

342-578  
Law

*Sri Lanka J. S. S.* 1984 7 (1 & 2)

**CABINET GOVERNMENT IN SRI LANKA:  
WHAT IT WAS AND WHAT IT MEANS TODAY**

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“The Cabinet is the core of the British constitutional system. It is the supreme directing authority. It integrates what would otherwise be a heterogeneous collection of authorities exercising a vast variety of functions. It provides unity to the British system of government”. So begins Sir Ivor Jennings’ *Cabinet Government*, first published in 1936. In a similar vein Arthur Berriedale Keith began his *British Cabinet System* (published in 1938) with the words : “The National Government of Great Britain today is controlled by the Cabinet.” These words are apt to accurately describe the basic constitutional structure of contemporary Britain, although one wonders whether such a simple and straightforward description needs to be qualified in the light of various developments that have taken place since 1930s. <sup>1</sup>

Sri Lanka which on achieving self government inherited a Parliamentary system of government modelled on the British experience has jealously safeguarded the traditions of Cabinet government, notwithstanding the establishment of the First Republican Constitution in 1972 and the introduction of the Second Republican Constitution in 1978. The governance of the Island under three successive constitutions has brought to light so many manifest as well as obscure features of Cabinet government. A comparative study of these three constitutions and their practical application will prove to be of great educational value limited in no sense to Sri Lanka alone.

In conducting this investigation the approach adopted will essentially be that of a constitutional lawyer. However, the discussion will to a considerable extent involve an assessment of the socio-political influences as well as implications. For “constitutional law and political science are divided by a line which is hard to distinguish.” <sup>2</sup>

The development of the Cabinet, as of all other institutions of the British constitutional system, is a product of gradual and more or less systematic growth. A survey of that evolution is out of place in this article. But, as

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1. See e.g., John P. Mackintosh, *The British Cabinet* (Third ed., 1977, London, Stevens and Sons Ltd.) p. 4.  
2. E. C. S. Wade in his Introduction to A. V. Dicey’s *Introduction to the Study of the Law of the Constitution* (10th edition, E. L. B. S. edition, 1971), p. xxvii.

indicated in the opening paragraph of this article and as will be illustrated later, the concept of Cabinet government is still the predominant feature of the British system of government.<sup>3</sup>

The system of representative democracy that prevails in England<sup>4</sup> finds expression through a legislative body, the House of Commons, directly elected by the people at periodic elections; the conferment of actual executive power, meaning the power to direct and control executive government, on a board of ministers, known as the Cabinet, which is drawn from the legislature; the provision of a second chamber, the House of Lords, as a check on hasty or unwise legislative measures; the institution of the Monarch, nominal in terms of executive power, but persuasive in terms of advisory power; the provision of safeguards to maintain impartiality in the areas of judicial and civil administration, conduct of elections and the Police. This British system of government has as its central theme the Sovereignty of Parliament and is founded on respect for the Rule of Law. Although there is not, and never has been, a strict separation of powers in the English constitution<sup>5</sup>, the doctrine of the Rule of Law provides adequate safeguards against tyranny.<sup>6</sup>

It is in the backdrop of the English constitutional system which has been outlined above, that one can understand the working of Cabinet government there. As there is a need for a strong central government there is also felt at the same time a need to guard against oppressive regimes. Thus in a system of government which seeks to balance these conflicting interests, Cabinet government finds a delicately poised place. Similarly, in assessing the working of Cabinet government in Sri Lanka, the constitutional structure and the environment in which it operates must as a rule be closely studied. Therefore, in this article when various aspects of Cabinet government are discussed reference will be made to the English system as well as to each of the constitutional systems in operation in Sri Lanka since Independence.

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3. For the growth of the Cabinet in England, see generally A. B. Keith, *The British Cabinet System, 1830-1938* (1939); Sir W. Ivor Jennings *Cabinet Government* (1936); John P. Mackintosh, *The British Cabinet* (3rd edition, 1977); and D. L. Keir, *A Constitutional History of Modern Britain since 1485*. (8th edition, 1968).

4. "The state for the purpose of international relations is the United Kingdom, although it is often popularly but inaccurately referred to as 'Britain', 'Great Britain' or 'England'. The appropriate adjective for our constitution, Parliament and so on would be 'United Kingdom', although again that commonly used is 'British' or 'English'." O. Hood Phillips, *Constitutional and Administrative Law*. (6th edition, 1978), p. 19.

5. See O. Hood Phillips, *Constitutional and Administrative Law* (6th edition) pp. 31-32; "A Constitutional Myth: Separation of Powers", (1977) 93 L. Q. R. 11.

6. O. Hood Phillips, *op. cit.* pp. 14-16.

### 1. Composition of the Cabinet

*Britain* : By law the Queen can appoint and dismiss Ministers at her pleasure, but by convention Ministers are appointed from among members of the House of Commons and the House of Lords.<sup>7</sup> A Minister need not be at the time of appointment a member of either House, but the convention is firmly established that within a period of grace he must sit in a House.<sup>8</sup> The inner ring of the Ministers, usually consisting of about twenty, is called the Cabinet. These Cabinet Ministers are appointed by the Queen, by convention, on the advice of the Prime Minister, with some Ministers (particularly the Chancellor of the Exchequer) invariably from the House of Commons, and some Ministers invariably from the House of Lords, e.g., the Lord Chancellor.<sup>9</sup>

*Under the Independence Constitution of Ceylon* : The Cabinet of Ministers was appointed by the Governor-General,<sup>10</sup> acting on the advice of the Prime Minister.<sup>11</sup> Every Cabinet Minister had to be a member of either of the two Houses of Parliament, owing to the rule that a Minister who was not such a member for any period of four consecutive months ceased to be Minister.<sup>12</sup> Not less than two Ministers had to be appointed from the Senate.<sup>13</sup>

*Under the First Republican Constitution (1972) of Sri Lanka* : The Cabinet of Ministers was appointed by the President<sup>14</sup> acting on the advice of the Prime Minister.<sup>15</sup> All Ministers had to be members of the National State Assembly, the unicameral legislature of the Republic, at the time of appointment.<sup>16</sup> This marks a departure from the rule which obtains in England and which was incorporated in the Independence Constitution of Ceylon.

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7. The House of Commons Disqualification Act of 1975 limits the number of members who may sit in the House of Commons. The rest must be from the House of Lords.
  8. This is illustrated by the appointment after the General Election in October 1964 of two outsiders as Ministers and their candidature at by-elections held in January 1965. See O. Hood Phillips, *op. cit.* p. 114.
  9. See O. Hood Phillips, *op. cit.* pp. 307-308.
  10. The Ceylon (Constitution) Order in Council, 1946, as amended in 1947. Sec. 46 (1).
  11. *Ibid.*, sec. 4 (2) : "All powers, authorities and provisions vested in His 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 His Majesty".
  12. *Ibid.*, sec. 49 (2).
  13. *Ibid.*, sec. 48.
  14. The Constitution of Sri Lanka (Ceylon), 1972, sec. 94 (1).
  15. *Ibid.*, sec. 27 (1) : "The President shall always, except as otherwise provided by the Constitution, act on the advice of the Prime Minister, or of such other Minister to whom the Prime Minister may have given authority to advise the President on any particular function assigned to that Minister."
  16. *Ibid.*, sec. 94 (1).

*Under the Second Republican Constitution (1978) of Sri Lanka:*

The President is empowered to appoint Ministers of the Cabinet of Ministers who are not members of the Cabinet of Ministers, from among the Members of Parliament, the unicameral legislature of the Republic. There is no requirement that the President must act on Prime Ministerial advice, but he may act "in consultation with the Prime Minister, where he considers such consultation to be necessary" in the exercise of such power of appointment.<sup>17</sup> Thus, under the 1978 Constitution we witness the emergence of an executive President as distinguished from a nominal or constitutional Head of State.

## 2. Assignment of Subjects

*Britain :* The Prime Minister is the Head of the Cabinet and decides on the allocation of functions to the Ministers that he will choose to appoint, the formal appointment of Ministers and the assignment of subjects being performed by the Queen. As mentioned above, the law compels the Prime Minister to choose some of his Ministers from the House of Lords. In choosing his Ministers, the Prime Minister will have to consider various factors, such as the relative importance of Ministries and Departments, the influence of members in the country, the authority of members in the House of Commons and their value in debate, and the representation of the government in the House of Lords.<sup>18</sup>

*Under the Independence Constitution of Ceylon :* Section 46(2) named three Ministers : "Of the Ministers, one who shall be the head of the Cabinet, shall be styled the 'Prime Minister'; of the other Ministers one shall be styled the 'Minister of Justice' and another shall be styled the 'Minister of Finance'." Section 46 (4) declared that "The Prime Minister shall be in charge of the Ministry of Defence and External Affairs and shall administer the matters relating to that Ministry, in addition to such other matters as he may determine to retain in his charge. Each Minister, other than the Prime Minister, shall be charged with the administration of such subjects and functions as may be assigned to him by the Prime Minister".

*Under the First Republican Constitution (1972) of Sri Lanka :* Section 92 (2) declared that "of the Ministers, one who shall be the Head of the Cabinet of Ministers shall be the Prime Minister". Section 94 in its first and the third sub-sections embodied the following provisions : "The Prime Minister shall determine the number of Ministers and Ministries and the assignment of

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17. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Articles 44 (1) and 45 (1).

18. See O. Hood Phillips, *Constitutional and Administrative Law* (6th edition), p. 307.

subjects and functions to Ministers . . . . The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers”.

This Constitution as well as the Second Republican Constitution, as we shall see later, refer by designation only to the Prime Minister. The Independence Constitution is unique in that it alone assigns a specific Ministry to the Prime Minister.

*Under the Second Republican Constitution (1978) of Sri Lanka:* This Constitution in Article 43 (3) refers to the appointment of the Prime Minister, but he is not the Head of the Cabinet. Article 43 (2) declares that “The President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers”. It is the President who determines the number of Cabinet Ministers and the Ministries and the assignment of subjects and functions to such Ministers<sup>19</sup> and has the power to change the assignment of subjects and functions and the composition of the Cabinet of Ministers.<sup>20</sup>

Thus, unlike under the Independence Constitution and the First Republican Constitution (where the Prime Minister took the actual decisions which were formally executed by the Head of the State), today the President who is the Head of the Cabinet as well as of the State makes the determination and puts it to effect.

### 3. Ministerial Responsibility

*Britain:* “For all that passes in Cabinet each member of it who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues”.<sup>21</sup> A Minister who is not prepared to defend a Cabinet decision must resign. If a Minister does not resign he is responsible, meaning that he must vote with and defend the government, unless a matter is left as an “open question”.<sup>22</sup> The device, invented in 1932, of an “agreement to differ” may temporarily keep in abeyance the operation of collective responsibility.<sup>23</sup> It is said that during the EEC Referendum campaign in 1975 the principle of collective responsibility was temporarily suspended.<sup>24</sup>

19. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 44 (1) (a).

20. *Ibid.*, Article 44 (3).

21. Lady Gwendolen, Cecil, *Life of Robert, Marquis of Salisbury*, (1921) Vol. II, pp. 219-220, cited in Sir W. Ivor Jennings, *Cabinet Government* (1947), p. 217.

22. See generally Sir W. Ivor Jennings, *Cabinet Government* (1947), pp. 217-227.

23. See generally Sir W. Ivor Jennings, *Cabinet Government* (1947), p. 218.

24. See M. J. A. Cooray, “The Referendum and its Place in the Constitutional Set Up of Sri Lanka”, *Mooter*, the Journal of the Moot Society of the Sri Lanka Law College, Vol. I. (1985), pp. 39-51.

A Minister has a duty not only to support the Government but also to refrain from jeopardizing its interests. To this extent he divests himself of that perfect freedom of action which belongs to a private and independent Member of Parliament.<sup>25</sup>

Ministers are also individually responsible to Parliament in that (a) a Minister must be prepared to answer questions in the House concerning matters for which he is administratively responsible, and (b) he must resign his office if a vote of censure is passed against him.<sup>26</sup>

*Under the Independence Constitution of Ceylon*: Section 46(1) ran as follows: "There shall be a Cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of government of the Island and who shall be collectively responsible to Parliament". Thus, when in 1948 one of the Ministers failed to abide by the decision of the Cabinet the Prime Minister wrote to him as follows: "It is very unfortunate that we should lose your services at this juncture, but I think that *we should establish proper traditions in our new government*, and I am most reluctantly constrained to ask you to tender your resignation as Minister of Commerce and Trade". (Emphasis added.)<sup>27</sup>

During the time the Independence Constitution was in operation there were many instances where collective responsibility was blatantly contravened, and the Prime Ministers had to warn and admonish their Ministers, sometimes even openly.

Individual responsibility, even though not specifically mentioned in the Constitution, was regarded as operative in Ceylon. On 27 November 1959 for instance a vote of censure was moved though unsuccessfully against the Minister of Justice. Another vote of censure listed to be taken up that day against the Finance Minister was not proceeded with as he had already resigned his office.<sup>28</sup> Questions could be asked in Parliament from Ministers regarding matters for which they were answerable.

*Under the First Republican Constitution (1972) of Sri Lanka*: Section 92(1) ran as follows: "There shall be a Cabinet of Ministers charged with the direction and control of the government of the Republic which shall be collectively responsible to the National State Assembly and answerable to the National State Assembly on all matters for which they are responsible".

25. Phillip Guedaila, *Palmerston* (1926), at p. 288.

26. See O. Hood Phillips, *Constitutional and Administrative Law* (6th edition, 1978), p. 116.

27. *Ceylon Hansard* (14.12.1948), Vol. 5., col. 604.

28. See the *Hansard* of 27.11.1959, and *The Times of Ceylon* of 23.11.1959.

This provision ensured the continuity of the then existing tradition of the collective responsibility of the Cabinet, and the allied principle of the individual responsibility of Cabinet Ministers. In 1975 Mrs. Sirima Bandaranaike removed from her Cabinet of Ministers the three Lanka Sama Samaja Party members who refused to toe the line with the government, and in 1977 the Communist Party member tendered his resignation.

The 1972 Constitution, in addition to making the Cabinet of Ministers collectively responsible to the National State Assembly, makes the Ministers answerable to the National State Assembly on all matters for which they are answerable. Thus as regards civil and judicial appointments which were made by the Cabinet of Ministers, they were held answerable to the legislature.

As before 1972, individual Ministers continued to be answerable to the legislature in respect of matters under their control.

*Under the Second Republican Constitution (1978) of Sri Lanka:* Article 43 (1) is as follows: "There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament". This is a slightly modified version of section 92 (1) of the 1972 Constitution. It is correct to assume in the light of our discussion on the position under the Independence Constitution and the First Republican Constitution that collective responsibility and individual responsibility of Cabinet Ministers continue to operate in Sri Lanka. The removal of Mr. Cyril Mathew from the Cabinet of Ministers provides an illustration of the applicability of the principle of collective responsibility.<sup>29</sup>

As we have seen above, the President is a member of the Cabinet and is the Head of the Cabinet. He is unlike any other Minister not subject to censure, except under the impeachment procedure which will be discussed later on in this article. However the immunity from suit which is conferred on him is subject to the qualification that proceedings can be instituted in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44. The Deputy Minister in each of the Ministries under the President answers questions in Parliament relating to such Ministries.

29. For the correspondence relating to the removal and Mr. Mathew's disclaimer that there was a breach of the collective responsibility, see his statement in Parliament *Hansard*, Vol. 33 No. 1 (8.1.1985) columns 64-91. The President in his letter stated that Mr. Mathew's public criticism of the All Party Conference proposals "now before the Cabinet for decision is a violation of the rules and conventions of Cabinet Government". Having pointed out that Mr. Mathew had himself on previous occasions complained about breaches of collective responsibility by certain Ministers citing passages of Jennings' *Cabinet Government*, His Excellency concluded that "since . . . you have deliberately broken them yourself I presume you have decided to cease to be one of my Ministers".

The present Constitution of Sri Lanka refers in Article 45 to the appointment by the President of Ministers who are not Members of the Cabinet of Ministers. "Every such Minister appointed under [Article 45] shall be responsible and answerable to the Cabinet of Ministers and to Parliament".<sup>30</sup>

#### 4. Formation of the Cabinet: The Selection of the Prime Minister

*Britain*: The formation of a Cabinet depends essentially on the royal choice of a Prime Minister. The occasion for such action arises (a) after the conclusion of a general election, or (b) on the death of the Prime Minister, or (c) on the resignation or the removal of the Prime Minister. The Prime Minister must be able to command the confidence of the House of Commons. Sometimes when there are more such persons than one, the Queen has a choice. However, in contemporary Britain the party system is so well established that there will really be very few occasions when the Queen may have a real choice.

It has not been seriously contended since 1923 that the Prime Minister may be appointed from the House of Lords.

Once a Prime Minister has been selected it is his prerogative to select his Ministers.

*Under the Independenece Constitution of Ceylon*: The Constitution did not contain any specific guideline as to who could be appointed as Prime Minister. The death of Mr. D. S. Senanayake in 1952, the resignation of Mr. Dudley Senanayake in 1953, and the death of Mr. S. W. R. D. Bandaranaike in 1959 necessitated the appointment of a successor in office. In addition, the conclusion of the general election provided the usual occasion for the selection of a Prime Minister. In all these circumstances, excepting after the general election in July 1960, a Member of the House of Representatives claiming to be the leader of the party having the largest number of seats in that House was appointed Prime Minister.

In 1959 after the assassination of Mr. S. W. R. D. Bandaranaike, there was little difficulty in selecting a successor. The Governor-General, Sir Oliver Goonetilleke, called upon Mr. W. Dahanayake who had the support of the late Mr. Bandaranaike's Cabinet to be the Prime Minister. In choosing his Cabinet Ministers, Mr. Dahanayake had no difficulty; in fact, all members of Mr. Bandaranaike's Cabinet were sworn in as members of Mr. Dahanayake's Cabinet with certain functions reallocated. Although this was the reality, in legal theory a new Cabinet with fresh letters of appointment came into being, since as one of the Ministers is reported to have said "the old SLFP Cabinet

30. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 45 (3).

died when Mr. Bandaranaike died yesterday morning". In fact since at the time the new Cabinet was appointed two Ministers were away from the Island, the two former Acting Ministers were appointed as Ministers only to resign shortly afterwards on the return of the former Ministers.<sup>31</sup>

However, the appointments made in 1952 upon the death of Mr. D. S. Senanayake, and in 1953 on the resignation of Mr. Dudley Senanayake, to fill the vacancy in the office of Prime Minister were the subjects of controversy and suspicion. In 1952 Mr. Dudley Senanayake (who was the son of the former Prime Minister and who had the support of the Government Parliamentary Group) was appointed as successor, overlooking the claim of Sir John Kotalawala, the Leader of the House. Again in 1953 when Mr. Dudley Senanayake resigned, the choice was not completely beyond question.<sup>32</sup>

The appointment of Mr. Dudley Senanayake as Prime Minister after the general election in March 1960 did not generate any real controversy. The appointment of Mrs. Bandaranaike (widow of the late Mr. Bandaranaike, Prime Minister from 1956 to 1959) as Prime Minister after the 1960 July general election, however, gave rise to much debate. Mrs. Bandaranaike who had by then become the undisputed leader of the Sri Lanka Freedom Party, did not contest a seat. Therefore at the time of appointment she was a stranger to both Houses of Parliament. Upon her appointment as Prime Minister she advised the Governor-General to appoint her as a member of the Senate, and continued to direct and control the government from there.

Thus, while the debate as to whether a Peer can be the Prime Minister seems to have been closed in 1923 in England with an answer in the negative, in 1960 Sri Lanka had a Prime Minister appointed from outside Parliament who later entered the Upper House and continued to function as Prime Minister without seeking entry to the House of Representatives.

*Under the First Republican Constitution (1972) of Sri Lanka:* Section 92 (2) contains the relevant rule: "Of the Ministers, one who shall be the Head of the Cabinet of the Ministers shall be the Prime Minister. The President shall appoint as Prime Minister the Member of the National State Assembly who, in the President's opinion, is most likely to command the confidence of the National State Assembly". This section prevented such an appointment as was made in July 1960 in that (a) the appointee could not be from outside Parliament and (b) no second chamber was retained in the 1972 Constitution.

31. See for the events referred to in this paragraph *The Times of Ceylon* of 26.9.1959, 27.9.59, 29.9.59 and 30.9.59.

32. See further as regards this paragraph A. J. Wilson, "The Role of the Governor-General in Ceylon", *Modern Asian Studies*, Vol. II, No. 3 (1969), pp. 193-220, at 213.

However, a discretionary power continued to be vested in the President in determining who in his opinion was "most likely to command the confidence of the National State Assembly".<sup>33</sup>

On the single occasion when the President was called upon to exercise this power, namely in 1977 in appointing Mr. J. R. Jayewardene, he had no difficulty in choosing the Prime Minister because Mr. Jayewardene was the undisputed leader of the winning party which obtained a sweeping majority in the National State Assembly.

*Under the Second Republican Constitution (1978) of Sri Lanka*: Article 43(3) is as follows: "The President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament". This section is in the same terms as the corresponding section in the 1972 Constitution. However, it must be noted that (a) the President today is an executive President and that he, and not the Prime Minister, is the Head of the Cabinet and (b) that accordingly the President when making appointments to the Cabinet of Ministers need not act on the Prime Minister's advice.

##### 5. The Prime Minister and his colleagues

In this section and hereafter in this article there will not be, as was the pattern so far, four sub-divisions for the English system and the three constitutional systems of Sri Lanka since Independence. It is believed that adequate background material for a comparative study has already been provided and unnecessary repetition can be avoided.

In England Sir R. Peel has been regarded as a model Prime Minister because "he supervised and was genuinely familiar with the business of each department".<sup>34</sup> However, it is admitted today that in view of the ever growing extension of state functions, an assumption of such a degree of control will result in disaster to him as well as to the country<sup>35</sup>. However, the evolution of the system of political parties, with a heavy accent on internal party discipline and the formulation of party policies at a national level, has greatly contributed to consolidate the position of the Prime Minister in Parliament.

33. This and other variations of it are adopted in several other Commonwealth jurisdictions. Some of these are as follows: "A member of the House of Representatives who in *Yang di-Pertuan Agong's* (the Malaysian Head of State's) judgment is likely to command the confidence of the majority of the members of that House" (Constitution of Malaysia of 1957 as amended in 1964, sec. 43 (2)); "the member of the National Assembly who appears to him best able to command the support of the members of the Assembly" (Constitution of Malawi of 1964).

34. See A. B. Keith, *The British Cabinet System*, (second edition, 1952), p. 55.

35. See A. B. Keith, *The British Cabinet System*, (second edition, 1952), p. 55.

In fact, there is a ready willingness on the part of many observers of political developments to describe parliamentary government as likened more to a Prime Ministerial system than to a Cabinet system. It has aptly been said that the polite description of the Prime Minister as *primus inter pares* or the higher claim that he should rank as *inter stellas luna minores* would be inadequate to describe the real position of the Prime Minister if by temperament he is willing to assert to the full the position he can assert if he so wishes.<sup>36</sup> In Sri Lanka, it has been claimed that Mrs. Bandaranaike became a virtual dictator during her premiership from 1970 to 1977.

Under the Independence Constitution of Ceylon and the First Republican Constitution the Cabinet did not have an existence separate from that of the Prime Minister. This is illustrated (a) by the fact that under the Independence Constitution the appointment of a new Prime Minister, even to manage a caretaker government as in 1959, resulted in the swearing in of a new Cabinet of Ministers and (b) by the fact that under the 1972 Constitution when the Prime Minister ceases to be the Prime Minister for any reason (excepting between a dissolution of Parliament and the conclusion of the resultant General Election) the Cabinet of Ministers stands dissolved.

It is interesting to note that a different rule prevails in England: "But resignation [of the Prime Minister which results automatically in the dissolution of the Cabinet of Ministers] is in law not a cessation of tenure of office. A Prime Minister and his colleagues by constitutional practice remain at their posts, pending the moment when a new ministry is constituted and is prepared to take over; should the Prime Minister die in office the rest of the Ministers likewise remain in office until the new government is constituted. Moreover, if the Prime Minister retains Ministers in their existing offices, there is no need for re-appointment. They retain their offices with tenure unaffected by the fact that the Ministry has been dissolved. On the other hand, each Minister holds until asked to retain his post on the understanding that he will relinquish it at the moment he is asked to do so. If he failed, he would forthwith be dismissed by the King on the advice of the Prime Minister".<sup>37</sup>

The foregoing description of the formal transfer of office does not in any sense contradict the position that the Cabinet is the Cabinet of a particular Prime Minister. But the British practice is flexible enough to accommodate situations where the selection of the Cabinet is not entirely at the wish of the

36. See A. B. Keith, *The King, The Constitution, the Empire and Foreign Affairs*, 1936-37, pp. 41 ff.

37. A. B. Keith, *The British Cabinet System*, (2nd edition, 1952) p. 53. It is pertinent to note that these views were found acceptable in the early years of Independent Ceylon. For instance when Mr. Dudley Senanayake was sworn in as Prime Minister after the General Election in 1952, such members of his Cabinet as held office before the Election were not required to be sworn in, provided they continued to hold the same portfolios.

Prime Minister, but dictated by the prevailing circumstances. It is interesting to compare this general practice with what happened in 1959 when Mr. Dahanayake succeeded the late Mr. Bandaranaike. A new Cabinet consisting of the outgoing Cabinet, was appointed afresh. However the Prime Minister somewhat erratically removed several Ministers of the Cabinet.

If parliamentary democracy as was practised under the Independence Constitution of Ceylon and the First Republican Constitution of Sri Lanka (1972) enabled a Prime Minister in Parliament to be elevated to a position involving immense power & influence due to his prime position in the Cabinet and in the Government parliamentary group, the present Constitution places today's Head of the Cabinet in an enviably exalted position.

As we have seen above in several different contexts, the Prime Minister today, in spite of the fact that he is the Member of Parliament best able to command the confidence of Parliament, is not the Head of the Cabinet. The President is the Head of the Cabinet and presides at Cabinet meetings. A dissolution of the Cabinet has no effect on the continuance of the President in his office. On the other hand, on the Prime Minister ceasing to hold office for any reason, the Cabinet stands dissolved. This principle is enunciated in Article 49(1): "On the Prime Minister ceasing to hold office by removal, resignation or otherwise, except during the period intervening between the dissolution of Parliament and the conclusion of the General Election, the Cabinet of Ministers shall, unless the President has in the exercise of his powers under Article 70 dissolved Parliament, stand dissolved and the President shall appoint a Prime Minister, Ministers of the Cabinet of Ministers, other Ministers and Deputy Ministers in terms of Articles 43, 44, 45 and 46."

By contrast a vacancy in the office of President, who is the Head of the Cabinet, does not result in a dissolution of the Cabinet. Thus we have a somewhat anomalous position in that (a) the Cabinet of Ministers does not have an existence independently of the Prime Minister, in the sense that the Cabinet goes out of office whenever the Prime Minister ceases to be the Prime Minister, (b) the Head of the Cabinet (i.e. the President of the Republic) remains in office surviving a dissolution of the Cabinet, to assume control of a Cabinet differently constituted, and (c) the displacement of the President, the Head of the Cabinet, does not result in the dissolution of the Cabinet.

In plain truth the Prime Minister today is not a "Prime Minister" in the sense in which that title is used in relation to the Westminster model. Nor is the President a constitutional Head of the State, as under the English system. It is the compromise that the Second Republican Constitution attempts to work out between Parliamentary democracy and Presidential government that has inevitably resulted in the anomalies referred to above.

The President today is at once a Prime Minister armed with extensive powers and a ceremonial Head of the State. His office has been constitutionally entrenched in order that he can be an extremely effective "Prime Minister" ensuring stability in government. If one needs an excuse for so doing, we may conveniently refer to the argument raised in favour of appointing a Prime Minister from the House of Lords: "There may be adduced in favour of the selection of a peer as Prime Minister the consideration that he is set free to concentrate on essential problems, as a result of detachment from the constant attendance in the Commons."<sup>38</sup>

The President as a member of the Cabinet can himself be in charge of Ministries. Article 44 (2) is as follows: "The President may assign to himself any subject or function not assigned to any Minister under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45, and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President."

As we have noted above, the President cannot be made answerable to Parliament regarding the way in which he manages functions in his charge as a Minister. This conclusion is drawn mainly from the following arguments: (1) According to Article 42 the President is responsible but not in addition answerable to Parliament, whereas the rest of the Cabinet of Ministers according to Article 43 (1) are responsible and answerable to Parliament; (2) Although it may be possible to raise a question in Parliament as regards a Ministry in the charge of the President, which may be answered by his Deputy Minister, Standing Order 78 provides a valuable safeguard to the President: "The conduct of the President, or Acting President, Members of Parliament, judges or other persons engaged in the administration of justice shall not be raised except upon a substantive motion," which means in effect that the only way of censuring the President is to impeach him.

As the President can appoint Cabinet Ministers, so too can he remove any Cabinet Minister, without consulting the Prime Minister at all. In the light of the power of the President to appoint, reshuffle and remove Cabinet Ministers, we may now look at article 48.

"48 (1). The Cabinet of Ministers functioning immediately prior to the dissolution of Parliament shall notwithstanding such dissolution continue to function and shall cease to function upon the conclusion of the General Election, and accordingly, the Prime Minister, Ministers of the Cabinet of Ministers,

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38. A. B. Keith, *The British Cabinet System 1830-1938*, p. 31.

other Ministers and Deputy Ministers shall continue to function unless they cease to hold office as provided in paragraph (a) or (b) of Article 47" [*i.e.* by removal or by resignation].<sup>39</sup>

"48 (2). Notwithstanding the death, removal from office or resignation of the Prime Minister, during the period intervening between the dissolution of Parliament and the conclusion of the General Election, the Cabinet of Ministers shall continue to function with the other Ministers of the Cabinet as its members until the conclusion of the General Election. The President may appoint one such Minister to exercise, perform and discharge, or *may himself exercise, perform and discharge the powers, duties and functions of the Prime Minister. If there is no such other Minister the President shall himself exercise perform or discharge the powers, duties and functions of the Cabinet of Ministers until the conclusion of the General Election*". (emphasis added).

"48 (3). On the death, removal from office or resignation, during the period intervening between the dissolution of Parliament and the conclusion of the General Election, of a Minister of the Cabinet of Ministers or any other Minister, the President may appoint any other Minister to be the Minister in charge of such Ministry or to exercise, perform and discharge the powers, duties and functions of such Minister or *may himself take charge of such Ministry or exercise, perform and discharge such powers, duties, and functions*". (emphasis added).

Paragraphs (1), (2) and (3) of Article 48 together permit a President who is so minded to remove the Prime Minister and all other Ministers of the Cabinet, take over all Ministries and the office of Prime Minister. If this is done, there will be a one member "President-Prime Minister-Cabinet System" during the short period intervening between the dissolution of Parliament and the conclusion of the General Election. The immensity of the power that the President can wield at a time like this shows how in extreme situations a Parliamentary system of Government can become so illusory under the Second Republican Constitution.

## 6. Cabinet of Ministers and the Head of the State

The general rule under the Independence Constitution of Ceylon and the First Republican Constitution of Sri Lanka (1972) was that the Head of the State exercised his powers and functions on the advice of the Prime Minister or any Minister who had been legally authorised to advise the Head of the

39. As at 26th November 1985 there are 27 Cabinet Ministers (excluding the President), 4 Ministers not in the Cabinet, 24 District Ministers and 36 Deputy Ministers (who are not at the same time Ministers). Thus 91 M. P. s out of a total of 168 will continue to function in their executive capacity notwithstanding a dissolution of Parliament.

State. Thus, except in the situations where the Head of the State had a discretion, the actual decision making was done in the Cabinet. The Independence Constitution ensured the compliance with this rule through the incorporation of British conventions in that Constitution merely by reference.

When the 1972 Constitution was drafted scrupulous care was taken to ensure that the Head of the State, the President, would not enjoy powers which he might use to pose a threat to the prominence of the Cabinet. Thus, Section 27 (1) expressly required the President to act on Prime Ministerial or Ministerial advice, "except as otherwise provided by the Constitution." In the chapter entitled "Public Security", Section 134 (2) provided specifically that "upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency the President shall act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency". (This provision was made to prevent a repetition of the assumption of extensive powers by the Governor-General during the 1958 emergency, allegedly without Prime Ministerial advice). The statement of government policy, or the Speech from the Throne as it was known before 1972, was to be presented in the Legislature by the Prime Minister and not by the Head of the State as before 1972. The Royal Assent to Bills of Parliament, as the formal act of bringing Bills into the statute book was abandoned, and the 1972 Constitution by section 48 (1) provided that a Bill became law when the Speaker endorsed a certificate upon it that it was duly passed by the National State Assembly. Section 26 (2) (c) provided that the President could be removed by the Prime Minister on the ground "that the President is incapable of performing the functions of his office by reason of mental or physical infirmity". He could also be removed by a resolution of no confidence passed in the National State Assembly.

Under the Second Republican Constitution, as we have already seen, the President of the Republic is the Head of the Cabinet. The President, therefore, maintains two distinct types of relationship with the Cabinet. First, his relationship with the Cabinet of Ministers in the capacity of the Head of the Cabinet (corresponding to that between the Prime Minister and the Cabinet of Ministers under the pre-1978 system) ; and, secondly, his relationship with the Cabinet of Ministers in the capacity of a constitutional Head (corresponding to that between the Queen or the Governor-General and the Cabinet of Ministers under the Westminster model).

The powers that the President today exercises as the Head of the Cabinet have already been discussed under sub-heading 5 above. Let us now look at his relationship *qua* President with the Cabinet of Ministers. First the President is not bound to act on Prime Ministerial or Ministerial advice. Even where the Constitution enables Ministerial advice to be offered, such as in respect

of the grant of pardon by the President, the acceptance of such advice has been left to the discretion of the President : Secondly the President is, as before 1978, detached from the law-making process, for a Bill becomes law when the Speaker endorses a certificate on it that it has been duly passed by Parliament. The President does, however, play a significant part in the legislative process, in that (a) he presides over Cabinet meetings where the majority of important Bills are presented, discussed and approved for submission to Parliament ; (b) he has a right of audience in Parliament.<sup>40</sup> Reversing the practice of the Prime Minister making the Statement of Government Policy started under the 1972 Constitution, Article 33(4) empowers the President to make such statement at the commencement of each session of Parliament. Article 33 (b) enables the President to preside at ceremonial sittings of Parliament ;<sup>41</sup> (c) Bills which need the approval of the House with a two-thirds special majority and of the People at a Referendum become law upon their being signed by the President ;<sup>42</sup> (d) an ordinary Bill rejected by Parliament may be referred to the People by the President for approval at a Referendum. If passed such a Bill becomes law upon the giving of the requisite certificate by the President.<sup>43</sup>

The most significant power the President has over the Cabinet of Ministers—that of dissolution—will be discussed under the next sub-heading.

### 7. Parliament and the Cabinet of Ministers

In a typical Westminster model system of Government, the justification for the vesting of executive power in the Cabinet is solely derived from the fact that the members of the Cabinet are drawn from the legislature. Both the Independence Constitution and the First Republican Constitution, as we have already seen, made provision in recognition of this principle. The present Constitution requires all Cabinet Ministers to be appointed from among Members of Parliament, with the notable exception that the President who is the Head of the Cabinet of Ministers is himself not a Member of Parliament. To rephrase an oft-cited quotation to suit the Sri Lankan situation, “with a majority in Parliament all things are possible, without it nothing is safe”. In other words the continuance of the Cabinet depends on the confidence it receives from Parliament or if Parliament is bicameral, from its representative assembly.

40. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 32(3).

41. This group of provisions clearly indicates how powers which belonged to the Prime Minister and those which belonged to the President under the 1972 Constitution are vested today in the President alone.

42. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 80(2).

43. *Ibid.*, Article 85. See for a detailed account M. J. A. Cooray, “The Referendum and its Place in the Constitutional Set up of Sri Lanka,” *Mooter*, the Journal of the Moot Society of the Sri Lanka Law College, (1985) Vol. I, pp. 39-51.

With the evolution of the political party system, confidence in the representative legislature has come to mean confidence in a party or a coalition of parties. This means that there is an opposition to be reckoned with an opposition aspiring to be the next government. If the government loses its majority in the representative legislature, then either it must make way for an alternative government or face a general election.

Both in England and under the Independence Constitution of Ceylon the question of confidence in the House was regulated by conventions. The First Republican Constitution was much more explicit. Article 98, which provided that the Cabinet of Ministers shall stand dissolved on the death or the resignation of the Prime Minister, was followed by provisions to this effect :

“ 99. The Prime Minister shall be deemed to have resigned—

(1) At the conclusion of a General Election ; or

(2) If the National State Assembly rejects the Appropriation Bill or the National State Assembly passes a vote of no confidence in the Government or the National State Assembly rejects the Statement of Government Policy at any session other than the first session of the National State Assembly and the Prime Minister does not within forty-eight hours of such rejection of the Appropriation Bill or of such passage of a vote of no-confidence in the Government or of such rejection of the Statement of Government Policy advise the President to dissolve the National State Assembly, upon such forty-eight hours having elapsed”.

“ 100(1). If the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister within forty-eight hours of such rejection advises the President to dissolve the National State Assembly, the President may notwithstanding such advice decide not to dissolve the National State Assembly. Upon the President so deciding, the Prime Minister shall be deemed to have resigned.

(2) If the National State Assembly rejects the Statement of Government Policy at its first session and the Prime Minister does not within forty-eight hours of such rejection advise the President to dissolve the National State Assembly, the Prime Minister shall be deemed to have resigned upon such forty-eight hours having elapsed”.

These provisions draw a distinction between two situations. The first is where the government is defeated at the presentation of its first Statement of Government Policy. Here the President is not bound to accept Prime

Ministerial advice to dissolve Parliament. If the President rejects such advice there will only be a dissolution of the Cabinet of Ministers. The second situation is where the government is defeated (a) at the presentation of the second or any later Statement of Government Policy, (b) at the passing of the Appropriation Bill, or (c) on the passage of a vote of no-confidence. Here if the President is advised within 48 hours by the Prime Minister to dissolve Parliament, the President must act on such advice. These provisions seem to have excluded the possibility of restoring the confidence of the House, immediately following a major defeat for the government which might well have been occasioned by a snap-vote.<sup>44</sup>

That the Prime Minister presides over a Cabinet "composed of Ministers over whose appointment and removal he has at least a substantial measure of control"<sup>45</sup> is implicitly recognised by these elaborate provisions.

The Second Republican Constitution, however, is founded on a different premise: that an elected President invested with executive power shall have a substantial measure of control over the Cabinet of Ministers and Parliament. In this light it is not difficult to understand Article 70 (1) of the Constitution: "The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament". There are four exceptions to this:

- (1) When a General Election has been held consequent upon a dissolution of Parliament by the President (as distinguished from a dissolution by operation of law, namely after the expiry of Parliament's six year term of office), the President shall not thereafter dissolve Parliament until the expiration, of a period of one year from the date of such General Election, unless Parliament by resolution requests the President to dissolve Parliament.
- (2) The President shall not dissolve Parliament on the rejection of the Statement of Government Policy at the commencement of the first session of Parliament after a General Election.

44. However, the Minister of Constitutional Affairs in the Constituent Assembly said: "Apart from the first occasion [i.e., defeat at the presentation of the First Statement of Government Policy], because I think the first occasion is too serious, on all other occasions the Prime Minister can follow what the Prime Minister is best advised to do. One of the procedures would be: 'Though I was defeated by a snap vote on that occasion, I in fact command a majority in the House.' It has been done in various places. But generally, in minor matters and not things like that, they move a Vote of Confidence in the Government and pass it and carry on with their business. All sorts of devices are available. None of them is shut out". (*Constituent Assembly Debates*, Columns 2790-2791).

45. S. A. De Smith, *The New Commonwealth and its Constitutions* (1964), p. 77.

- (3) The President's power of dissolution has been restricted in order to permit the undisturbed operation of the power of Parliament to remove the President from his office.
- (4) Where the President has not dissolved Parliament consequent upon the rejection by Parliament of the Appropriation Bill, the President shall dissolve Parliament if Parliament rejects the next Appropriation Bill.

The above provisions dealing with the President's power to dissolve Parliament and the limitations placed on that power are designed more to balance the interests of the Parliament and the President than to reflect the working of the Cabinet system as under a Westminster model constitution.

As regards dissolution of the Cabinet we have already seen that on the Prime Minister ceasing to hold office by removal, resignation or otherwise the Cabinet stands dissolved.<sup>46</sup> Similarly, as provided in Article 49 (2), if Parliament rejects the Statement of Government Policy or the Appropriation Bill or passes a vote of no-confidence in the Government, the Cabinet of Ministers shall stand dissolved. In the instances referred to in this Article we witness how the legislature may terminate the term of office of the Cabinet of Ministers.

### **8. The Cabinet and the Administration**

One of the distinctive features of a Parliamentary democracy is that the administrative structure has at its head the Cabinet of Ministers. Policy formulated by the Cabinet is implemented by the administrative service. To that extent the Cabinet has an interest in the composition of the administrative service, to ensure that it is loyal to the Government. On the other hand adequate provision is needed to make the administrative service non-partisan and efficient.

The Independence Constitution established a Public Service Commission, in which was vested the appointment, transfer, dismissal and disciplinary control of public servants, consisting of three persons, one at least of whom had not held public or judicial office during the period of five years immediately preceding his appointment. Senators and Members of Parliament were not eligible to be members of the Commission. Its members were appointed for a term of five years and were eligible for reappointment. Their salaries were charged on the Consolidated Fund. Any member could be removed by the Governor-General for cause assigned. It was an offence to interfere with the Commission.<sup>47</sup>

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46. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 49 (1).

47. Chapter VII of the Ceylon (Constitution) Order in Council 1946, as amended in 1947, deals with the Public Service Commission.

Since the Commission once appointed could decide to be independent and uninfluenced by politicians, the executive would really be disgruntled about at least some of the appointments, unless the relations between the Cabinet of Ministers, particularly the Prime Minister, and the Commission were genuinely cordial. It was therefore felt that some measure of control over the administration must directly be transferred to the Cabinet of Ministers.<sup>48</sup>

The First Republican Constitution introduced the changes required to consolidate the position of the Cabinet of Ministers in relation to the public service. Section 106 (2) provided that "subject to the provisions of the constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers". In keeping with this overriding principle a State Services Advisory Board and a State Services Disciplinary Board were appointed. The Advisory Board and the Disciplinary Board were separately constituted and each consisted of three persons.<sup>49</sup>

Except when the Constitution provided otherwise, appointments to posts of Heads of Departments and to any other prescribed posts were to be made by the Cabinet of Ministers only on the recommendation of the relevant Minister who in turn was required to consult the Advisory Board<sup>50</sup>. Appointments not falling within the above category and which may be prescribed by the Cabinet of Ministers could be made only after receiving the recommendation of the Advisory Board through the relevant Minister.<sup>51</sup>

Similarly, the Cabinet of Ministers could exercise its power of dismissal and disciplinary control of state officers only after receiving through the relevant Minister the recommendation of the Disciplinary Board<sup>52</sup>. The power of transfer was given to the Cabinet of Ministers.<sup>52a</sup>

These provisions ensured that in respect of appointment, transfer, dismissal or disciplinary control of state officers, the Cabinet of Ministers was given immense powers.

48. See A. Jeyaratnam Wilson, "The Public Service Commission and Ministerial Responsibility: The Ceylonese Experience", *Public Administration* Vol. 46 (1968), pp. 81-93; In fact Sir W. Ivor Jennings himself had noted in his *The Constitution of Ceylon* (p. 111) that "the experiment of handing over the control of the public service to 'three bashaws' will therefore be watched with some trepidation"

49. See Sections 111 and 112 of the Constitution of Sri Lanka 1972.

50. *Ibid.*, sec. 113.

51. *Ibid.*, sec. 114.

52. *Ibid.*, sec. 117.

52 a *Ibid.*, sec. 120.

Section 105 (5) completed the virtual politicisation of the control of the public service : “ No institution administering justice shall have the power or jurisdiction to inquire into pronounce upon or in any manner call in question any recommendation order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers”.

The Second Republican Constitution of Sri Lanka contains an amalgam of the provisions contained in the two previous Constitutions, in regard to the public service. Article 55 (1) provides that subject to provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is vested in the Cabinet of Ministers. Paragraphs (1), (2) and (3) of Article 55 together prescribe that the Cabinet of Ministers may delegate to the Public Service Commission those powers, excepting in respect of Heads of Departments. If the Cabinet of Ministers delegated the power of transfer in respect of any specified categories of public officers to any Minister, then the Public Service Commission shall not exercise such power in respect of such categories of officers.

At the direction of the Cabinet of Ministers a Committee of the Public Service Commission may be formed, and in respect of the categories of officers specified in that direction the Public Service Commission shall cease to exercise its powers of appointment, transfer, dismissal and disciplinary control.<sup>53</sup> The Commission or a Committee thereof, subject to conditions prescribed by the Cabinet of Ministers, may delegate its powers to a public officer.<sup>54</sup> An officer aggrieved by any order made by such a public officer may appeal to the Commission or a Committee thereof as the case may be.<sup>55</sup>

The Cabinet of Ministers has the power to alter vary or rescind (a) any appointment, order of transfer or dismissal or any other order relating to a disciplinary matter made on appeal or otherwise, by the Commission or a Committee thereof ; (b) any order of transfer made by a Minister ; and (c) any appointment made by a public officer to whom the Commission or any Committee thereof has delegated its powers under Article 58 (1).<sup>56</sup>

As under the 1972 Constitution, today the Cabinet of Ministers has the authority to provide for all matters relating to public officers, including formulation of schemes of recruitment, codes of conduct for public officers,

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53. The Constitution of the Democratic Socialist Republic of Sri Lanka, Article 57.

54. *Ibid.*, Article 58 (1).

55. *Ibid.*, Article 58 (2).

56. *Ibid.*, Article 59.

principles to be followed in making promotions and transfers, and the procedure for the exercise and delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers.<sup>57</sup>

While the 1972 Constitution gave merely advisory functions to the two Boards, the present Constitution permits delegation of power to the Commission, subject to an appeal to the Cabinet of Ministers. The device adopted today permits a well-meaning Cabinet of Ministers to let the Commission act independently and uninfluenced. However, the Second Republican Constitution does not go all the way to restore the fully insulated system which operated in Sri Lanka before 1972.

The composition of the present Commission is more in line with the Independence Constitution in that the 1972 device of two boards has been abandoned. Today the Commission consists of not less than five persons, who shall not be members of Parliament, judicial officers or public officers. Each member is appointed for a period of five years and is eligible for reappointment. His salary is charged on the Consolidated Fund and shall not be diminished during his term of office.<sup>58</sup> It is an offence to interfere with the Commission.<sup>59</sup> These provisions are more or less consonant with the corresponding provisions in the two previous Constitutions.

Article 55 (5) provides as follows: "Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer." The difference between this and the corresponding provision in the 1972 Constitution is that the present provision permits a judicial inquiry if a breach of a fundamental right is involved.<sup>60</sup>

Sir Ivor Jennings observed in his *The Constitution of Ceylon*<sup>60a</sup> that Ceylon had a system of responsible government in which Ministers had no control over the public service. The Second Republican Constitution incorporates

57. 1972 Constitution, sec. 106 (3); 1978 Constitution, Article 55(4).

58. The 1978 Constitution, Article 56.

59. *Ibid.*, Article 60.

60. See for an unsuccessful attempt to invoke the jurisdiction of the Supreme Court in relation to the dismissal of a public officer *Elmore Perera v. Minister of Public Administration and Plantation Industries*, S. C. Apln. No. 134/84 ([1985] 1 Sri L. R. 285).

60a. at p. 121.

provisions relating to the public service which remedy that ill of the past. These provisions, however, as noted above, do not preclude the possibility of maintaining a public service insulated from political interference : for the new Constitution entrusts such responsibility to the Public Service Commission, which it can discharge quite independently.

### 9. The Cabinet and the Judicial Service<sup>61</sup>

The Independence Constitution contained carefully drafted provisions to safeguard the independence of the judiciary. Excepting the Judges of the Supreme Court (who were to be appointed by the Governor-General and removable by him on an Address of Parliament), all judicial officers came within the purview of the Judicial Service Commission. This commission, for the independence of which adequate constitutional provision had been made, had the power of appointment, transfer, dismissal and disciplinary control of judicial officers.<sup>62</sup>

The First Republican Constitution of 1972, however, did not secure such a great measure of independence to the judiciary. While the provisions relating to the judges of superior courts were comparable to the corresponding provisions in the Independence Constitution, the provisions relating to the minor judiciary presented a completely different picture.

In place of the Judicial Service Commission as under the Independence Constitution, a Judicial Services Advisory Board and a Judicial Services Disciplinary Board were set up. While the Disciplinary Board consisted of three Judges of the Supreme Court, the Advisory Board have among its five members two who were not required to be judicial officers at all.<sup>63</sup> In fact one of the members so appointed happened to be the Secretary of the Ministry of Justice.

Appointments to the minor judiciary were made by the Cabinet of Ministers on the advice of the Advisory Board, which advice however could be rejected<sup>64</sup>. Transfers were effected by the Advisory Board, but an aggrieved judicial officer could appeal from such decision to the Minister.<sup>65</sup> Power in respect of disciplinary matters was left to the Disciplinary Board<sup>66</sup>. The Disciplinary

61. See generally on this topic my *Judicial Role Under the Constitutions of Ceylon/Sri Lanka*, (Lake House Investments, 1982), pp. 69-70, 231-236, 275-281 : "Judiciary in a Democratic System of Government: Some Aspects of the Sri Lankan Experience", *Logos*, Vol. 23, No. 2, pp. 82-105 ; "The Supreme Court in the Legal System of Sri Lanka", *University of Colombo Review* (1985) Vol 1 No. 4, pp. 84-97.

62. See Section 52 to 56 of the Independence Constitution.

63. See the Constitution of Sri Lanka (1972) sections 125 and 127.

64. *Ibid.*, sec. 126.

65. *Ibid.*, sec. 130.

66. *Ibid.*, sec. 127.

Board could remove any minor judicial officer, but so could the National State Assembly.<sup>67</sup> However, the legislature could remove a judicial officer only if charges against him were found to be true by the Disciplinary Board.<sup>68</sup>

Thus under the 1972 Constitution although the Cabinet of Ministers did not enjoy a measure of control over the judiciary comparable to its control over the state service, it enjoyed certain regulatory powers over the judiciary—powers which the Independence Constitution of Ceylon did not confer on the executive branch of government.

The Second Republican Constitution bluntly refuses to recognise the need for such Cabinet or Parliamentary control over the judiciary. The experiment of the two Boards is abandoned and in their place the Judicial Service Commission has been reinstated.<sup>69</sup> Even as regards the superior courts there is more salutary provision. Such a judicial officer could be removed only if charges against him are proved; however, the forum provided for investigation is unfortunately only a Select Committee of Parliament.<sup>70</sup>

The position today then is that the Cabinet of Ministers has withdrawn from the sphere of judicial activity so that administration of justice may not only be impartial but will also appear to be so.

#### 10. Cabinet Government in Sri Lanka : Today and Tomorrow

The Machinery of Government Committee, 1918,<sup>71</sup> gave an authoritative statement of the functions of the Cabinet in the United Kingdom. They comprise (a) the final determination of the policy to be submitted to Parliament; (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and (c) the continuous co-ordination and delimitation of the authorities of the several departments of state. In other words, the Cabinet has the first word as well as the last word in the governance of the country; it makes the major policy decisions, sees them through Parliament, and co-ordinates the work of various government departments and state agencies to ensure that the activities of government have a measure of unity.

The Cabinet which provides the central bureau which steers and guides the mechanism of government is in effect the focal point of power in a Parliamentary democracy. In a pure presidential system or an authoritarian system this role is usually played by an individual leader perhaps riding high on a single party system.

67. *Ibid.*, secs. 127, 128, and 129.

68. *Ibid.*, sec. 129.

69. The Constitution of the Democratic Socialist Republic of Sri Lanka, Article 112.

70. *Ibid.*, Article 167. See my article "Judiciary in a Democratic System of Government: Some Aspects of the Sri Lankan Experience", *Logos*, Vol. 23, No. 2, at pp. 88-93.

71. Cmnd. 9230, at p. 5 cited in A. B. Keith, *The British Cabinet System* (2nd ed. 1952), p. 85.

Under the First Republican Constitution, as much as under the Independence Constitution, the Cabinet system operated as it does in Britain, in the true Parliamentary tradition, in the backdrop of a multi party system. The First Republican Constitution, which was seen as an attempt at severing all links with the past,<sup>72</sup> merely succeeded in producing a refined version of the typical Westminster model.<sup>73</sup>

The extent and the manner in which the introduction of an executive President affected Cabinet Government in Sri Lanka has been the recurrent theme of this article. In the light of our discussion the following propositions may be made about the future of Cabinet Government in Sri Lanka.

(1) The President of Sri Lanka, who is directly elected by the people, is the Head of the Cabinet, the Head of the Executive and the Head of the State. The Cabinet and the Central Government therefore revolve around him, and not around the Prime Minister who commands a majority of votes in Parliament.

(2) As the Head of the Cabinet, he can influence policy making and the initiation of legislation. If any legislative measure (not involving Constitutional amendment) is rejected in Parliament, the President can have it referred to the people by Referendum. If passed it becomes an "Act of Parliament".<sup>74</sup>

(3) If a Bill rejected in Parliament is submitted for approval of the people at a Referendum a popular parliament will come into being momentarily, thereby posing a threat to the concept of the legislative supremacy of Parliament. If one could call it (possibly inaccurately) a "substitute Parliament" there is no constitutional provision for a comparable "substitute President".

(4) As the Head of the State, the President makes all the important appointments, ministerial or otherwise. These are made solely in his discretion. He is not answerable to Parliament, or in Courts of Law<sup>75</sup> regarding the exercise of such power.

72. As the Minister of Constitutional Affairs was reported as saying: "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 laying down a new foundation for a new building which the people of this country will occupy." See the *Sri Lanka Press Council Bill Decision, Decisions of the Constitutional Court of Sri Lanka*, Vol. I (1973), p. 5.

73. As Dr. W. Dahanayake, M.P., a former Prime Minister remarked, "the system which the Hon. Minister proposes to introduce is the same existing one. If we call it the 'Westminster Model' what the Minister plans to do is merely redecorate it". *Constitution Assembly: Official Report*, Column 2671.

74. See the Constitution of the Democratic Socialist Republic of Sri Lanka, paragraphs (2) and (3) of Article 80.

75. See on Presidential immunity *Mallikarachchi v. Shiva Pasupathy*, Attorney-General (1985)1 Sri L. R. 74; *Wijaya Kumaranatunga v. K. K. Jayakody and J. R. Jayewardene*, S. C. Election Petitions Appeal No. 5/84 decided on 8.7.85 ((1985) 2 Sri L. R. 124); and order of High Court of Colombo No. 1204/83 given on 3.9.85.

(5) In a typical Westminster model Constitution the Prime Minister or any Minister could be dismissed if that is the desire of a majority of members of Parliament. In Sri Lanka today the President, who is the Head of the Cabinet cannot be displaced so easily. As provided in Article 38 (2) he can be removed only if (a) the Supreme Court finds that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of (i) intentional violation of the Constitution, (ii) treason (iii) bribery (iv) misconduct or corruption involving the abuse of the powers of his office, or (v) any offence under any law, involving moral turpitude and (b) a resolution to remove him is passed by not less than two-thirds of the whole number of Members (including those not present) voting in its favour.

(6) While the President can make or unmake Governments almost at will (see above under "2. Parliament and the Cabinet of Ministers"), the President is given a high degree of stability in his office. Constitutionally Parliament is weak relatively as the President is strong. The electoral system itself is geared towards making this balance a reality. The proportional representation system is very unlikely to produce a government with a two-thirds majority in Parliament (which is the basic requirement also for constitutional amendment). The Presidential election system allows even a candidate who does not obtain an absolute majority to become President. Once President he is entitled to exercise all the powers of that high office, without any "Oppositional President" (to draw an analogy with the Opposition to the Government in Parliament).

(7) It is true that the President under the present Constitution of Sri Lanka has enormous power. However, it is a grave error to call the present system a Presidential system. It is at best a Presidential-Parliamentary system of Government. A comparison of the major features of the present Constitutional system of Sri Lanka with a typical Presidential system will prove the point. The 1962 Constitution of Pakistan provides a good example for such comparison.<sup>76</sup>

Under the 1962 Constitution of Pakistan, the President (who is elected by members of basic democracies) can be removed from office for gross misconduct or proved mental or physical incapacity, on a resolution passed with the support of three-quarters of the members of the Assembly. If the resolution fails to get the support of half the members its sponsors shall lose their seats forthwith. In Sri Lanka charges against the President, as prescribed in the Constitution, must be proved and the resolution has to be passed with a two-

76. See generally S. A. de Smith, *The New Commonwealth and Its Constitutions* (1964), Chap. 6, especially pp. 223-230.

thirds majority. No penalty attaches to the sponsors if the resolution fails, except that the President may dissolve Parliament, sending home his supporters and opponents alike.

In Pakistan the President has the power to withhold assent to Bills, and thereby prevent them being put into operation. No such veto power is given to the Sri Lankan counterpart.

The President appoints and removes members of his Council of Ministers, who are not responsible to the Assembly. A Minister appointed from among the assemblymen loses his seat in the legislature. By contrast the Cabinet in Sri Lanka is essentially Parliamentary.

When the legislature is not in session the President may legislate by Temporary Ordinance. If an emergency is declared his ordaining power is beyond control by the Legislature. Once the annual budget is passed it could be varied only with the approval of the President. None of these features is even remotely discernible in our Constitution.

President Ayub Khan's Constitution did not, however, make him a law giver unto himself. His legislative power was shared with the legislature and save in periods of emergency, laws made by him had to be ratified by the Assembly. A dissolution of the Assembly had to be followed by a free election, and the Assembly had to be summoned within ninety days of the dissolution. Meetings of the legislature were guaranteed by the Constitution.

The Pakistan Constitution, then, created a Presidential system with built-in safeguards against the imposition of a Presidential dictatorship. The Sri Lankan Constitution, which does not clothe the President with such extensive powers, emphasises throughout the Constitution the importance of Parliament.

The President of Sri Lanka cannot set himself up as a rival legislature. It is true that the President has the power to make emergency regulations having the legal effect of overriding amending or suspending the operation of the provisions of any law<sup>77</sup> and that the conferment of such emergency law making powers on the President by Parliament shall not be a contravention of the Constitutional provision that "Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power".<sup>78</sup>

The President, however, cannot exercise these enormous powers independently of Parliament. Elaborate provision has been made in Chapter XVII entitled "Public Security" to ensure not only that the President cannot exercise

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77. The Constitution of the Democratic Socialist Republic of Sri Lanka, Article 155(2).

78. *Ibid.*, Article 76, Paragraphs (1) and (2).

emergency powers without Parliamentary control, but also that Parliament itself cannot resort to emergency powers for long periods without the support of a two-thirds majority in Parliament. Thus, although during an emergency the President can make laws, it is in effect Parliament which legislates through the instrumentality of the President.

The other area where the President has a role in the legislative process is that where the Referendum is involved. It is only a Bill which has been rejected by Parliament that the President may refer to the people for approval at a Referendum. This means that the President cannot place before the people a draft law, which has not gone through all stages of law making in Parliament, with a view to enacting it if approval at the Referendum is obtained. The best that the President can do is to solicit the "opinion" of the people through Referendum whether a draft Bill which, say, Parliament refuses even to entertain and which he places before the people for consideration is acceptable to them.

By the mere fact that such a draft Bill receives the approval of the people at a Referendum, it does not become law. It will merely persuade Parliament to reconsider its stand and give it Parliamentary approval. Thus, although the President may make indirect use of the referendum to influence the thinking in Parliament, he cannot use it as a direct challenge to Parliament. And even in situations where the President initiates a referendum, the people and not the President will determine its outcome.

The present Constitution of Sri Lanka can be best described as a Parliamentary democracy with an executive President, meaning that the Parliamentary tradition is stronger than the Presidential tract. In fact, the full control over public finance given to Parliament makes the government of the Country impracticable, as in England, without Parliamentary sanction.<sup>79</sup> Article 148 states that "Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law". Article 152 provides that no Bill or motion affecting public revenue shall be introduced in Parliament except by a Minister with Cabinet approval. Thus Parliamentary control over finance in the final analysis means financial control as planned and executed by the Cabinet Ministers. Cabinet Government then is and will be in Sri Lanka the central wheel of the administrative machinery of the Island.

79. The paramountcy of Parliamentary control over public finance has been judicially enforced recently in the decision of the Supreme Court in respect of the Bill entitled "Appropriation". See *Hansard* Vol. 38, No. 4 (2.12.1985), Columns 445-450.

(8) In view of the discussion of the working of Cabinet Government in Sri Lanka and the undisputed pre-eminence given to Cabinet under the present Constitution, there is no doubt that Cabinet Government has come to stay in Sri Lanka. Obviously the Cabinet is not today what it used to be before 1978. Making allowance for changes in the Cabinet system to accommodate the executive President and for the indirect impact on Parliament of proportional representation and the referendum, it is not hard to disagree with the proposition that the power of Parliament has been greatly reduced or that the opposition in Parliament is permitted merely a nominal role.<sup>80</sup>

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80. See for comments by R. Premadasa, Hon. Prime Minister. *Hansard* Vol. 38, No. 1 (26.11.1985), Columns 51-53.