Amendment to the Constitution*.

As it had done with the Third Amendment, the Supreme Court presided over by Chief Justice Shirani Bandaranayake acknowledged that Articles 3 and 4 had to be read together but went on to hold that the removal of the two-term limit actually enhanced the franchise by giving the people a choice of candidates, including a person who has served two terms already. It is apparent from the Court's opinion that it had dealt with the petitioners' arguments in a cursory manner, making no attempt to identify in sufficient detail the arguments that were presented to it by the petitioners objecting to the Bill. The Court failed to appreciate the degree to which its interpretation would fundamentally undermine the terms subject to which the office of President had been created and to which vast powers had been delegated. The Court failed to consider the impact that the Amendment might have on the terms subject to which the people had delegated their powers of government to the President. The Court referred to the impact the Amendment had on Article 4(e) but did not give its mind to the impact it had on the powers of government mentioned in Article 4(b). The Court's misconceived and misplaced emphasis on Article 4(e) led it towards an erroneous interpretation.

If the Court's rationale were carried to its logical conclusion and elections are held every year, then the franchise rights of the people would be enhanced even further but that would lead to what mathematicians and logicians call a *reductio ad absurdum.* It ignored the people's wish that they did not want any enhancement of their franchise as stated by the Court, which they had indicated by insisting that no elections shall be called more than once in six years. They had even provided that if a vacancy were to occur in that office during the pendency of a President's term, as when he dies or is removed from office, then it shall be filled by a process other than election.

The Bandaranayake Court had an opportunity to correct the errors made by the Sharvananda Court but it proceeded to make the same errors because it adopted the same faulty reasoning and

logic as had been adopted by the latter.[145] The Eighteenth Amendment represented a multi-pronged attack on those Constitutional provisions which were designed to operate as a check on the enormous powers given to the Executive.

Asanga Welikala has noted[146] the indecent haste with which the Eighteenth Amendment Bill was rushed through the Court and Parliament as an urgent measure. It is impossible to understand the urgency behind the introduction of the Bill. The President had been re-elected only a few months before and there was no prospect of any election for about four more years; the people would have been tired of elections and the thought of elections would have been far from their minds.

Such haste had the effect of preventing a fully informed debate taking place on the Bill's merits. Indeed, the petitioners who intervened in Court were not provided with accurate copies of its text until after the Attorney General had commenced his submissions to Court. It is almost certain that no submissions were made on the Bill's effect on the president's immunity from suit. Both the Court and the lawyers who appeared before the Court were placed under severe constraints and had inadequate time to gain a proper insight into the Bill's purport and its ramifications. Consequently, the Court did not have the benefit of an informed discussion on the Bill. To compound the matter, the Court performed the extraordinary feat of pronouncing judgment on the Bill's constitutionality within a day.

Not much discussion took place in Parliament. Many members absented themselves from Parliament when it was taken up there and members who did attend must have had their minds occupied by other urgent matters affecting their electorates rendering them unable to make a careful study of its contents, to understand its consequences and to make meaningful contributions, especially with the three line whip hanging over them.

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[145] See further R. Hameed, *'Mahinda Rajapkse cannot succeed President Rajapakse'* ***Colombo Telegraph,*** 1st January 2015.

[146] 'Do we need an alternative approach to the third term question beyond text and intention?', ***Groundviews***, 21st October 2014

The Sovereignty of Parliament and the Separation of Powers

The idea is entertained and propagated by politicians that the Sri Lankan Parliament is sovereign. It is a fiction and a myth. Parliament is neither sovereign nor supreme.

The Soulbury Constitution operated under a system in which the powers of government were kept separate and parliamentary legislation was subject to legislative review.[147] The 1972 Constitution unified governmental powers in the National State Assembly,[148] declaring it as the supreme instrument of state power.[149] Nevertheless, even in the latter constitution it was explicitly declared that sovereignty was in the People and that it was inalienable.[150] It meant that the people could not give up their sovereignty over Sri Lanka even if they wanted to.[151]

The Second Amendment to the 1972 Constitution abandoned the notion of the legislature as the sole supreme instrument of state power and made the executive and the legislature coordinate branches of government. The Second Amendment made both the National State Assembly and the President supreme instruments of state power. The 1978 Constitution abandoned this provision altogether and with it the notion that either of these organs is supreme. Parliament is no longer a supreme instrument of state power; sovereignty continues to be reposed in the people and is inalienable.[152] The basic principles subject to which governmental power has been delegated to Parliament have been set out in the constitution. In Sri Lanka, there is a law higher than Parliament's and it is the constitution. The constitution is supreme and the

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[147] See *Liyanage v The Queen* (1965) 68 NLR 265; *Kariapper v Wijesinghe* (1967) 70 NLR 49.
[148] See *1972 Constitution*, section 4. See *Associated Newspapers of Ceylon Limited (Special provisions) Bill*, Decisions of the Constitutional Court 35, at 53: 'In our view, the doctrine of separation of powers has no place in our Constitution.'
[149] *1972 Constitution*, section 5.
[150] *1972 Constitution*, section 3.
[151] See C.R de Silva, '*Safeguards for the minorities in the 1972 Constitution*', ***Marga Institute Lecture***, 20th November 1986 at p.2: '… even the people of Sri Lanka could not give up their sovereignty over Sri Lanka. It is inalienable by any procedure that you can think of.'
[152] *1978 Constitution*, Article 3.

people are sovereign. It also meant that the delegation of governmental powers by the people to their representatives meant only that the representatives were authorised to exercise those powers on their behalf; it did not result in a transfer of the sovereignty to their representatives.

The powers of government originate with the people and they are to be exercised by the organs of government as trustees.[153] They are to be exercised in good faith, according to law, and in the best interests of the people.[154] J.R. Jayewardene, who as Prime Minister chaired the Parliamentary Select Committee on the draft 1978 Constitution, remarked at one of its hearings:

> "We are practically a dictatorship today. There is nothing we cannot do in this House with a five-sixths majority. I am trying to avoid that".[155]

This intention is made clear by not giving the Sri Lanka Parliament the same powers as those of the British Parliament. In a speech he made on the constitution, Jayewardene emphasised that an independent judiciary, the powers of the legislature in relation to the President, which enabled it to act as a check on presidential power, and an independent press are the important elements of the checks and balances which made the constitution work democratically.[156] Parliament is expected to ensure that the President and the executive are held politically responsible while the judiciary is responsible for holding the executive legally responsible.[157]

It is for this reason that the powers of government have been kept separate and the independence of the judiciary and fundamental

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[153] *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga* SC (FR) No 352/2007 where the Court said that powers are entrusted 'only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People… To do otherwise would be to betray the trust reposed by the People …'

[154] *Vasudeva Nanayakkara v K.N. Choksy* SC (FR) App No. 158/2007 SC decided on 4.6.2009.

[155] *Report of the Parliamentary Select Committee of the National State Assembly*, Parliamentary Series No 14: p.214.

[156] See J.R. Jayewardene (1996) ***Relived Memories*** (New Delhi: Navrang): p.24.

[157] The focus of this chapter is on Parliament and not on the judiciary.

rights have been guaranteed. The system of government is underpinned by the theory of the separation of powers. The constitution embodies a system of checks and balances with a view to ensuring that no one branch of the government is able to assume over all control of government. The powers of the President are so extensive that, in the absence of an effective system of checks and balances, the Presidency can become an authoritarian institution.

Yet, it has not prevented parliamentarians and the executive from falsely claiming that Parliament is sovereign. It is to the executive's advantage to support Parliament's sovereignty as, being in control of Parliament, it would work for the benefit of the executive. The theory of parliamentary sovereignty is at odds with the principle of sovereignty of the people and separation of powers, which are basic features of the Sri Lankan constitution. The Supreme Court recognised that a balance has been struck in Article 4 of the constitution based on separation of powers between the three organs of government in relation to the power that is attributed to each such organ, reinforced by a system of checks and balances.[158]

Accordingly, the powers of government are not fused in the hands of a single organ of the state but are kept separate. The rationale behind their separation is that reposing all the powers of government in a single body is an invitation to tyranny and would lead to powers being abused; the separation of powers accompanied by a system of checks and balances would prevent abuse of power and facilitate good governance.

As was said by the Supreme Court in the matter relating to the Eighteenth Amendment to the Constitution Bill of 2002,[159] the constitution does not attribute any unfettered discretion or authority to any organ or body established under the constitution. Even the immunity of the President under Article 35 has been limited in relation to court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided

[158] *In Re the Nineteenth Amendment to the Constitution*.
[159] *In Re the Eighteenth to the Constitution Bill* (2002) 3 Sri LR 71.

the questions in relation to Emergency Regulations made by the President[160] and presidential appointments.[161]

The doctrine of parliamentary sovereignty has its roots in the legal theory developed by A.V. Dicey in relation to English constitutional law and it essentially deals with the relationship between the Parliament and the law under a system which has no codified constitution. It is a distinctively English principle which has no counterpart even in Scottish constitutional law.[162] In English constitutional law, the doctrine of sovereignty implies that there is no higher law to restrain Parliament from making – or unmaking – any law. There is no law which Parliament cannot change, and the courts will give effect to the laws passed by Parliament.

However, the Kings of England had delegated their judicial power to the courts, and as Blackstone observed many centuries ago:

> "In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power."[163]

In the absence of a written constitution in England, there was no fundamental rule to which Parliament is required to conform.[164] The principle of parliamentary sovereignty was developed by English constitutional lawyers to legitimise the power of Parliament and to validate what it does. It is a creation of the common law. In *Jackson v Attorney General*,[165] the then House of Lords considered the relationship between the rule of law and

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[160] *Joseph Perera v Attorney-General* (1992) 1 Sri LR. 199.
[161] *Silva v. Bandaranayake* (1997)1 Sri L.R. 92.
[162] *MacCormick v Lord Advocate* (1953) SC 396.
[163] W. Blackstone (1765) ***Commentaries on the Laws of England***: ch.7, p.258.
[164] Lord Hope in *Jackson v AG* [2005] UKHL 56 at para 126 said that 'the principle of parliamentary sovereignty … in the absence of higher authority, has been created by common law'.
[165] [2005] UKHL 56.

parliamentary sovereignty, and it was suggested by some of the Law Lords that the theory of parliamentary sovereignty has its limits and that courts would contradict Parliament if it were to enact legislation contrary to the rule of law. Even in England, parliamentary sovereignty is no longer absolute and some judges have argued that the ultimate norm of the English constitution is the rule of law.

In *Jackson*, Lord Hope spoke of the *supremacy of the law* and said:

> "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty."[166]

Lord Hope made similar remarks off the bench as well.[167] He characterised a statement made by the Master of Rolls that judges cannot go against Parliament's will as expressed through a statute as,

> "a dangerous doctrine, unless one can be absolutely confident that the increasingly powerful executive will not abuse the legislative authority of Parliament which, *ex hypothesi*, it controls because of the absolute majority that it enjoys in the House of Commons … The sovereignty of Parliament is in the hands of the executive … So when we think of the sovereignty of Parliament we should really be thinking of what this means about the power that this gives to the executive.'[168]

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[166] ibid.; para.107.

[167] See Hope, '*Sovereignty in Question- A view from the Bench*', lecture given at WG Hart Legal Workshop, 28th June 2011.

[168] In his lecture, Lord Hope also raised 'the very real question as to whether we can continue to rely on Parliament to control an abuse of its legislative authority by the executive. It is an uncomfortable fact that Parliamentary sovereignty and the rule of law are not entirely in harmony with each other.' He also stated that the principle of parliamentary sovereignty cannot be referred to a statute.

In Sri Lanka, the basic norm is the constitution.[169] The constitution has not anointed Parliament with a special status. As a creation of the constitution it cannot pretend to be superior to its creator. Parliament's occupation of the legislative field is not exclusive. If Parliament were to act in a manner not permitted by the constitution, then it would be acting illegally. Its illegal actions cannot be rendered legitimate by a meaningless claim that it is sitting on the highest echelon of democracy.

The President can override Parliament's will in matters affecting legislation; he can submit to the people a bill which has been rejected by Parliament for approval at a referendum.[170] This provision would allow a President to by-pass a hostile Parliament to get legislation enacted against the wishes of the majority in Parliament. Even if Article 4 of the constitution makes no reference to Parliament sharing its legislative power with the President, it is difficult to rationalise the existence of this provision with the principle of parliamentary sovereignty.[171]

Besides, not all actions of Parliament can attract force or finality. A resolution passed by Parliament has no legal effect.[172] Courts can strike down rules and regulations framed by persons or bodies created by Parliament exercising power delegated to them by Parliament. Some measures passed by Parliament have no force outside it unless they have been approved by the people at a referendum. It would be absurd to ascribe sovereignty to what Ministers might say inside Parliament. A Bill that has been approved at a referendum has to be certified by the President that it has been so approved by way of an endorsement in the prescribed form. Until then it does not become law.

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[169] *Walker & Sons v Gunathileke* (1978-79-80) 1 Sri L R 221, 247 per Thamotharam J.

[170] See Article 85 (2) of the *Constitution*. The President cannot, however, submit under this provision a bill for the amendment, repeal or replacement of the constitution or an addition to it. He cannot also submit a bill which is inconsistent with any provision of the Constitution.

[171] Parliament could have the last word on such a law as it would have the power to repeal it.

[172] *Stockdale v Hansard* (1839) EWHC QB J21; *Bowles* v *Bank of England* [1913] I Ch. 57.

Legislation is proposed and initiated by the Cabinet headed by the President and chosen by him, and presented to Parliament for its approval. The Ministers double up as MPs and a large number of them hold ministerial portfolios, both within and outside Cabinet. It has enabled the executive to hold the Parliament by the snaffle and virtually neutralise its constitutional function to hold the executive to account. It is impossible to describe Parliament as either sovereign or supreme.

The notion that Parliament is sovereign has received uncritical approval for far too long; it has become a sort of *mantra* that is invoked by those who wish to invest Parliament with the charisma of a holy cow. It has been used to shield Parliament's actions and legislation from judicial scrutiny. The principal justification for the special status claimed by parliamentarians is that they are elected by the people as opposed to judges who are not. A former Speaker stated with a touch of arrogance and pomposity that three or four judges should not be allowed to sit in judgement over deliberations of Parliament after a Bill has been passed because they "do not know the social forces that brought about the legislation. They cannot understand the social concepts involved."[173] The idea that Members of Parliament are elevated to a special status because they are the elected representatives of the people is a false one. The President, too, is elected by the people, but that makes him neither sovereign nor supreme.

The people have preferred to have their representatives chosen by them at periodic elections because they want their representatives to account to them. Elections offer the people an opportunity to choose those candidates who are most suitable to govern them. As was observed by Justice Mark Fernando in *Karunathilaka v Commissioner of Elections*:[174]

> "A voter had the right to choose between [such] candidates, because in a democracy it is he who must select those who are to govern – or rather, to serve – him … A voter can therefore express his opinion about

173 Stanley Tillekeratne testifying before the Select Committee on Revision of the Constitution. See *Report of the Select Committee on the Revision of the Constitution*, Parliamentary Series No 14 (22nd June 1978): p.215.
174 (1999) 1 Sri L R 157.

> candidates, their past performance in office, and their suitability for office in the future. The verbal expression of such opinions, as, for instance, that the performance in office of one set of candidates was so bad that they ought not to be re-elected, or that another set deserved re-election – whether expressed directly to the candidates themselves, or to other voters – would clearly be within the scope of 'speech and expression'; and there is also no doubt that 'speech and expression' can take many forms besides the verbal. But although it is important for the average voter to be able to speak out in that way, that will not directly bring candidates into office or throw them out of office; and he may not be persuasive enough even to convince other voters. In contrast, the most effective manner in which a voter may give expression to his views, with minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth."[175]

The process by which representatives to Parliament are chosen does not warrant the attribution of special status to Parliament. Election campaigns are often marked by violence [176] and candidates have to engage in cutthroat competition for votes and make promises that are often difficult to deliver. In *Senasinghe v Karunatilleke*[177] Justice Mark Fernando described the electoral process of a referendum as,

> " … little different to any nation-wide election, in respect of the enormous expenditure of public funds and the disruption of day-to-day life involved – including danger to life and limb, and damage to property."

It would be undesirable in any event to require judges to engage in such unseemly competition as it would be inimical to the role that judges are expected to play. The roles of parliamentarians and judges are different and it is reflected in the different procedures adopted for their selection. Judges will have to

[175] ibid.: 173-174.
[176] See
[177] (2003) 1 Sri LR 157, 187

approach their task with detachment and rationality, free from extraneous influence including that of party politics.

Even if the sovereignty of Parliament is not acknowledged, great significance is attached to the fact that Members of Parliament are elected. For instance, in *Attorney General v. Bandaranayake*[178] Justice Marsoof speaking for the entire court regarded as significant that,

> " … legislative, executive and judicial power of the People is vested either on Parliament or the President, *both being elected by the people* so as to maintain accountability and transparency, and the courts … *which are not elected by the People*, are accountable and responsible to the People through Parliament …" (italics supplied).

Later, he returned to this theme and described the power of impeachment of superior court judges as a *sui generis* power that is vested jointly in Parliament and the President, noting that both are governmental organs, "*that are elected by the People*, and when they act in concurrence, they act in the name of the People of Sri Lanka."[179] (italics supplied).

If the *raison d'etre* for vesting the power to impeach a judge in these two organs is that they are both elected functionaries of the people, then the judges in *Attorney General v. Bandaranayake* failed to explain why the people have entrusted the power to impeach an elected President jointly to Parliament and an unelected Supreme Court, and when exercising this power, whether or not they would be acting in the name of the people.

The constitution has prescribed the limits within which Parliament must function and not left it to the good sense of parliamentarians to find those limits and act accordingly.[180] It is a measure of the distrust that the people have of their politicians. It would be illogical to assume that Parliament has unlimited powers because it is composed of members elected by the people. The

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[178] SC Appeal No 67/2013 decided on 21.02.2014 (unreported).
[179] ibid.
[180] Cf *A.G. v Bandaranayake* where the Supreme Court said that the Constitution has left it to Parliament's good sense to decide whether all matters relating to the impeachment of a superior court judge should be provided for by law or standing orders.

people have not given their representatives authority to act without limits. There is no constitutional basis for Parliament to have recourse to a theory of English constitutional law, which has no application to the Sri Lankan Parliament, which operates under a written constitution.[181]

The constitution enshrines the fundamental norm that sovereignty is in the people and that it is inalienable. The powers of government are only aspects but not the entirety of that sovereignty. The people have entrusted to Parliament the power to legislate but have retained the power to approve at a referendum measures that have been passed by Parliament by a special majority. It is evident that legislative power is not a monopoly of Parliament. It is not an inherent power of Parliament but a power conferred upon it subject to limits.

As was said by the Supreme Court in *Singarasa v AG*,[182] the principle of English constitutional law[183] that Parliament is supreme would not apply to the Sri Lanka Parliament, which exercises legislative power derived from the people whose sovereignty is inalienable. Likewise, the President does not exercise plenary executive power as his powers too are derived from the people.

Concluding Remarks

The presidential system combines contradictory objectives, of seeking to have a strong executive with extensive powers, combined with the need to have checks on his powers. A President elected by the people might be inclined to get carried away with the notion that he has a mandate of his own, making him insensitive to the demands of the parliamentary majority. A President who is elected by a majority vote might not feel obliged to satisfy the needs of the minorities to remain in power. There is

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[181] See further R. Hameed, '*Fundamental rights and fundamental values*' ***Colombo Telegraph***, 4th January 2013; R. Hameed, '*Parliament is not a law free zone*' ***Colombo Telegraph***, 13th January 2013; R. Hameed, '*Impeachment and the misconceived reliance on CJ Corona's case*' ***Colombo Telegraph***, 16th January 2013.

[182] *S.C. Spl (LA) No. 182/99* decided on 15.09.2006.

[183] See *Manuel vs A.G* (1982) 3 AER 786 at 795

potential for conflict between the President and Parliament, as both can claim to be legitimate choices of the electorate. Where the President and the parliamentary majority are from the same party, such conflict may not occur but if they are from different parties, there is potential for a gridlock. The President has the power to destabilise Parliament by either exercising or threatening to exercise his power of dissolution of Parliament.

The function of a constitution is to put in place an effective system of checks and balances to deter abuse of power. The constitution has failed to put in place effective checks and safeguards to prevent a President from abusing his powers. Short of impeachment, which is virtually unlikely, a President who is unpopular cannot be removed from office during his term.

The system of government is built on the premise that the President and Parliament would work together, and for the President to be responsible to Parliament. Parliament on its own has proved incapable of holding the executive responsible. A strong President wielding enormous power has prevented the effective functioning of Parliament, resulting in its failure to discharge its constitutional duty to hold the President and the executive to account. The powers that are at Parliament's disposal, such as the power of impeachment, have proved to be impotent against the President. On the other hand, Parliament and the President have together acted to rein in the judiciary, the only institution capable of acting as a check against the excesses of the executive.

The President has several means available to him to control Parliament. The President appoints the Prime Minister and the cabinet from Parliament. The grant of portfolios within and outside cabinet provides a useful tool for a president wishing to grant patronage to secure support from Members of Parliament. When a large number of its members become part of the executive, it is difficult for Parliament to discharge its function of making the executive answerable to Parliament. Parliament has virtually become an extension of the executive rather than function as a separate and independent branch of government. The practice of opposition members being lured into the

government's ranks encourages even members in the opposition to look for favours from the executive.

Regrettably, Parliament has turned out to be ineffective against an over-mighty executive President, playing to the President's tune. Parliament should speak softly and carry a big stick; instead, Parliament has been talking big while carrying a fiddle stick.[184]

[184] The author wishes to acknowledge the useful comments made by Dr H.J.F. Silva, former Principal of The Sri Lanka Law College, on a previous draft of this chapter.