

CONSTITUTIONAL CHANGE IN SRI LANKA SINCE INDEPENDENCE*

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Introduction

There are many people, including social scientists, who believe that constitutions are not of much relevance or interest to the people of a country. The constitutional development of Ceylon/Sri Lanka however, is not only of interest because of the influence of diverse political pressure and ideologies, but also because it has contributed towards the national crisis of recent times, the unfortunate trend towards authoritarianism and the steady decline of liberal democracy in the country.

Jawaharlal Nehru once said that "a constitution should express the dreams and aspirations of a people." Constitutional developments in Sri Lanka since independence seem to have merely expressed the dreams and ambitions of the people in power. Both the constitution of the first Republic of 1972 and the constitution of the Second Republic of 1978 were partisan documents which sought to promote a narrow spectrum of political ideology and the interests of the ruling clique. A constitution should be the basic or supreme law of the land and therefore should command a bi-partisan consensus. In the United States, for example, the constitution has lasted for over 200 years and is accepted and respected by people and groups of varied political hues and persuasions.

Another regressive feature of post independence constitutional developments has been the obsession on the part of constitutional framers, with executive convenience and the concentration of power. The need for "stability", "rapid development", "action not words" and of "jettisoning the luxuries which a developing country cannot afford", have been used to justify constitutional changes which have, far from achieving the objectives of their naive or cynical proponents, engendered authoritarianism, corruption, hasty and ill-conceived legislation, leading almost to the collapse of a liberal democratic political order.

There is a myth among politicians and even some constitutional experts in this country that autochthonous or homegrown constitutions are inherently superior to constitutions drafted by foreigners. The architects of the 1972 Constitution trumpeted its autochthonous character as its most important aspect. Prime Minister Sirimavo Bandaranaike declared at the first meeting of the Constituent Assembly held at the Navarangahala on 19th July 1970 that:

"The constitution which the constituent assembly will draft, establish and enact will derive its authority from the people of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and Parliament in establishing the present constitution they gave us."¹

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1. See M.J.A. Cooray, *Judicial Role Under the Constitution of Ceylon/Sri Lanka, An Historical and Comparative Study*, p. 218, 219.

Political developments in Ceylon/Sri Lanka since 1931 suggest that in fact, the records of both the Donoughmore Constitution of 1931 and the Dominion Constitution of 1946 were superior to both the autochthonous constitutions of 1972 and 1978. Far from seeking to merely transplant British institutions and constitutional provisions in Ceylon, the Donoughmore Commission in particular, sought to create a constitutional order to suit the Ceylonese context and indeed to overcome some of the shortcomings of the British Constitution.² The Executive Committee system was a creative and exciting experiment to try to actually involve elected representatives in the legislative process instead of allowing them to function as mere rubber stamps for laws initiated by the executive. The abolition of communal representation and the significant extension of the franchise despite opposition from the Ceylonese political leadership, were other courageous and far-sighted features of the Donoughmore Constitution. Several constitutional lawyers and political scientists have in recent years advocated the reintroduction of a modified Executive Committee system or at least a Select Committee System similar to it.³ The record of achievement in the spheres of social welfare and development with equity during the period 1931 - 1946 bears testimony to the wisdom of the Donoughmore Commission in introducing universal adult franchise. A constitution, therefore, should be judged by the provisions contained therein, and its record, not by its source or origin.

This paper will trace some of the significant constitutional developments in Ceylon/Sri Lanka since independence. It will also try to illustrate how these changes have contributed towards the decline of liberal democratic values in Sri Lankan society and suggest amendments to seek to arrest this adverse trend.

The Soulbury Constitution/The Dominion Constitution

The Soulbury Constitution promoted a moderately conservative form of liberal democracy based upon the constitutions of Britain and other members of the Commonwealth. While traditional British constitutional principles relating to the Parliamentary and cabinet systems were adopted, the Soulbury Commissioners were keen to prevent ethnic tensions, encourage a national consciousness and create a constitution which would meet the requirements of a plural society. Instead of incorporating a Bill of Rights into the Constitution, they opted instead for alternative approaches.

The main constitutional protection for minority interests was Section 29(2) which constituted a fetter on the legislative power of Parliament. Section 29(1) provided that Parliament could make law for the "peace, order and good government" of the island. This phrase has been construed by the courts as amounting to full, plenary legislative powers. Section 29(2) provided however that Parliament could not confer upon any community or religion, a benefit which was not conferred on other communities or

2. See Dr. Colvin R. de Silva, *The Effectiveness of Parliament as an Instrument of Pluralist Democracy in Ideas for Constitutional Reform*, Chanaka Amaratunga (ed.), p. 45-48.

3. *Ibid.*

religions and the constitution also provided that any law made in contravention of (2) would be void. Section 29(4) enabled constitutional provisions to be amended by a two-thirds majority of the legislature and an interesting question arose as to whether Section 29(2) could be amended by this procedure. Lord Pearce, delivering the opinion of the Judicial Committee of the Privy Council, observed in an *obiter dictum* that Section 29(2) referred to:

"entrenched religious and racial matters which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se*, they accepted the constitution, and these are therefore unalterable under the constitution."⁴

Viscount Radcliffe expressed similar sentiments in *Ibbralebbe v. The Queen*.⁵

"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."⁶

Viscount Radcliffe described these as "fundamental reservations" implying that they served to curtail the powers of the legislature.

Minority interests, therefore, were sought to be protected by constitutional limitations on legislative sovereignty. Thus the Parliament of Ceylon could not be considered sovereign in the same sense as the British Parliament. This was acknowledged by the Courts of Ceylon. In *The Queen v. Liyanage*,⁷ T.S. Fernando J. observed,

"Nor do we have a sovereign Parliament in the sense that the expression is used with reference to the Parliament of the United Kingdom."⁸

In *Piyadasa v. Bribery Commissioner*,⁹ Tambiah J. stated,

"The legislative powers of the Ceylon Parliament as contained in Section 29 of the Order in Council is not that of a sovereign legislature in as much as it derives its authority from the Order-in-Council which imposed fetters on its powers of legislation."¹⁰

It must be noted however that this limitation on parliamentary sovereignty was not a devious attempt by the British authorities to retain a foothold in Ceylon. Rather it was an attempt by them to create a constitutional dispensation which would suit the multi-ethnic and multi religious context in Ceylon. The British positivist constitutional tradi-

4. *Bribery Commissioner v. Ranasinghe* (1964) 66 NLR p. 78.

5. (1963) 65 NLR 433 (P.C.).

6. at p. 350.

7. (1962) 64 NLR p. 313.

8. at p. 350.

9. (1962) 64 NLR 385.

10. at p. 387.

tion which stresses illimitability and indivisibility¹¹ as essential characteristics of sovereignty, was rejected for Ceylon as it was deemed crucial to allay minority fears by providing them with a fortress of entrenched rights which could not be invaded by the will of the majority. The Soulbury Commission acted with wisdom and foresight in so doing. Since World War II and in more recent years in particular, constitutional trends throughout the world have moved away from notions such as sovereignty towards the incorporation of fundamental rights provisions to protect the citizen from majoritarian tyranny or the intrusion of the powerful welfare state.

Notwithstanding this enlightened constitutional provision and the *obiter dicta* of several British and Ceylonese judges pointing out the shackles on parliamentary sovereignty, in general, the courts of Ceylon failed to exploit the full potential of this section. Ceylonese judges, no doubt steeped in the British Constitutional tradition with its doctrine of the sovereignty of Parliament and attendant dangerously illiberal notions such as Parliament can do anything except make a man a woman and a man, failed to maintain the balance between majoritarianism and constitutional limitations to protect individual freedom and minority rights.

An example of the courts failing to interpret section 29 effectively can be seen in two cases dealing with citizenship and franchise. The Citizenship Act No. 18 of 1948 and the Ceylon Parliamentary elections (Amendment) Act No. 48 of 1949, while purporting to lay down guidelines for the acquisition of citizenship and the right to vote, in effect drastically restricted the voting rights of the Indian Tamil Community. It was perhaps not an insignificant factor that the opposition parties derived considerable support from this community. These Acts were challenged in *Mudanayake v. Sivagnanasunderam*¹² and *Kodakanpillai v. Mudanayake*¹³ on the grounds that they contravened section 29. Lawyers challenging the legislation argued that the court had to consider political history and the context in which section 29 had been included in the constitution, which was to protect minority interests. They also pointed out that while in some cases the question as to whether a statute is *ultra vires* or not is apparent on the face of it, in other cases, like the one under consideration, the courts had to consider the practical effect of the legislation. Several American cases were cited to buttress this contention.¹⁴

The Supreme Court however adopting a narrow and technical approach, declared that as the statutory provisions were free from ambiguity, the scope and effect of the legislation should be ascertained from the actual words of the provision. Therefore motive and practical effect were deemed irrelevant. The court also refused to admit affidavits which sought to establish the harsh operation of the legislation on the Indian Tamil community or various documents on constitutional reform and other political documents, which indicated the rationale for Section 29 and provisions relating to the franchise.

11. See Austin, *Lectures in Jurisprudence*, VI, 5th Ed.

12. (1957) 53 NLR p. 25.

13. (1953) 54 NLR p. 433.

14. *Lane v. Wilson* 307 U.S. 268. *Yick Wo v. Hopkins* 118 U.S. 256.

When the matter went before the Privy Council on appeal their Lordships position was slightly less narrow, though perhaps more naive. The Privy Council conceded that there may be situations where legislation though framed in a way not directly to affect protected rights, may indirectly do so, in which case it would be constitutionally invalid. In considering such a question it held that legislative materials such as reports of Parliamentary Commissions would be admissible. However they dismissed the appeal on the grounds that the maxim *omnia praesumuntur rite esse acta* was applicable to the act of a legislature and that were therefore unwilling to attribute illegal motives to it concluding that

"it is a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals."¹⁵

It is useful to compare the approach of these courts with the attitude of the American courts in one of the cases cited by Mr. Nadesan in challenging the legislation. In *Yick Wo v. Hopkins*¹⁶ a law which was "fair on its face and impartial in appearance" which required a permit to operate a laundry was declared unconstitutional because the effect was that permits were given to nearly all the non-Chinese applicants but to none of the Chinese applicants. Thus purposeful invidious discrimination was inferred from statistical data regarding the operation of a facially neutral statute.

The Sri Lankan Supreme Court and the Privy Council however adopted a superficial and unrealistic approach in the citizenship case, where there was a definite plan to alter the balance of representation in Parliament. That these decisions influenced subsequent Sri Lankan political developments is clear from the fact that there was a substantial shift of political power to the detriment of minority interests. These decisions perhaps also contributed to a lack of confidence in this constitutional provision and the judiciary as an effective bulwark against the tyranny of the majority, as successful litigation tends to create a "ripple effect" where other aggrieved individuals or groups are encouraged to assert their rights and challenge suspect legislation.

Thus emboldened, Sinhalese-led governments sought to further introduce legislative measures to the detriment of the minorities. In 1956, the government introduced the Official Language Act which made Sinhala the sole official language. Although communal riots erupted as a result, the Act's constitutionality was not challenged until much later, when a Tamil public servant was notified by a government circular that a certain degree of proficiency in Sinhala was a prerequisite for promotion.¹⁷ The circular was impugned on the ground that it was issued pursuant to the Official Language Act which it was argued violated section 29 and also because it was in breach of a fundamental term of the contract between the plaintiff and the State, (at that time, the Crown in Ceylon) which was entered into before the enactment of the Official Language Act. The plaintiff

15. (1953) 54 NLR p. 435 *per* Lord Oaksey.

16. 118 U.S. 256.

17. See *Kodeswaran v. A.G.* 70 NLR 121 (S.C.) and 72 NLR 337 (PC).

claimed that he was otherwise eligible for promotion and that his increments had been wrongly withheld.

The original court held with the plaintiff on both grounds. On appeal by the State, the Supreme Court, in a classic example of restraint and timidity, set aside the judgement on the ground that a public servant had no right to sue the Crown for the payment of arrears of salary and stated that it was therefore not necessary for them to consider the crucial constitutional issue. When the case went before the Privy Council, it reversed the decision of the Supreme Court on the question of the availability of an action against the Crown in the particular circumstances and sent the case back to the Supreme Court so that full argument could be heard on the constitutional issue. The Privy Council was unwilling to consider the matter until the Supreme court was first given the opportunity to do so.

It was not surprising therefore that the minorities lost faith in the judiciary to function as an effective bulwark for the protection of their rights. Sri Lanka's political landscape may have been very different if the judiciary had interpreted Section 29 in a more creative and dynamic manner.

Fortunately however, the judiciary acted creatively to protect the rule of law, independence of the judiciary and check the arbitrary exercise of governmental authority. Several constitutional provisions sought to protect the independence of the judiciary and insulate it from political and other influences. Judges of superior courts were appointed by the Governor General¹⁸ and could only be removed by him on an address by the Senate and the House of Representatives.¹⁹ Their salaries were fixed and could not be reduced during their term of office.²⁰ The constitution provided for a Judicial Service Commission consisting of the Chief Justice and two judges of the Supreme Court. This Commission was responsible for the appointment, transfer, dismissal and disciplinary control of judicial officers.²¹ This statutory provision enabled judges to discharge their duties without fear or favour.

While constitutional provisions safeguarding the independence of the judiciary were adequate, the courts had to deal with the issue of the entrenchment of judicial power. Section 55 of the Constitution provided that judicial officers must be appointed by the Judicial Service Commission. In a series of cases²² the courts of Ceylon, held that if an official was required to engage in functions of a judicial character, his appointment would only be valid if it was made by the Judicial Service Commission. The courts no doubt felt that this would ensure that the administration of justice was not subject to undesirable extraneous influences. However the Constitution did not expressly provide

18. Section 52.

19. Section 52(1) and (2), The Ceylon (Constitution) Order in Council, 1946.

20. Section 52(6).

21. Section 55(1).

22. *Senadheera v. Bribery Commissioner* (1961) 63 NLR 313, *Ranasinghe v. Bribery Commissioner* (1964) 66 NLR 73, *Jailabdeen v. Danina Umma* (1963) 64 NLR 419, *Ratwatte v. Piyadasa* (1966) 69 NLR 49, *United Engineering Workers Union v. Devanayagam* (1967) 69 NLR 289.

that the courts should be the exclusive repository of judicial power. The courts established this principle through a process of imaginative and creative constitutional interpretation.

An example of this is the opinion of the Judicial Committee of the Privy Council in *R. v. Liyanage*.²³ The judicial committee was called upon to consider the constitutionality of the Criminal Law (Special Provisions) Act of 1961 which purported to regulate the trial of a group of persons charged with conspiracy to overthrow illegally the government of Ceylon. The legislation was striking in that a wide range of safeguards ordinarily available to accused persons were excluded and the penalties appreciably enhanced for this specific trial. Lord Pearce in a landmark judgement held that the legislation was unconstitutional. He stated that a separation of powers could plausibly be inferred from the structural framework of the Constitution, at least to the extent that judicial power was vested exclusively in the judicature and that therefore Parliament was precluded from passing a law which, in effect, amounted to a "legislative judgement". The Judicial Committee placed considerable emphasis on the cumulative effect of the several statutory provisions;

"The pith and substance of both Acts was a legislative plan *ex-post facto*, to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences."²⁴

The refreshing boldness and creativity with which the Privy Council inferred the existence of a doctrine of separation of powers and the entrenchment of judicial power moved S.A. de Smith to describe the decision as

"the most remarkable exercise in judicial activism ever performed by the Privy Council".²⁵

23. (1965) 68 NLR p. 284.

24. (1965) 68 NLR p. 284.

25. S.A. de Smith, *The Separation of Powers in a New Dress*, (1966) 12 McGill L.J. 491 at 492.

The Senate

Although the Donoughmore Commissioners did not think that a second chamber was necessary, the Soulbury Commissioners recommended the creation of a Senate. There were several reasons for this proposal:

- a) The desire to harness the services of eminent and mature persons who would otherwise be prevented from participating in the parliamentary arena because of their aversion to the rough and tumble of electoral politics.
- b) The desire to provide a further protection for minority interests.
- c) The need for a check against hasty and ill conceived legislation.
- d) The belief that the standard of debate and the contributions made in the second Chamber would bolster the political education of the public.
- e) The fact that second chambers are an integral feature of almost all vibrant liberal democracies in the world.

The Senate consisted of 30 members, 15 of whom were nominated by the Governor-General, who as in all else, acted on the advice of the Prime Minister. The other 15 members were elected by the House of Representatives.²⁶

Perhaps because of its method of composition which allowed the government in power excessive influence in the nomination of Senators and due to its limited powers, the Senate did not function as an effective check on the Lower House. During its twenty five years of existence only twice did the Senate confront the wishes of the House of Representatives. However the contributions made by its members in the legislative process through the detachment, experience and knowledge they brought to bear in the debates and deliberations, were extremely significant.

The Public Service

One of the cardinal features of the Soulbury Constitution was its attempt to develop an independent public service based upon the British notion of an impartial civil service. The rationale for this system is that public servants should be free to offer their political heads candid advice and thereafter carry out the policy decisions made by the political leadership whether they personally agreed with these or not. Public servants are assured of protection from vindictive actions or reprisals from wielders of political power. The merits and demerits of the principle of an independent public service have long been the subject of debate. The American tradition is completely different. Here it is felt that for executive action to be carried out effectively, senior public servants in particular, should believe in the policies involved and be able to identify with the policy objectives of the government in power.

26. See Sections 8,9,10 of the Soulbury Constitution.

The objective of creating an independent public service was accomplished principally by the provision of an independent Public Service Commission. The Commission consisting of a Chairman and two other members were appointed by the Governor General and were responsible for the transfer, dismissal and disciplinary control of public servants.²⁷ The record of the Public Service Commission under the Soulbury Constitution was impressive. There were several instances when the Commission refused to yield to political pressures pertaining to the transfer and dismissal of public servants, thereby bolstering the morale of public servants and helping to preserve the integrity and stability of an important arm of government.

The First Republican Constitution of 1972

Dr Colvin R. de Silva, the chief architect of the Constitution of 1972 stated often that some of the Privy Council's decisions referred to earlier in this paper relating to the limitations imposed by Section 29 of the Soulbury Constitution, profoundly influenced the framers of the First Republican Constitution.²⁸ The strong emphasis on autochthony and legal revolution indicated the desire to liberate the new constitutional order from the yoke of Section 29. As Dr de Silva himself observed;

"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."²⁹

Since the United Front Government was committed to a radical political programme which contained a blend of nationalism and socialism, they viewed the judiciary with considerable suspicion.³⁰ The possibility that the Supreme Court, despite its attempts to evade the issue, might finally declare the Official Language Act unconstitutional and the traditional view of the judiciary as upholders of the status quo and the possessors of a generally conservative political outlook, prompted the framers of the new constitution to whittle down the powers of the judiciary and declare in no uncertain terms that supreme power resided in the elected representatives of the people. The doctrine of separation of powers was therefore vigorously rejected. As Felix R. Dias Bandaranaike, a leading figure in the United Front Government explained,

"We are trying to reject the theory of the separation of powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you

27. Section 60(1).

28. See Neelan Tiruchelvam, *Constitutional Reform: Principle Themes in Ideas for Constitutional Reform op.cit.*, p. 29.

29. M.J.A. Cooray, *op.cit.* p. 217.

30. M.J.A. Cooray, *op.cit.* p. 222. See also C.R. de Silva, *The Independence of the Judiciary under the Second Republic of Sri Lanka in Ideas for Constitutional Reform, op.cit.* pp. 485-486.

saying that a judge once appointed should have the right to declare that Parliament is wrong."³¹

The fear that the judiciary would serve as an obstacle to "progressive" development and that judicial review of legislation might undo radical reforms resulted in the abolition of judicial review of legislation and the adoption of "a constitution that will be an accelerator and not a brake on progressive development."³²

The most striking feature therefore of the constitution of 1972 was the fusion of powers in the Legislature through the exaltation of the notion of popular sovereignty. The constitution unequivocally declared that sovereignty resided in the people and was inalienable.³³ However in practice this meant that sovereign power was exercised by the people elected by the people, the National State Assembly.³⁴ Section 5 of the Constitution states that the National State Assembly combined and concentrated within itself the legislative, executive and judicial power of the people. A limited concession was made in that the executive and judicial power were expected to be exercised indirectly. The executive power was to be exercised by the National State Assembly through the President and Cabinet of Ministers. The judicial power of the people was exercised by the National State Assembly through courts and other institutions created by law.³⁵ Thus the framers of the First Republican Constitution made quite certain that no institution could thwart the will of the elected representatives of the people.

Apart from the strengthening of the legislative arm of government (which indeed could be considered a move closer to the British Constitutional tradition which does not have a separation of powers or judicial review of legislation but because of its unique constitutional evolution must be considered a special case) and the repudiation of the notion of an independent public service, the First Republican Constitution did not possess very many characteristics that were "home grown" or sprung from native soil despite the frequent use of the adjective "autochthonous".³⁶ The powers of the President were almost identical with those of the Governor-General of the previous Constitution. Several British Constitutional conventions were incorporated into the new constitution. Section 27(i) provided that the President should act on the advice of the Prime Minister or such other Minister to whom the Prime Minister may have given authority, to advise the President on any particular function assigned to that Minister. The British Cabinet system of government which had been introduced under the Soulbury Constitution, and its attendant conventions and practices continued virtually untouched. The President, acting on the advice of the Prime Minister appointed members of the National State Assembly to take charge of Ministries identified by the Prime Minister.³⁷

31. See C.R. de Silva, *supra* p. 485.

32. Statement made by Mr. Pieter Keuneman, Minister in the United Front Government, cited by M.J.A. Cooray, *op. cit.*, p. 222.

33. Section 3.

34. Section 4.

35. Section 5.

36. For a definition of the term "autochthonous" see K.C. Wheare, *The Constitutional Structure of the Commonwealth* (1960) p. 89.

37. Section 94.

The Public Service

The concept of an independent public service commission and public service was repudiated by the new constitution. It was made clear, in no uncertain terms, that the public service was to be firmly under the control of the executive branch of government. The Constitution provided that the Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of State officers, and in discharging this responsibility would only be responsible to the National State Assembly.³⁸ Ever conscious of the "threat from the judiciary to undermine the "popular will", the constitution also provided that no institution administering justice had 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, 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.³⁹ The State Services Advisory Board and Disciplinary Board consisted of persons appointed by the President. Their powers were extremely limited and bore no comparison with those enjoyed by the Public Service Commission.⁴⁰

The independence of the public service was further debilitated by the provision that every state officer holds office during the pleasure of the President.⁴¹ Thus in the area of the public service there was an abrupt departure from the British and Soulbury traditions to a more politicised and pliant public service.

Fundamental Rights

A Chapter setting out a list of fundamental rights and freedoms was incorporated into the Constitution for the first time.⁴² This was perhaps the only significant aspect of this Chapter as it had little or no impact on the lives of citizens in this country. While section 18(1) set out the freedoms and rights, section 18(2) contained such a blanket limitation on the rights and freedoms so as to render them almost nugatory, if the executive or legislature thought it fit so to do.

Section 18(2) provided that the exercise and operation of the fundamental rights and freedoms shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health and morals or the protection of the rights and freedoms of others or giving effect to the principles of State Policy.

Whereas the rationale for incorporating a Bill of Rights into the supreme law of the land, is to provide an individual with a circle of protection free from encroachment from the State or other person or institution, this sweeping provision virtually meant that

38. Section 106(1).

39. Section 106(4).

40. Sections 111 and 112.

41. Section 107(1).

42. Chapter VI, Section 18.

fundamental rights could only be enjoyed if the National State Assembly permitted it, as the grounds for restriction were so broad, nebulous and subjective. Furthermore by not setting out any enforcement mechanism the impression was created that these were not justiciable. The Supreme Court however in *People's Bank v. Guneratne*⁴³ upheld the view that the fundamental rights incorporated in Section 18 were enforceable before the District Court. The impact of this decision however was negligible and perhaps only of academic interest as the decision was delivered just before the Constitution was replaced by the Constitution of 1978.

The Constitutional Court

The Constitutional Court was an innovative feature introduced into the Constitution of 1972.⁴⁴ The framers considered it desirable to have a special court with exclusive responsibility for the interpretation of the constitution and to determine before enactment, whether proposed legislation violated the constitution. The Constitutional Court was to consist of 5 members appointed by the President for a term of 4 years. The Constitution made no reference to the qualifications for appointment to this court.

The Constitutional Court however got off to a rather inauspicious start. The first piece of legislation to be referred to the court was the Sri Lanka Press Council Bill. During the hearing, the Chairman of the Constitutional Court, Hon. Justice T.S. Fernando, expressed the view that the constitutional provision requiring the court to give its decision with reasons, within two weeks of the reference, was a directory provision and therefore the court could take a longer period, if it found it necessary, for deliberation. The government rejected this contention and at a meeting of the President, Chairman of the Constitutional Court and the Minister of Justice, the Minister suggested that the court ask for an extension of time from the National State Assembly. This suggestion was rejected by the Chairman of the court who observed.

"We are clear in our own minds about the interpretation of this section. We do not admit that anybody has the right to give an extension of time, or that we are obliged to ask for time."⁴⁵

This impasse led to the resignation of the three members of the Constitutional Court assigned to adjudicate upon the Press Council Bill. Thereafter the independence and integrity of the Constitutional Court were open to question and the courts record particularly when dealing with issues confronting the executive was not very impressive.

43. (1986) SLLR p. 338.

44. See Section 54.

45. Hansard Vol. 4(1) No. 7 of 12th December 1972, Column 1553.

The Independence of the Judiciary

Radika Coomaraswamy has described the judiciary under the Constitution of 1972 as "the most crippled arm of government."⁴⁶ Several Constitutional provisions gave the executive branch of government power over minor judicial appointments; the Judicial Services Commission which had hitherto performed this function was replaced by an Advisory Board and a Disciplinary Board⁴⁷ which lacked the powers and independence of the commission. The Advisory Board consisted of 5 members, with the Chief Justice as Chairperson. The other 4 persons were appointed for a period of 4 years and could be removed by the President without assigning any reason. The Advisory Board was a consultative body which merely advised the Cabinet of Ministers with regard to the appointment of inferior court judges and judicial officers. The Board had the power to transfer such officers, though an officer could appeal to the Cabinet of Ministers against such a decision of the Advisory Board. Furthermore the Cabinet of Ministers had substantial powers with regard to rules of conduct for judges, rules of procedure etc., while the National State Assembly wielded considerable influence in the dismissal of judges of lower courts.⁴⁸ The cumulative effect of these provisions in particular, served to undermine the independence and self-regulation of the judiciary and provide the executive and legislative arms of government with excessive influence in the judicial domain.

Entrenchment of Majoritarianism

The veneration of the notion of the will of the people, the rejection of most of the minority safeguards introduced by the Soulbury Constitution and the absence of other provisions for the protection of minority groups and individuals, enshrined the notion that majority decision making was the cardinal, if not the only, feature of a democratic society. This was of course in the interests of the government as it provided a justification for all their laws and actions but it had disastrous consequences for national unity.

Buddhism was enshrined in the Constitution almost as a state religion⁴⁹ while the Sinhala language was made the official language with Tamil given grudging step-motherly treatment in certain situations.⁵⁰

The emphasis on majoritarianism and suspicion of traditional constitutional institutions as conservative obstacles to development, prompted the framers of the constitution to make use of "emergency powers" relatively easily.⁵¹ This enhanced the power of the parliamentary executive which virtually enabled it to rule without accountability

46. Radhika Coomaraswamy, *Sri Lanka, The Crisis of the Anglo-American Constitutional Traditions in a Developing Society*, p. 29.

47. Sections 125 and 127.

48. Sections 125, 126, 129 and 130.

49. Section 6.

50. Sections 8 and 9.

51. Section 134. See also Suriya Wickremasinghe, *Emergency* (unpublished) Civil Rights Movement, 1977, p. 4.

during a national emergency. The fact that there was excessive concern for 'decisional mobility' can be seen from the fact that the government ruled under a state of emergency for most of the period between 1972 and 1978. The extensive powers of the Public Security Ordinance have been used by successive governments in Sri Lanka, not only to cope with national crises but also to stifle more democratic forms of dissent and opposition political activities.⁵²

The effectiveness of the constitution of 1972 as a device sitting out checks and balances to ensure a balance of power was vitiated even further because the "first past the post" electoral system gave the government in power during this period a two thirds majority which made it immune from any restrictions imposed by the Constitution. The nett result however was that the Constitution of 1972 and the period governed by it, contributed significantly to Sri Lanka's plunge towards authoritarianism and away from liberal democratic values, pluralism and individual liberty.

The Second Republican Constitution of 1978

It could be argued that the second Republican Constitution of 1978, introduced by the United National Party government of J.R. Jayewardene was more autochthonous in character than its predecessor. The constitution adopted several features from the French and American Constitutional traditions while preserving several British traditions as well and to that extent was a creative document which according to its champions, suited the needs of Sri Lankan society, but according to its detractors,

"the Constitution of the Second Republic like that of the Fifth French Republic was Gaullist not only in the similarity to it of its institutional arrangements, also in that it was designed to suit the personal vision of one man - Junius Richard Jayewardene. The constitution of the Second Republic embodies a profound and cynical realpolitik, a contempt for ideology and a deep concern for that kind of "stable" executive that was believed conducive to development".⁵³

Stability for rapid economic development seemed to be the dominant consideration of the framers of the new constitution. Jayewardene himself pleaded for the need to establish political stability and provide for 'strong' leadership, an executive freed from the "whims and fancies" of Parliament.⁵⁴ Apart from the issue of whether the executive should be thus insulated from the whims and fancies of the representatives of the people in a liberal democratic society, it is pertinent to ask whether the Ceylon/Sri Lanka prior to 1978 was particularly unstable. The changing of governments through peaceful, free and fair elections at periodic intervals should surely not be considered a symptom of instability. A more sophisticated definition of the term stability which encompasses the

52. *Ibid.*

53. Chanaka Amaratunga, Alternative Institutional forms for the Sri Lankan State, in *Ideas for Constitutional Reform* (1989) *op.cit.*, p. 345.

54. *Ibid* p. 354.

existence of conditions that do not disrupt national life or the liberal democratic process should be adopted rather than one which is preoccupied with the survival of governments. Recent political developments in Sri Lanka fortify this contention.

The introduction of the Executive Presidency, which is perhaps the most radical change introduced by the Constitution of 1978, undermined the notion of parliamentary sovereignty by reposing considerable power in one person who in effect, combined the ceremonial or titular functions of the former President or Governor General, with the substantive powers of the former Prime Minister. The President is elected directly by the people for a six year term and cannot serve more than two terms.⁵⁵ While the constitution originally contemplated a fixed term of office with the new President assuming office on the 4th February following the election, the third Amendment to the Constitution now permits a President who has completed the first four years of his term to seek re-election. The President presides over the Cabinet, decides the number of Ministries, appoints from among members of Parliament, Ministers to the Cabinet and other ministries and is not even bound to consult the Prime Minister regarding these appointments.⁵⁶ Indeed when President Premadasa constituted his first Cabinet, he had not even appointed a Prime Minister! The Prime Minister and Cabinet of Ministers hold office at the will and pleasure of the President. The Constitution also permits the President to assign to himself any portfolio or function.⁵⁷

The considerable powers thus reposed in the President go far beyond those enjoyed by the President of the Fifth Republic of France. Furthermore various provisions concerning immunity drawn up to protect the nominal or ceremonial Head of State, who was expected to be a non-partisan, ceremonial figure, were applied to the Executive Presidency, notwithstanding the phenomenal increase in its powers. Provisions in the standing orders of Parliament forbidding reference in Parliament to the conduct of the Crown or its representative have been applied to the Executive President. The constitution also provides that while any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.⁵⁸ Granting such immunity to a politically partisan figure who wields enormous powers is totally unjustified. It has been argued that the conferment of such immunity permits the President to make highly tendentious and even defamatory statements about political opponents during election campaigns which if made by any other person would constitute a violation of the laws governing elections or defamation.⁵⁹

The President of the Second Republic also enjoys limited powers over financial supply which vitiates the principle applicable in most liberal democracies that the legislature has sole and exclusive powers over finance. Article 150(3) provides that

55. Article 31.

56. Article 44.

57. Article 44.

58. Article 35.

59. Chanaka Amaratunga, *Alternative Institutional Forms for the Sri Lankan State*, *op.cit.*, p. 350.

where the President dissolves Parliament before the Appropriation Bill for the Financial year has been passed, he may authorize the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new Parliament is summoned to meet. This provision could enable a President faced with a hostile legislature, to make use of his powers to dissolve Parliament, and rule the country for several months without Parliament.

The Devaluation of Parliament

This concentration of power in one person was all the more serious because the powers and effectiveness of a rival source of political legitimacy, the parliament, were whittled down considerably. Apart from the power of dissolution which the President possessed, the role of a member of Parliament changed drastically under the new constitution. The traditional British idea of the Member of Parliament as an independent legislator who is expected to cast his vote in a way which he/she thinks would be in the best interests of the country, was repudiated, and the notion that an M.P. is merely a member of a party and that Parliament consists of an aggregation of political parties gained constitutional recognition. The Burkean tradition expressed in the words,

"I am not first the Member for Bristol, I am not first a Whig, I am first a Member of Parliament",

permitted a member of Parliament to even take up positions independent of his party, tolerated dissent, members crossing the floor, criticising their party leadership etc. Members of the legislature enjoyed far more independence and security of tenure under the Donoughmore, Soulbury and First Republican Constitutions.

Under the Second Republican Constitution when a Member of Parliament is expelled from his party or resigns from it he automatically loses his seat in Parliament. This coupled with the fact that most party constitutions in Sri Lanka, grant overwhelming powers to the party hierarchy mean that the party leadership exercises tight control over its members in Parliament. A Member of Parliament knows that s/he can be subjected to disciplinary action for a variety of reasons and thereafter a replacement nominated by a "chit" from the Secretary of the party.⁶⁰ The party leadership is not even tempered by the prospect of a by-election in these circumstances and therefore could quite easily nominate a less troublesome party loyalist. The position with respect to the first Parliament under the constitution of 1978 was made even worse by the introduction of the provision of expulsion clauses which favour the majority party. In situations where a Member of Parliament leaves his/her party, Parliament can by a simple majority vote to expel that member. There is provision for such member to appeal to the Supreme Court or a Select Committee. The Select Committees have functioned in a disgustingly partisan manner. For example, the proceedings of the Select Committee dealing with

60.

Article 161. This was the position until the dissolution of the last parliament.

the case of Mr Rajadurai who left the T.U.L.F. to join the Government in 1979 were not completed even when Parliament was dissolved in December 1988. However when Dr Neville Fernando was expelled from the UNP, within a month he was forced to resign from Parliament. Similarly when Mr Ronnie de Mel resigned from the UNP and joined the SLFP in August 1988, a Select Committee recommended that he should be expelled from Parliament in less than a month but Mr de Mel resigned his seat in September 1988 before the resolution for expulsion could be introduced. This control over Members of Parliament has eroded the effectiveness of Parliament as a dynamic, independent arm of government, where its members subject the executive to vigilant scrutiny.

The supremacy of Presidential power over Parliament can also be seen in relation to the Public Security Ordinance, where the President is entitled to introduce regulations which have the effect of over-riding, amending or suspending the operation of any law enacted by Parliament.⁶¹ Though theoretically it can be argued that Parliament has the power to review the existence and duration of the state of emergency, the control exercised over Parliament by the President or the leadership of the majority party, make this a remote possibility. Furthermore a Constitution must not only be judged by its provisions but also by its record and the political context in which it operates. The former President had in his possession undated letters of resignation from members of the governing party for a major part of his term of office thus rendering constitutional provisions elaborating control over the executive with regard to the emergency, and indeed all other matters, nugatory.

The combination of the "overmighty Executive" and a devalued Parliament has hastened the march towards authoritarianism in Sri Lanka. It is interesting to note that when former President J.R. Jayewardene and President Premadasa introduced a resolution for the creation of an Executive Presidency in the Constituent Assembly appointed to draft the Constitution of 1972, their then leader, Dudley Senanayake observed prophetically,

"The Presidential system has worked in the United States where it was the result of a special historic situation. It works in France for similar reasons. But for Ceylon it would be disastrous. It would create a tradition of Caesarism. It would concentrate power in a leader and undermine Parliament and the structure of political parties. In America and France it has worked but generally it is a system for a Nkrumah or a Nasser not for a free democracy".⁶²

The Referendum

Another device which bestows considerable power in the Executive President is the referendum which enables the President to place a particular proposal before the people for approval. The manifest populist or Gaullist dimensions of a referendum are

61. Article 155.

62. Dudley Senanayake, Daily Mirror of 8th October 1971.

clear from the provision that enables the President to even appeal to the people over the heads of the members of the legislature.

A salutary feature is the use of the referendum to grant extra protection to certain fundamental constitutional provisions. These provisions can only be amended if the proposed change not only enjoys a two-thirds majority in Parliament, but also receives the endorsement of the people at a Referendum.⁶³

Unfortunately, the one exercise of this novel feature experienced to date was not a happy one. Though heralded as an ultra-democratic device, it was used to remove a fundamental right possessed by the people of Sri Lanka, unbroken for a period of over fifty years, the crucial right to vote to choose one's representatives in Parliament, thereby contributing further to the steady decline of liberal democracy in the country.

Proportional Representation

A positive feature of the new constitution was the introduction of a system of proportional representation for elections to Parliament. Though introduced into the Constitution in 1978, the new electoral system was unfortunately resorted to for the first time only in 1989 at Parliamentary elections.

The new system was intended to remedy some of the glaring deficiencies in the "first past the post" Westminster model electoral system which obtained since independence. The main weakness in the old system was that parliamentary seats were allocated in a manner totally disproportionate to the votes it polled. For example in the General Election of 1970, the United Front Government won 77% of the seats in Parliament with 49% of the votes polled, while the United National Party obtained 11% of the seats despite winning 38% of the votes. In the election of 1977, the United National Party secured over 83% of the seats in Parliament with 51% of the vote while the Sri Lanka Freedom Party won 5% of the seats with 30% of the vote and the Tamil United Liberation Front obtained 11% of the seats with just 6% of the vote.⁶⁴

The system of proportional representation helps to achieve a greater balance between the popular vote and the strength of Parliamentary representation, and to ensure that a wider spectrum of political opinion would secure representation in the legislature.

A major change brought about by the new electoral system relates to the constituency. In place of a single member electorate, the district functions as the effective constituency. Voters in each of the 24 electoral districts can choose between competing lists of candidates put forward by political parties and groups. The emphasis is on the party or group as the voter firstly indicates his choice in this regard. Thereafter the

63. Article 83.

64. See Chanaka Amaratunga and Rajiva Wijesinha, Political Pluralism as a necessary condition of Liberal Democracy: Proportional Representation and the Sri Lankan Experience in *Ideas for Constitutional Reform op.cit.*, pp. 183-203.

constitution provides that a voter may express his preference for individual candidates in the list.⁶⁵ This is an improvement on the system originally envisaged, where the party would indicate the order in which the candidates would be selected. The subsequent amendment was an improvement in that the voters determination rather than the party high command's became crucial in deciding which candidates enter the parliamentary arena.

Another weakness of the proportional representation system originally envisaged by the framers of the Constitution was a high cut off point of 12.5%. This provision was particularly detrimental to smaller parties and independent groups. However a subsequent amendment reduced the cut off point to 5% enabling smaller parties to obtain representation at the Parliamentary Elections of 1989.⁶⁶

Thus while the system of proportional representation operative in Sri Lanka has several shortcomings, it is clear that the system is markedly better than the previous one. Several proposals for a more effective system of proportional representation have been put forward and it is hoped that the All Party Conference which is considering constitutional reform will adopt a modified proportional representation system which is a further improvement on the present scheme.

The Judiciary

The constitutional provisions relating to the judiciary constitute a marked improvement on the provisions of the previous constitution. The independence of the judiciary is fortified considerably. The constitution provides that judges of the Supreme Court and Court of Appeal, who are appointed by the President, hold office during good behaviour and shall not be removed except by an Order of the President made after an address of Parliament supported by a majority of the total number of members of parliament has been presented to the President for removal on the ground of proved misbehaviour or incapacity.⁶⁷ Other traditional safeguards are also included.⁶⁸

The jurisdiction of the Supreme Court is comprehensively outlined. One of the important functions of the Supreme Court relates to the interpretation of the Constitution and the protection of fundamental rights.⁶⁹

Unfortunately, however, the new Constitution did not reintroduce judicial review of legislation. The constitutionality of legislation can only be challenged prior to enactment, when it is a Bill before Parliament. Since legislation is often rushed through Parliament and members of the legislature are hardly given enough time to read the proposed legislation, this prevents rigorous scrutiny of legislation which could violate the constitution.

65. Article 99 (2) as amended by Section 7 of the 14th Amendment to the Constitution.

66. Article 99 (6) (a) as amended by Section 7 of the 14th Amendment to the Constitution.

67. Article 107.

68. Articles 107, 108, 112.

69. Articles 118, 120.

Fundamental Rights

The provisions in the Constitution of 1978 too are a slight improvement on those of the previous Constitution. The rights and freedoms are spelled out in greater detail, the restrictions more narrowly tailored and most important of all, an enforcement mechanism is set out in the Constitution.⁷⁰ Several fundamental rights applications were made to the Supreme Court and a body of case law developed in this area.

Still however, there is an excessive obsession with executive convenience and the Constitution confers too much discretion on the executive to decide when and how fundamental rights should be abridged. Furthermore Article 126 of the Constitution imposes various limitations on applications for redress of violations of fundamental rights which have served as an unnecessary obstacle to the development of a dynamic and comprehensive human rights jurisprudence in Sri Lanka. Coupled with this, the judiciary has failed through creative and liberal constitutional interpretation to exploit the tools at its disposal.⁷¹ The Supreme court has failed to adopt imaginative activist approaches adopted by courts in several countries including India, the Philippines and the United States of America.

The creation of the office of an Ombudsman, though hailed as a major innovation to promote checks and balances, has proved disappointing. This is because he is a "watchdog without much teeth" as complaints reach him after a meaningless and complicated screening process in Parliament. This suggests that the framers of the constitution were not serious in their intention to create an effective check on executive and administrative action.⁷²

The Public Service

The Constitution of 1978, like its predecessor opted to reject the idea of an independent public service. Though a Public Service Commission was reintroduced, its powers were severely limited as it is dependent for its power on Cabinet delegation.⁷³

Devolution of Power

The introduction of the 13th Amendment to the Constitution witnessed another major change of constitutional significance in this country. Being a unitary state in character, this island came under a uniform administrative system as far back as 1833 during British rule. Although the country was divided into provinces for purposes of administration, it was a highly centralised system that obtained throughout this multi ethnic, linguistic and religious land. Adverting to very cogent reasons, the Donoughmore

70. Article 126.

71. See Rohan Edrisinha, The Role of the Judiciary in the Protection of Human Rights in *Ideas for Constitutional Reform*, *op. cit.*, pp. 595-615.

72. See Sam Wijesinha, The Changing Face of Parliament in *Ideas for Constitutional Reform*, *op. cit.*, pp. 105-107.

73. Article 57.

Commission, in its recommendations, suggested that the Department of Local Government should consider a system of Provincial Councils as a supportive institution to the existing local government system.⁷⁴ However, these recommendations and future attempts at establishing regional/provincial councils did not bring any positive results. 1980 saw Parliament enacting an Act providing for decentralization of administrative powers to district levels from the centre.⁷⁵ This Act set up in every district a Development Council which enjoyed decentralized powers in respect of their districts. However, in practice this did not work as expected and had to be abandoned within a short period.

In contrast, the 13th Amendment with purported conformity to the unitary character of the constitution, makes way for devolution of state authority to the periphery from the centre. By establishing a Provincial Council for each Province, Constitutional recognition has been accorded to the devolution of legislative and administrative powers on the Provincial Councils. This Amendment proved to be a very controversial piece of legislation and evoked vigorous discussion. When the Bill was referred to the Supreme Court to have its constitutionality tested, all Supreme Court Judges sitting as the Court were divided sharply. While five judges inclusive of the former Chief Justice, held⁷⁶ that the proposed Amendment did not require the approval of the people as stipulated in Article 83 to become law, one amongst them, Justice Ranasinghe, the present Chief Justice, declined⁷⁷ to subscribe to the proposition that the amending provisions establishing the Provincial Councils could be entrenched in the Constitution without resorting to the mechanism of a Referendum. On the other hand, four judges in the minority were categorical that the contemplated Amendment required the consent of the people at a Referendum to become law. Eventually, the legislature passed the Amendment devoid of the provision which sought to mandate the approval of the People for its repeal or amendment.

An outline of the structure and powers of Provincial Councils is apposite here. The Amendment establishes⁷⁸ a Provincial Council for each province with the allowance that the President can merge⁷⁹ two or more adjoining Provincial Councils into one administrative Unit. Each Provincial Council or merged administrative unit of two or more Provincial Councils shall have a Governor⁸⁰ to be appointed by the President and who holds office during the pleasure of the President.⁸¹ Once the election, under a proportional representation system,⁸² is over, the Governor is empowered to appoint⁸³ a Chief Minister from among the Councillors who in the Governor's opinion is capable

74. Recommendations of the Donoughmore Commission, Report of the Special Commission of the Constitution, (Ceylon Government Press) pp. 87-88.

75. Development Councils Act No. 35 of 1980.

76. *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 Sri Lanka 312.

77. *Ibid.* pp. 383-387.

78. Article 154A (1).

79. Article 154A (4).

80. Article 154B (1).

81. Article 154B (2).

82. Provincial Councils Elections Act, No. 2 of 1988.

83. Article 154F (4).

of commanding the support of the majority of the Council. The Governor's power of selecting the Chief Minister is, however, subject to one restriction in that he has to appoint the leader of the party which has more than one half of the members of the Provincial Council.⁸⁴

The Governor has been vested with the power to summon, prorogue and dissolve the Provincial Council,⁸⁵ however he is required to exercise this power on the advice of the Chief Minister so long as the latter's Board of Ministers commands the confidence of the council.⁸⁶

The Provincial Councils have statute making powers.⁸⁷ However the Governor's assent is indispensable for every statute to come into force.⁸⁸ The Governor can, with his suggestions, return a statute to the Provincial Council requesting it to reconsider the same.⁸⁹ If the Council passes the statute again, without any amendment the Governor can forward it to the President for referral to the Supreme Court.⁹⁰ If the Supreme Court determines that the statute is inconsistent with the provisions of the Constitution, the Governor shall refuse his assent to the statute.⁹¹ The Governor can, as of right, address and send messages to the Provincial Councils.⁹² The Chief Minister is duty bound to keep the Governor informed of all decisions of the Board of Ministers in respect of the administration of the affairs of the Province and the proposals for legislation.⁹³

The statute making power of the Provincial Council relates to subjects mentioned in the list known as the Provincial Council List.⁹⁴ These matters include Police and Public Order, Implementation of Provincial Economic Plans, Education and Educational Services, Local Government, Provincial Housing and Construction, Social Services and Rehabilitation, Agriculture and Agricultural Services, Rural Development, Health, Co-operative etc. The subjects specified in the List known as the Concurrent List can also be the subject of legislation of the Provincial Councils in consultation with Parliament.⁹⁵ The Concurrent List pertains to, amongst others, Higher Education, Housing and Construction, Irrigation, Animal Husbandry, Employment, Fisheries, Tourism, Trade and Commerce. Exclusive legislative authority is conferred on Parliament as regards subjects falling within the Reserved List.⁹⁶ These include amongst others, National policy on all subjects and functions, Defence and National Security, Foreign Affairs, Post and Telecommunications, Broadcasting, Televisions, Ports and Harbour, Foreign Trade, Inter Province Trade and Commerce, Aviation and Air-ports, National

84. Article 154 F (4) proviso.

85. Article 154 B (8) (a)-(c).

86. Article 154 B (8) (d).

87. Article 154 G (1).

88. Article 154 H (1).

89. Article 154 H (2).

90. Article 154 H (4).

91. Article 154 H (4).

92. Article 154 B (10).

93. Article 154 B (11).

94. Article 154 G (1).

95. Article 154 G (5) (b).

96. Article 154 G (7).

Transport, Rivers and Waterways, Shipping and Navigation, State lands and Foreshore, Mines and Minerals, Immigration and Emigration, Citizenship, Elections, Census and Statistics, Professional Occupations and training, National Archives, Archaeological Activities and sites of national importance, Finance in relation to national revenue and all subjects and functions not specified in List 1 and III.

Any existing law on any matter on the Provincial Council List will fall into abeyance in a Province if the Provincial Council makes a statute on the same matter, describing it in its long title as being inconsistent with that law.⁹⁷ The matters mentioned in the Provincial Council List are, however, not beyond the legislative competence of Parliament. The Sri Lankan legislature can enact laws on those matters, but a rather different and cumbersome procedure is prescribed as opposed to the normal method, adopted to pass a law.⁹⁸ A law passed in such a manner will prevail over any statute made by any Provincial Council to the extent of any inconsistency.⁹⁹

From the above, it would be seen that though the Provincial Councils are vested with statute making powers, they cannot claim exclusive competence over any matter - even those specified in the Provincial Council List. Parliament can even after the 13th Amendment assert its legislative dominance by permitting its legislative writ to run over the length and breadth of this country. This is in addition to the power of Parliament to repeal the entire 13th Amendment with a 2/3 majority.

Although the President is the sole repository of the executive power of the state, the 13th Amendment authorises the Governor, an appointee of the President, to wield executive power pertaining to matters in respect of which the Provincial Council has power to legislate.¹⁰⁰ This he can do either directly or through the Board of Ministers or his subordinate officers. A Board of Ministers is established to aid and advise the Governor in the exercise of his functions.¹⁰¹ The Governor is obligated to exercise his functions in accordance with the advice of the Board, except where the Constitution requires him to exercise his functions at his discretion. It is important to note that the Governor is vested with the discretion to decide whether or not a matter is one in respect of which he is constitutionally required to exercise his discretion.¹⁰² He has to abide only by the President's directions in respect of the exercise of his discretion. Also, the Governor need not heed the advice of the Board of Ministers where the provisions of the Public Security Ordinance have been brought into operation by the President, in which case again the latter's directions will guide the functions of the Governor.¹⁰³

Where the Governor or any Provincial Council fails to comply with any directions given to such authority, the President can hold that a situation has arisen in which the

97. Article 154 G (8).

98. Article 154 G (3); cf. Article 154G (6) and Article 154G (11).

99. Article 154 G (6); also see Article 154G (11).

100. Article 154 C.

101. Article 154 F (1).

102. Article 154 F (2).

103. Article 154 J (1).

administration of the Province cannot be carried on in accordance with the provisions of the constitution.¹⁰⁴ This circumstance will permit the President to assume to himself the executive power of the Province and also to declare that the powers of the Provincial Council will be exercisable by or under the authority of Parliament.¹⁰⁵

The legislature may, in turn, confer on the President power of making statutes of the Provincial Council.¹⁰⁶

Conclusion

As indicated earlier, extra-constitutional factors have a crucial impact on constitutions and therefore it would be unrealistic to access a constitution by merely examining the provisions contained therein. There are several examples which illustrate this point. The office of Prime Minister was devalued considerably under the Constitution of 1978, yet the holder of that office between 1978 and 1988, through sheer force of personality and determination, retained a certain degree of influence and dignity for that office. Now it seems as if the post of Prime Minister has been reduced in political significance to a level perhaps never envisaged by the framers of the constitution. Then despite greater protection afforded to the judiciary constitutionally, it is well known that this institution was subjected to a barrage of intimidation through extra-constitutional means. The link between the internal democracy of political parties on their members in Parliament has been highlighted by several commentators. Of crucial significance in the Sri Lanka of the post 1977 era is the question of the validity and fairness of elections. Here detailed constitutional safeguards take on an almost illusory aspect, in the light of the corruption and abuses witnessed in recent elections. Another extra-constitutional factor that has undermined liberal democracy in Sri Lanka in recent years, been the state control, both overt and subtle, over the media.

At the same time however, constitutions can either promote or retard liberal democratic values. It is hoped that the All Party Conference will seriously consider some fundamental constitutional changes which could check the trend towards authoritarianism.¹⁰⁷ The provisions relating to fundamental rights must be strengthened and other reforms introduced to restore confidence in the electoral process. The traditional role of Parliament as a vibrant institution where members are free to examine, criticise and discuss freely must be restored. An Upper House, which attracts intellectuals, persons who are nominated ex-officio to represent important interests and a component elected on a national proportional representation system, and which has greater powers than those of the Senate of the Soulbury Constitution should be introduced. Political developments in Sri Lanka have warned us of the unmeasurable harm that can be caused by hasty, ill-conceived and un-examined legislation and though it is

104. Article 154 K.

105. Article 154 L (1).

106. Article 154 M (1) (a).

107. See *Ideas for Constitutional Reform* (1989) Chanaka Amaratunga (ed) for an exhaustive discussion on constitutional reform in Sri Lanka.

considered somewhat unfashionable to advocate in modern times, a bi-cameral Parliament which is a truly deliberative assembly can be of immense benefit to the country. The 6th Amendment to the constitution, the Universities Amendment Act, the Referendum and their catastrophic consequences might have been averted if a traditional, admonitory Parliament had existed at the time.

Radical constitutional change is therefore an urgent need if the country's democratic tradition is to be salvaged. However since the Constitution is the supreme law of the land, this exercise should be approached with a spirit of generosity, tolerance and statesmanship and not, with the narrow, partisan, self-interest which has dominated framers of constitutions in Sri Lanka since Independence.