Constitutionalism, Governance, and the People

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Coming to the University of Peradeniya is always a special experience. It brings back memories of carefree student days in a perfect environment for friendship and learning. Who can forget the glorious "yellow showers," the winding Galaha Road, the lawn mowers on fresh grass, "sunset and evening star" and the flute music? The memory is also tinged with sadness, for the troubled times experienced on this beautiful campus, the changes in that familiar environment that have taken place, over threescore years and ten. The changes themselves reflect my own experience, and that of all of us as citizens, on the governance of this country and our universities. I thank the Law Department for inviting me, an alumnus of the first Department of Law in our public university system, to deliver the inaugural Sir Ivor Jennings memorial lecture. Sir Ivor Jennings, the founding Vice Chancellor of the first national University of Ceylon and its twin successor the University of Peradeniya[1] can also be described as one of the founders of Constitutionalism and governance in both the country and the national university system of Sri Lanka.

The inauguration of a lecture series in Sir Ivor Jennings' memory by the Law Department can also be an occasion to reflect on his life and times in this country, and the changes we have witnessed in these areas. The topic I have chosen for this evening's lecture is a tribute to a scholar and administrator of a colonial era, whose ideas are an important resource, as we respond to contemporary realities of governance in our country and the university system.

Let me clarify at the outset especially to students, that I am not one of the oldest living students of Sir Ivor Jennings. I was not a student of Sir Ivor, when he lectured in the Law Department, and was Vice Chancellor of the University of Ceylon in Peradeniya. Indeed, I discovered I was a prize winner in my secondary school, Ladies' College, when Sir Ivor gave the keynote speech at our annual prize giving. I am sure that I was much less impressed with him, than I was with senior student Kumari Jayawardene, speaking passionately on a school platform on worker's rights. I read through his classic works "The Law and the Constitution," and "Cabinet Government," and Jennings and Tambiah on "The Legal System of Ceylon," very much in the spirit of plodding through "recommended readings." Constitutional law paled in comparison with other law courses that inspired my interest. However, there were anecdotes that we heard about Sir Ivor. We heard that he was a "student friendly" former Vice Chancellor, quite the contrast of fearsome Sir Nicholas Attygalle. I recall my first examiners' meeting in his room (the Vice Chancellor chaired the Board Meeting for the award of degrees.) Sir Nicholas looked at me with a steely eye and said "who may I ask are you?" Quite a

[1] The University of Colombo is the other twin!

contrast to Sir Ivor, who sent out a staff circular, which said, "My address is now 18, Aloe Avenue, Colpetty. A drink is always available for members of the staff who feel thirsty or otherwise sociable."[2]

Besides, we were the beneficiaries, the "nidahas adhyapanaya labee," the early students to enjoy the beautiful learning environment that we knew Sir Ivor had struggled to create for us all, despite his implacable objections to the Kannangara policies of free education.[3] We enjoyed a peaceful conflict-free learning environment that had been created according to Sir Ivor Jennings' vision of what university life should be.

When we were undergraduate, some of us women students who refused to boycott classes were met with hoots and whistles when we went for lectures. Yet our "black leg" voices were heard at a huge meeting held under the glorious tree in front of the Senate building, and the strike was over. This meeting was presided by senior politician Dr Sarath Amunugama. Barely a decade later when I was on the staff of the Law Department, which had by then moved to Colombo, a student in one of the halls of residence in Peradeniya leapt from an upper floor during "ragging," and was crippled for life. My students in Colombo told me they would be assaulted if they followed my advice and expressed their objections to boycotting classes "in sympathy" with the students suspended over the incident. The beautiful and conflict free learning environment that Sir Ivor Jennings, the founding Vice Chancellor had strived to create was already beginning to crumble, a decade later.

Sir Ivor's commitment to academic excellence meant that high academic standards were maintained in the years that followed his term in office. Products of the University of Peradeniya at the time, and not just the top tier, achieved success and eminence in diverse fields. The equality of access that Sir Ivor feared would result in a "levelling down" of academic quality with free education, in fact gave equal access to a good education for those who entered through the portals of the University of Ceylon, Peradeniya.

Institutional memory in this country is very short. It is only the University of Peradeniya that has sustained our memories of Sir Ivor Jennings' contribution to our university system and the governance of this country. When I served as Vice Chancellor of the University of Colombo there was no photograph of Sir Ivor Jennings in College House, which he had occupied for many years, or any other building. I obtained a faded copy of a black and white photograph from Prof. Kapila Goonesekere, former Vice Chancellor of Peradeniya University; nothing like the imposing painting of Sir Ivor by David Paynter that adorns the walls of your Senate room.

[2] The Road to Peradeniya, An Autobiography, Sir William Ivor Jennings, Lake House Investments 2006 p vii.
[3] Ibid Ch. IX.

Sir Ivor Jennings and the Road to Peradeniya

The life and times of Sir Ivor Jennings are documented in his own autobiography, published with an introduction of great professional skill, and with admiration, by the distinguished librarian, late Ian Goonetilleke. This is a rich resource.[4] Professor Lakshman Marasinghe's essay in a book on legal personalities supplements the autobiography with interesting insights on his work as a legal scholar and jurist.[5] Sir Ivor was a controversial figure during the time he spent in the island, then Ceylon, where he had an important impact on public life and the education sector. His views and his engagement in the political life of the country, attracted criticism, but also admiration.

Sir Ivor began his tenure as Vice Chancellor of the University of Ceylon in the University of Colombo of today. He recalls in his autobiography how the law creating the University of Ceylon was passed on the 2nd April 1942, three days before the Japanese air raid on Colombo. He unfurled the university's flag on the 12th of June on the grounds of College House. He remarks wryly, "being a little sentimental, [seeing] the flag sagging at one end [he] climbed the tower and adjusted it with a safety pin."[6] No Kandyan dancers, drummers and fanfare at this event.

An educationist of colonial times like Rev. W S Senior of Trinity College Kandy, when he left the island, could record in poetry, "my soul you will break with longing - it can never be goodbye."[7] Sir Ivor, the legal scholar, jurist, educationist, and administrator, could say with somewhat clinical objectivity, "I am in no way tied to Ceylon and can leave when the spirit moves." Yet he had a vision and commitment to laying the foundation for a national university, which he believed could become "one of the finest small universities in the world.[8]

Sir Ivor believed that a residential University in an attractive environment was one of the essential attributes of a great university. He was, as he describes himself, "a Cambridge [university] man."[9] His appreciation of the physical environs of that University created a desire to build a university campus on a site in Peradeniya, which he thought was one of "the most beautiful environments in the world for a university."[10]

The architecture and landscaping of this university continues to be a model for well-planned and attractive landscaped surroundings, creating a near perfect environment

[4] Ibid.
[5] M L Marasinghe, Sir William Ivor Jennings, Legal Personalities of Sri Lanka, Vol 1 Law and Society Trust, Colombo, 2005, pp280, 312.
[6] Autobiography, op cit, p. 120.
[7] WS Senior, Call of Lanka, Trinity College, Kandy, 1960, p 29 at p30.
[8] Autobiography, op cit, Ch XII, pp 183-184,198
[9] Ibid Ch III p. 49, Ch XII P 189.
[10] Ibid p 198.

for scholarship and learning. His contribution in this regard has outlived Sir Ivor, even if the values on governance and university education that inspired him have been challenged in the realities of our nation's post-independence experience. However, if Sir Ivor's surprising inclination to "pull down" College House and construct a women's hostel had been realised,[11] Colombo University would not have even that colonial heritage of great beauty on its campus surrounded by a wilderness of concrete box like structures.

Sir Ivor had a spectacular student career, receiving first class honours at every level. His approach to study is perhaps relevant to all law students who want to achieve academic honours in their law schools. He was a disciplined workaholic, even as a student. He saved his lunch money to buy books, and "study took precedence over everything."[12] He studied with "regularity and consistency," developed a timetable for this, studied the "technique of examinations," striving to obtain "not only a first, but a brilliant first."[13] Yet he did not believe only in examination success and paper qualifications. He believed that a residential University could create an environment for extra-curricular activities providing an education that was interdisciplinary, stimulating interest in poetry, philosophy, and the arts.[14] His own scholarship crossed the boundaries of law, politics, and political science. He gave up mathematics to study law. He thought "the boundaries between academic subjects very artificial, for knowledge … knows no boundaries."[15]

The Law Department of Peradeniya is the first to integrate an interdisciplinary perspective, an initiative very much in harmony with Sir Ivor's concept of a good legal education. Law schools, have, in general adopted what legal theory in the Anglo American tradition describes as "Austinian positivism" that teaches students how to learn and analyse the content of laws. However, in the early years the focus on reference and reading meant that students read widely and understood the core norms and concepts that linked law and administration of justice. This approach produced lawyers of great professional skill and eminence at a time when legal education was exclusively in English. It has had serious drawbacks for teaching and research in a challenging environment where very little literature is available in local languages, and most lawyers obtain a monolingual legal education with lecture notes in Sinhala or Tamil. Sir Ivor was uncompromising in his commitment to excellence in teaching and research. When my husband, as one of the young lecturers in the Law Department, was to go to Oxford for post-graduate studies, Sir Ivor advised him to read for a taught post-graduate degree in Civil law, (the BCL). Undertaking research he said, was the post qualification obligation of all University teachers, and a law teacher could then apply for a higher

[11] Ibid page 194.
[12] Ibid p 30.
[13] Ibid p 60.
[14] Ibid pp 101, 51. Marasinghe, op cit, p 303.
[15] Autobiography, ibid, p. 69.

doctorate! This advice was clearly based on his personal experience as a scholar and jurist.

Though Sir Ivor's scholarship and vision span law, politics and an interdisciplinary perspective, he was cynical about all "isms" – Marxism, nationalism, communalism, considering them political rhetoric. He had a poor and mistaken impression of the country's cultural heritage. He thought that transferring the University to Peradeniya could help "a cultural desert in Ceylon to blossom like a rose."[16] Yet he established a Faculty of Oriental Studies in the University of Ceylon, encouraged the development of these disciplines, and stressed the importance of scholarship and learning that was sensitive to local social and economic realities.[17] He supported the creation of a university endowment fund, and a museum for sculpture, paintings and objects of art. He thought "pious benefactors"[18] from the private sector would contribute to such a fund, and wanted the sales of his autobiography used for such an initiative. I believe that late Ian Goonetilleke who treasured his own stunning collection of artworks by George Keyt and many other reputed Sri Lankan artists, was inspired by Sir Ivor's vision to donate this priceless collection to the University of Peradeniya. An Ivor Jennings memorial lecture is surely an occasion to also pay tribute to that joint vision. Universities are receiving substantial funds from Government to improve their infrastructure. Is it not possible to give a museum project maximum priority in university planning, supplementing this with support from "pious benefactor" alumni in business and the professions?

Values on university autonomy free from political interference were very much the foundation for Sir Ivor's vision of university education. The 1942 University Ordinance, which he drafted, also incorporated the concept. This law established Councils, Senates and Faculty Boards, modelled on the institutional arrangements of British universities. For Sir Ivor, the institutions, (still embedded in our university system, in 1978/1985 legislation), could provide academics with the tools to resist abuse of political and official authority and interference in university administration. When the University of Ceylon Bill was being debated in the legislature, Sir Ivor who sat behind the Minister C.W.W. Kannangara, drafted quick amendments that prevented clauses being introduced that could erode university autonomy. Though he and the Minister opposed each other in the Committee on Education on the proposals for free education, they shared the same perspective on the importance of maintaining the autonomy of universities in the area of higher education.[19]

[16] Ibid p 106-107, 5, 91, 141-143, 147-148, 169, 174; Marasinghe op cit, December 1947, pp 305, 300 (Speech at Ladies' College Prize Giving, December 1947).
[17] Autobiography, ibid, pp 97, 160.
[18] Ibid, Preface p 1-2.
[19] Ibid p 98, 117, 118.

Academics from the university community in Peradeniya gave leadership when university autonomy was under attack in the late 1960s and 1970s. The current Universities Act with strong provisions on this principle, was adopted once again in 1978 with the contribution of senior academics from Peradeniya University. It was intended to restore the autonomy of universities. It was unfortunately amended in 1985, creating new provisions on the appointment and dismissal of Vice Chancellors with an expanded regulatory role for the University Grants Commission. These changes undermined the authority of the highest university bodies (Councils and Senates) and have encouraged political interference.

Two university Vice Chancellors have been recently removed without, it is alleged, following even the required procedures. A few academics have publicly challenged these actions. But we have, in general, become accustomed to erosion of university autonomy by political authorities, even though the institutional arrangements introduced in 1942 by Sir Ivor continue to be part of our university system. State universities are being blamed for not sustaining excellence in education and contributing to human resource development. No link is made to the toxic impact of politicization of university education.

Constitutionalism and the Sri Lankan People

Constitutionalism, as law students know, refers to the theoretical underpinnings of Constitutional law. The theories in turn impact on the institutional arrangements for governance, and the concepts incorporated in Constitutions. Constitutions and their theoretical concepts are often dismissed as irrelevant for the People. Yet, governance impacts on peoples' lives. Constitutions and the people are therefore all connected.

Nelson Mandela referring to Constitution making in South Africa in 1996, said that a Constitution is "a law that embodies the nation's aspirations."[20] Sir Ivor Jennings wrote an Article published in the Ceylon Daily News three decades earlier in 1962 commenting that, "any lawyer can draft a Constitution for anywhere. The difficulty is to persuade a people to make it work."[21] The "aspirations" justification for Constitution making in Mandela's words, places the concept of the "Sovereignty of the People" at the centre of Constitution making. Sir Ivor's comment focuses on the responsibility of both rulers and the governed to make Constitutions work.

The weeks and months prior to the Presidential elections 2019 witnessed an outpouring of public anger against politicians and our legislators. A constant refrain is the failure and defects of democracy, and Constitutionalism as lawyers know it, and a

[20] Cited Ian Currie and Johan de Waal, The New Constitution and Administrative Law, Vol 1, Juta Law, reprinted 2004, p 2.
[21] Ceylon Daily News, 23 Nov 1962, cited Marasinghe op. cit, p 295

desire to replace it with new institutions and "strong individual leadership." Another discourse calls for rejection of any links to Constitutional norms and standards derived from what are described as implanted and alien "colonial" or "Western elitist" norms and standards of governance. The idea of governance based on "jathika chinthanaya" or national conscience advocated the need to link political ideology with a local, rural, traditional culture. This has now been reinvented in a new discourse on the need to reject for all time "Suddha law." This is a phrase used by the monk Gnanasara when he disrupted Court proceedings and was convicted of contempt of court. The public display of abuse of power, arrogant, irresponsible and corrupt governance, selfish political leadership and waste of national resources despite regime changes, has created a demand by some for a complete rejection of Constitutional theories and the institutions of governance.

Such trends are visible in other countries too. The furore over Brexit in the United Kingdom and the conflict between Parliament and the Prime Minister is sometimes traced to the absence of a written Constitution with specific provisions on how to cope with challenging problems of governance. Sir Ivor Jennings, the British constitutional lawyer and jurist, drafted written Constitutions for many countries, and wrote his seminal work on "The Law and the Constitution."[22] He would have contested the suggestion that Constitutional law and Constitutionalism could only be embedded in a written Constitution. From his perspective, governance that limited State power, and based on written or unwritten Constitutions was the responsibility of the rulers and the governed.[23]

I would like in this lecture to examine developments that have taken place in our country in regard to some limited aspects of Constitutionalism and governance. In my view there are some theories and concepts absorbed in our post-independence written Constitutions that have continuing relevance in achieving accountable governance for the People, even in these troubled times.

Constitutionalism and Written Constitutions

Constitutionalism as it has been defined is linked to the objectives of accountable exercise of power in governance. Such accountability is to the People and requires that the power of the State must be limited. Limitations on governance, both in regard to the State powers, and procedures that must be followed in governance, are considered essential measures to prevent autocracy or a dictatorship. It is recognised that the challenge of Constitutionalism is to create a balance. The state must have powers of governance but should not be so powerful as to disregard the interests of the people. Written Constitutions therefore strive to achieve this balance.

[22] Sir Ivor Jennings, The Law and the Constitution, Hodder and Stoughton, UK (1933).
[23] Note 21 supra.

Constitutionalism is embedded in a concept also recognised in our legal system of "the Sovereignty of the People" of a country.[24] The idea of governance as a social contract between a Sovereign People and the Ruler has its origin in natural law theory of seventeenth century Europe and the European Enlightenment, and especially the jurisprudential theories of John Locke. As law teachers and law students know, allegiance to the state or political body is based on the obligation to protect the "natural right" of the people to life, liberty and property. What is described as the European Enlightenment also goes back to philosophical thought in ancient Rome and Greece. These ideas have had a powerful impact on political movements like the French Revolution and the American War of Independence. The dismantling of colonialism, and national peoples' movements for enhancement of human rights contributed to their incorporation in written Constitutions of many countries, including in South Asia and Africa, and in international human rights instruments of the United Nations. Some common ideas and concepts for written Constitutions have therefore emerged across the globe.[25]

Though sometimes condemned on political platforms in Sri Lanka as "Suddha law and a colonial legacy", these ideas on Constitutionalism and accountable governance to the people have roots in our own country. There is a body of scholarship in the postcolonial period describing governance before colonial regimes were established, which reflect a sophisticated polity rather than an absolute monarchy. Rulers respected People's diversity.[26] There were measures and practices that restrained rulers from exercising absolute power. The Gamsabhava functioned as community level participatory bodies of local administration.[27] Buddhist texts which are rarely discussed in public discourse, like the Vasala Sutta on caste and the Sigalovada Sutta on relations in the family and community, and the ideas written in stone in Ashokan inscriptions of antiquity, are founded on the values of respect for human dignity and potential, and accountable exercise of authority in kingship, the family and the community. The Milinda Prashna records the manner in which a king could interact with a scholar as an ordinary citizen. The Mahabharatha in Hindu texts recognises that neither the rod nor rod bearer governs the people and dharma ensures mutual protection.[28] "Populism" that supports

[24] Constitution of 1972, Art. 3, Constitution 1978, Art. 1 and Preamble.
[25] J Symonides, (ed), Human Rights Concepts and Standards, UNESCO 2000: Currie and de Waal op cit p 10 – 24.
[26] G Obeysekere, The Doomed King, Perera Hussein 2017; S Arasaratnam, Dutch Power in Ceylon 1667-1687 Netherlands; Narang, New Delhi, 1988 p.115.
[27] Arasaratnam, ibid pp 113-114; Lorna Devaraja, The Muslims in the Kandyan Kingdom in M Shukri (ed), Muslims of Ceylon Colombo, 1986p.211; ARB Amerasinghe, The Protection of Culture, Vishva Lekha 2006 (conservation and environment); R K W Goonesekere, "The Eclipse of the Village Court" 1958 (2) Ceylon Journal of Historical and Social Studies, pp 138-146; N Tiruchelvam, The Ideology of Popular Justice in Sri Lanka, Vikas Publishing, India 1984.
[28] Vasala Sutta, Discourse on Out Castes Piyadassi Thera, The Book of Protection 1975 p 91; Sigalovada Sutta, Bhikkhu Bodhi, Numerical Discourses of the Buddha, Wisdom Publications MA USA 2012 pp 56-562; N Lahiri, Ashoka in Ancient India, Ashoka University India 2013; Tiruchelvam, ibid, Preface; Questions of King Milinda, trans. T W Rhys Davids, Tohokai Inc. Japan, reprinted 1977 pp 46-47.

extremist ethnic or religious agenda, is contrary to these values, that seek to contain abuse of power. "Populism" has become associated with Peoples' movements but often represent viewpoints that ignore the wellbeing of the people.

The first written Constitution of Sri Lanka (1948), drafted by Sir Ivor Jennings was replaced in 1972, more than two decades after its adoption. Sri Lanka's early post-independence experience of government based on a written Constitution, inspired by the values of Constitutionalism in Britain, created the context for conflict free accountable governance. This experience has been sometimes connected with the vibrant multi-party system of the early years, and the holding of a regular Parliamentary election where the Peoples' power of the vote was exercised.[29] Our written Constitutions may be described as incorporating elitist colonial values. However, like many other nations we must recognize that these values reflect a lived experience of limiting authority and abuse of state power in governance. They link to a long tradition of accountability to the People in governance.

Constitution Making in Post-Independence Sri Lanka

Sir Ivor Jennings was the single author of the first independence Constitution of Ceylon (1948).[30] His autobiography has a fascinating account of the personal and political context that was the background to this work, and the ideas that influenced him in drafting the document. The issue of British and Ceylonese perspectives on defence, as well as differences in majority and minority community concerns, were two areas that dominated the discussions, Sir Ivor sustaining his intellectual efforts in Constitution drafting with a box of cigarettes![31] The 1948 Constitution was modelled on British Constitutional theory and law, though that country did not have a written Constitution. Described as "Westminster Constitutionalism," this model has influenced Constitution making in our country and many others.[32]

Home Grown Constitution Making and Revolutions

When Mrs. Bandaranaike and the United Front obtained a resounding victory at the elections in 1970, her election manifesto had asked the people for a mandate to "permit the Members of the House of Representatives to elect to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution."[33] The Government had the required majority under Article 29(4) to amend the 1948

[29] S A de Smith, Constitutional and Administrative Law, Penguin 1973, p 19.
[30] The Constitution 1948 consisted of several documents and the Ceylon Independence Act 1947.
[31] Autobiography, op cit, Ch. XI.
[32] Currie and de Waal, op cit, p 12.
[33] Cited M J A Cooray, Judicial Role under the Constitution of Ceylon (Sri Lanka), Lake House Ltd. Colombo (1982) p 218.

Constitution. Yet it was decided to adopt a Constitution deriving its authority from the will of the people. There was to be a complete break from Dominion to Sovereign Republican legal status in the Commonwealth, by adopting a "home grown" or "autochthonous" Constitution. Delinking from a previous colonial past was the foundational value of this approach to Constitution making. The Minister of Constitutional affairs late Colvin R de Silva describing this initiative said, "We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy."[34] Anticipating the thoughts of Nelson Mandela on the South African Constitution (1996), Mrs. Bandaranaike the Prime Minister said that "Our people have clearly expressed their desire to have a new Constitution … of which as a self respecting nation they can be proud - a Constitution which will reflect the highest aspirations and help to ensure the wellbeing and happiness of future generations."[35]

The idea that political revolutions can give legality to a written Constitution that is enacted without following earlier procedures is no longer considered "extra-legal" or as rejecting the idea of Constitutionalism. South Africa dismantled its earlier Constitutional system, embedded in apartheid in 1996, by what is called a "negotiated revolution."[36] The concept that colonised countries that achieved independence can break the link with a past and adopt on their own a written Constitution that is the supreme "home grown" law of the land, through a concept of "Constitutional autochthony" had been articulated and acquired legitimacy.[37]

A written Constitution deriving its validity from the "Sovereignty of the People" in a revolution reflects lived political experience in many countries. Sir Ivor Jennings recognised this link between law and politics in his own scholarship and criticism of the eminent British jurist Dicey in his seminal work on the "Rule of Law." In his book "Law and the Constitution," written at the age of thirty, he said that revolutions "if successful always make new law … all revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes the Constitution law."[38] These views are also reflected in the thinking of other famous scholars and jurists.[39] There are Constitutions like India where the process was, as in South Africa, by reference to another Constitution, and partly "revolutionary or outside it".[40]

Arguments based on the "Sovereignty of the People," and a "revolution" or a new political, social and economic order cannot be used as an argument to support the extra

[34] Ibid p 217.
[35] Ibid p 221.
[36] Currie and de Waal, op cit, p 63.
[37] 37 KC Wheare, The Constitutional Structure of the Commonwealth 1966 Clarendon Press Oxford p 89 cited LJM Cooray, Reflections on the Constitution, Hansa Publications Ltd, Colombo 1980 p 123.
[38] Law and the Constitution, op cit, 1959 ed p 85.
[39] H Kelsen, extracts on Basic Norm of a Legal Order etc Lloyd's Introduction to Jurisprudence 5th Ed Stevens London, 1985 p 348-385; HWR Wade, Constitutional Fundamentals, The Hamlyn Trust Stevens and Sons London 1980 pp 35-37.
[40] Cooray, op cit, p 126.

Constitutional grab of political power that occurred in October 2018. "The sovereignty of the people," as reflected in a massive vote of confidence in Local Government elections was sometimes used to argue for the "legality" of this change. "Autochthonous" Constitution making requires a mandate of the People where the whole country votes at a General Election as it happened in 1970. If no party receives a two-thirds majority and a mandate to amend or repeal the Constitution, it can be argued that major changes can be made through a "negotiated revolution," an all-party two thirds majority consensus in Parliament.[41] The idea that a written Constitution can be changed only by following procedures outlined in an earlier Constitution is currently accepted in political and public discourse in the country. Hence the discussion on the need to have a two third majority in Parliament and a referendum in order to dismantle the Executive Presidency created by the current Constitution of 1978.

Constitution Making 1972-1978

The Constitution of Sri Lanka (1972), for the first time acknowledged the idea of the Constitution as a fundamental law "deriving" power and authority solely from a "Sovereign People."[42] Though this Constitution incorporated some of the theories and ideas associated with the 1948 Constitution, the modifications were also significant. The Constituent Assembly drafting process was confined to the elected representatives, and individuals like the Minister, who gave leadership in doing so.

The Constitution of 1978 that replaced the 1972 Constitution, was also adopted after a General Election that gave one party a significant majority in Parliament. Interestingly, though the new Constitution was enacted by repealing the 1972 Constitution, following the procedure for amendment by a two third majority set out in that Constitution, the rationale articulated was the Party's election manifesto and the mandate requested at the General Election to "draft, adopt and operate a new Constitution." The fear that this Constitution could be changed by a simple majority, bypassing the new provision in the Constitution actually led to an initial draft that made advocating such an amendment an offence! This provision was dropped due to protests.[43] It was described by Professor Wade in his Hamlyn lecture on Constitutional Fundamentals as meriting a prize for bizarre Constitution making.[44]

A Select Committee procedure was adopted for the reform process, and the Committee made recommendations to the National State Assembly elected under the 1972 Constitution. Many political parties did not participate, and the Constitution was criticised as one imposed on the people. Late Professor A.J. Wilson, a distinguished

[41] See AJ Wilson, The Gaullist Constitution in Asia: The Constitution of Sri Lanka, MacMillan Press, Hong Kong 1980, p 25 and Ch. 3.
[42] Preamble, Article 3.
[43] Wilson, op cit, p 23
[44] Wade, op cit, p 40

scholar and political scientist from the University of Peradeniya who was involved in the process, described the 1978 Constitution as "enjoy(ing) a limited but fair consensus."[45] This Constitution making too did not ensure wide public discussion and support.

This Constitution also incorporated the concept of the "Sovereignty of the People." The Preamble even declares that the Constitution was adopted by Parliamentarians "humbly acknowledging their obligations to the People!" Like the 1972 Constitution, it retained some ideas and institutional arrangements that go back to the first independence Constitution (1948) that Sir Ivor Jennings drafted. However, it introduced an Executive Presidency that reflected President J R Jayawardene's vision of stable Government that "would not be swayed by pressure within the legislature and outside." [46]

The 19th Amendment, one of many Amendments to the 1978 Constitution, was enacted in 2015. Disowned later by the Joint Opposition, it was adopted by a two-thirds majority in Parliament by consensus, as a compromise to remove the worst aspects of the Executive Presidency. Drafted in a non-participatory manner by lawyers who could hardly compare with Sir Ivor, it has been the subject of constant attack, and is enmeshed in political controversy. The 2015 Government's more recent efforts at major Constitutional reform through a Select Committee procedure have been derailed because of lack of transparency and lack of political commitment to creating consensus. Excellent reports prepared by expert groups, and a useful early procedure of public consultations, did not impact as expected, to promote reform of the 1978 Constitution.

The history of Constitutional reform in our country indicates how individual personal ambitions and party politics in the period 1972 to date contributed to the concept of the "Peoples' Sovereignty" being disregarded in Constitution making. If Constitutional reforms are to be effective, a completely participatory process as in South Africa in 1996, must replace the practices of the past. Peoples' participation with those engaged in governance is important for Constitutional reform. As Sir Ivor Jennings remarked, "lawyers can draft a Constitution but it takes people to make it work."[47] Unless the Rulers and the People understand and internalise the values of a written Constitution, it cannot become a living fundamental law in governance.

Constitutionalism in Sri Lanka: Some Institutions and Principles of Governance

The concept of "social contract" and the "Sovereignty of the People" embedded in our Constitutions recognises that governance must be based on Constitutionalism, the consent of the People, and accountability to the People, not to abuse State power. The Constitution is the supreme basic law of the country that receives priority and binds all

[45] Wilson, op cit, p 41.
[46] Ibid p 43.
[47] Marasinghe, op cit, p 295

organs of Government. The Constitutions of 1972 and 1978 accepted some features of Westminster Constitutionalism in the Jennings Constitution 1948, and the concept of Constitutional supremacy. It is only possible to reflect in this lecture on how some of the key institutions and principles of this system were modified significantly, and how the changes contributed to changes in accountable governance in our country.

A. Parliament

A Parliament of elected representatives or the Legislature has been the most important organ of Government and the state since 1948. We had a bicameral or two-chamber legislature with a House of Representatives and Senate in 1948, and a unicameral or one chamber legislature from 1972 onwards. After the 13th Amendment created a system of devolution in governance there is limited power sharing at the devolved levels. Unfortunately, devolution of power has been a controversial political issue connected with minority rights, and has prevented consensus on Constitutional reforms in the country.

The concepts of Parliamentary sovereignty and the connected concept of an independent judiciary and separation of powers provide the theoretical foundation for determining how State power is exercised and limited, and how Government should function in our country. It is important to reflect on what these concepts mean and have meant in our written Constitutions.

1972

Separation of powers between Parliament, the Legislature, and the Judiciary, and the need for a balance between them were the underpinnings of the 1948 Constitution. This balance is considered critical to Constitutionalism and the limitation of State Power.[48] Separation of powers and the division of organs of Government in the 1948 Constitution were recognised in jurisprudence of the Supreme Court and the Privy Council in the Liyanage cases.[49] However, the "autochthonous Constitution" of 1972, which abolished the Senate as a Second Chamber of elected "eminent persons," also made Parliament the dominant organ of Government. The 1972 Constitution recognised the "Sovereignty of the People" but described this as "Political Sovereignty." The "Legal Sovereign" was the elected legislature or Parliament. The National State Assembly (NSA) of elected persons was described as the supreme instrument of State power. The NSA therefore exercised the legislative, executive and judicial power of the people.[50] Parliament's dominance in governance as the "Legal Sovereign" contributed to undermining the earlier values

[48] Currie and de Waal, op cit, p 17
[49] Queen v Liyanage 1962 64NLR 313 350 (SC), Liyanage v Queen 1965 68 NLR 265, 281 (PC)
[50] Art 5; Ch. 3 (language); Article 9 (Buddhism); cf S Namasivayam, The Legislatures of Ceylon 1928-1948, Faber and Faber London (nd) p 139

incorporated in the Constitution of 1948, and began a trend towards authoritarianism in the political culture of the country. Legislative supremacy gave legitimacy to the idea that a "politicized" public service committed to implementing without question decisions made by elected representatives in Parliament and the Executive, was essential for good governance. New provisions on Sinhala as the official language, and Buddhism as the state religion in the Constitution, gave for the first time predominance to the majority community in the country.

The manner in which this all powerful legislative body made inroads in the balance of separation of powers in the 1948 Constitution was witnessed particularly in the limitations on the Court's power of judicial review, and the erosion of judicial independence, thus even undermining the dignity of the Judiciary. The late Felix Dias Bandaranaike said publicly that the courts had "no right to declare that Parliament is wrong."[51] All institutions were dominated by Parliament, and the Executive and Judiciary were expected to implement the legislative agenda of the elected representatives.

Higher education also witnessed at this time the first inroads into the norm of "University autonomy" that Sir Ivor Jennings incorporated in the Universities Act, 1942. Reinstating university autonomy or "autonomia," as the Minister of Education in the pre-1970 Government described it, was a campaign cry for university academics led by dons from the Peradeniya University in 1970. Yet ironically, Constitutional values of 1972 impacted higher education. The authority of the Ministry of Education over universities was entrenched. The 1971 JVP insurgency disrupted universities. Repressive regulations like exit permits encouraged political interference. The Ministry imposed State policy on the medium of instruction, disregarding the views of academics. Policies considered as interventions that gave educational opportunities to disadvantaged rural students, and their implementation, were perceived as targeted efforts to discriminate against the Tamil community. The earlier Official Languages Act and policies connected with its implementation combined to strengthen the sense of exclusion and discrimination on the grounds of ethnicity. Other erosions of Constitutionalism through abuse of State power, interference with the criminal justice system, control of the media, and postponement of elections, have been forgotten today but are documented in scholarship on this period. [52]

A chapter on fundamental rights and freedoms was incorporated in the 1972 Constitution, but they were not enforceable in the courts. They were, as in some East Asian countries, only aspirational norms and standards. Recognition of fundamental

[51] ARB Amerasinghe, The Supreme Court of Sri Lanka, Sarvodaya Colombo 1986 p 83-89; RKW Goonesekere and S Goonesekere, "Conflict Resolution and the Contribution of the Legal System: The Sri Lanka Experience" in D Chandraratne ed Sri Lanka: Perspectives on the Resolution of Conflict, University of Western Australia 1993 p107- 131, at p 114

[52] Goonesekere and Goonesekere, Ibid, pp 115-116.

rights could not contribute to limitations on Executive or Legislative power. Infringements on private rights occurred, but went unchallenged. Some important legislation on land reform and housing was enacted and justified as necessary to achieve distributive justice and access to economic resources and shelter. [53] "Sovereignty of the People" was therefore undermined by the dominance of one organ of government – Parliament, describe as the "Legal Sovereign" created by the Constitution.

1978

The Constitution of 1978, following the election of 1977, was meant to be a return to the accepted values and norms of Parliamentary democracy in Westminster Constitutionalism. The political rhetoric was to establish a "dharmishta" Government that went back to those ideas and values. The term tried to recreate the historical Ashokan legacy of a change from "Chandashoka" to "Dharmashoka" governance of the People. The Constitution that was adopted, inspired by a Gaullist French model of Presidential governance and Westminster Constitutionalism,[54] in fact created a new kind of "Executive Sovereignty" for the first time, an institution now described as an "Executive Presidency." [55] It also incorporated some of the ideas in the 1972 Constitution, which should have been discarded. It is this legacy of Constitution making between 1972 and 1978 that increased the political authoritarianism and non-accountable governance that has had a lasting impact on our country.

The Executive President and Parliament

The Executive Presidency combined with the new system of proportional representation that gave sweeping authority to political parties to select candidates, also contributed to negative changes in the composition of Parliament. Sir Ivor Jennings' views on the role of members of Parliament make interesting reading in this context. "Membership of Parliament" he said "is too serious a business to be merely an asset or a prospectus. It is one of the professions to which no forty-four hours of work rule applies. Nor is it … on the road to wealth, it may lead to office, honour,… not to riches." He endorsed the views of one Prime Minister in the British Parliament who considered payment to members as an "allowance" to enable them to render "incalculable" public service.[56]

We have seen in the last few decades the manner in which many Members of Parliament including Ministers have acquired unexplained wealth, interfered with procurement

[53] Chapter VI; Goonesekere and Goonesekere, ibid.
[54] Wilson, op cit.
[55] This is not a word used in the Constitution of 1978.
[56] Cited Marasinghe, op cit, pp 286-287.

procedures, signed contracts that squandered national wealth, and denied responsibility for such conduct before Public Commissions of Inquiry. They have unashamedly abused the privilege granted to obtain duty free vehicles to trade with them and obtain unconscionable profits. We have read of and seen the violent behaviour of some Parliamentarians within Parliament, especially during the regime change effort of 2018. We witnessed their appalling and shameful conduct in Parliament, (watched by their leaders), assaulting people and destroying public property. Some of these same persons were visible at election time on public platforms and the media, shouting slogans on democratic governance.

We as the public and the media do not hold Parliamentarians of all political parties accountable for the appalling manner in which they have functioned as elected representatives. It is no wonder that the record of legislation in the last 15 years in particular has left unreformed important areas of public concern, such as family relations, disability, criminal justice and environmental conservation, despite the large body of expert reports and an evidence base indicating the urgent need for policy reform and implementation. Most importantly there has been a complete failure by Members of Parliament to develop consensus in addressing the "national question" on devolution, power sharing, and minority community concerns.

These systemic problems are not just a manifestation of the wrong people being elected by us as our voters to our Parliament. The proportional representation system, combined with the party apparatus for selecting candidates, has denied voters an opportunity to elect individual candidates with the capacity, integrity and commitment to fulfil their responsibilities as legislators in Parliament.[57] There are no minimum educational qualifications, and the "presumption of innocence until proved guilty in a court" has enabled the corrupt, and the violent to become elected Members of Parliament. Worse, unreported jurisprudence on the manner in which a Member of Parliament can lose his seat, has replaced the earlier legal procedure. New proposals on losing a seat for crossing from the political party to which a member was elected to Parliament were rejected by Parliamentarians themselves when the 19th Amendment was enacted in 2015. The practice of party crossovers and trading and bidding in cash for such defection continues to be regarded as a legitimate practice by some political leaders and Parliamentarians. The Joint Opposition could not acquire the required majority to legalize the regime change in 2018 only because of articulate public protests against this corrupt practice. Electoral reforms have never been introduced or are stalled because of resistance from within elected Parliaments.

The diminishing quality of our legislature post-1978 has been combined with the dominant role of the Executive Presidency. The Constitution recognises, like in 1972,

[57] RKW Goonesekere "Political Parties and Governance" SWRD Memorial Lecture extract published Law and Society Trust Review Vol 25 (2015) pp 46-49

that "Sovereignty is in the People," and is inalienable.[58] However, sovereignty is not exercised through a single powerful Legislature as in 1972, but separate institutions, Parliament (the legislature), an elected Executive President and Judiciary. There are confusing provisions. An elected Parliament is identified with the power of the People exercised through a referendum, once again linking, as in 1972, Peoples' Sovereignty with Parliamentary Sovereignty. The President with extensive powers, and a dominant role in governance is also accountable to Parliament in the exercise of his powers and duties.[59] The 1978 Constitution links to 1972 by referring to "**judicial power exercised by Parliament** through courts and tribunals created by law or the Constitution,"[60] thus undermining the concept of judicial independence in separation of powers.

President J.R. Jayewardene's 1978 Constitution distorted the balance of institutions and the fundamentals of Westminster Constitutionalism that he wished to retain. This is seen very clearly in the powers of the Executive Presidency and Parliament in the 1978 Constitution.

The second Amendment to the 1978 Constitution enabled J.R. Jayawardene who had been elected as Prime Minister, to become the first Executive President. The Constitution[61] gives him the right to hold office for two terms, each of six years. He is described as Head of State, Head of the Executive and of Government, and Commander in Chief. He is a member of the Cabinet, determines the Ministries, and may or may not consult the Prime Minister. He can also dismiss the Prime Minister or Cabinet Ministers. He can summon, prorogue and dissolve Parliament. Most importantly he is immune from suit for acts done in an official or private capacity while he holds office. These powers of dissolution and dismissal were in fact exercised by Presidents prior to the 19th Amendment 2015. Similarly, immunity from suit prevented Court cases challenging Presidential decisions that violated statutes and laws. These provisions make it difficult to accept the interpretation that the Cabinet shares the President's Executive role in Government.

The dynamics of Sri Lankan politics at the time ensured that Prime Minister Ranil Wickremesinghe from the UNP, despite the provisions of the written Constitution on the Presidency, could marginalize President Kumaratunge in governance during a period when they came from different parties. She eventually responded by exercising the power of dissolving Parliament. Though Article 42 (now 33 A), stated that the President

[58] Art 3 (1978) cf Art 3 (1972)
[59] Art 4 (a), Art. 42 now 33 (A), see discussion HNG Perera CJ Sampanthan v. The Attorney General, note 68 infra.
[60] Art 4(c)
[61] Art 30-31, Art 33 as amended by the 19th Amendment; Art. 33A, 42, 43 as amended by the 19th Amendment, interpreted in the Nineteenth Amendment Determination, SC Application 4/2015-2019/2050.

shall be responsible to Parliament for due exercise, performance and discharge of his responsibilities under the Constitution, this provision was undermined by the above sweeping Executive powers.

The controversial 19th Amendment was passed, it must be recalled, by a two thirds majority of Parliament including the members of the Joint Opposition. Parliament agreed that it was important to limit Presidential powers. It tried to take away or limit Presidential powers in all the above areas, and also repealed the Mahinda Rajapaksa Government's 18th Amendment, which had eliminated the term limits of the presidency. The 19th amendment placed restrictions on the President's power to remove the Prime Minister and dissolve Parliament at his discretion.

Tension and conflicts between the President and the Prime Minister contributed to the regime change of 2018 when the President dismissed the Government and appointed his own administration. This created a crisis in governance followed by violence within Parliament. The 19th Amendment is now disowned as an aberration for creating two centres of power that have made cohabitation between the President and Prime Minister impossible, further politicizing and debilitating the public service and public administration. The tragic incidents of Easter Sunday, and the complete lack of accountability and networking between the national security agencies and political leadership is condemned, and often traced to the Amendment. A new discourse has emerged that the 19th Amendment has made the Executive President a figure head, like a ceremonial head of state.

The 19th Amendment has provisions, which are badly drafted, and some times contradictory. Yet it tried to create some balance between the role of Parliament and the Executive in governance. Though the 18th Amendment has been repealed, and the term of office reduced to two terms of five years, the words of the original articles on his dominant status are the same.[62] Other powers of significance have been given by a new formulation of Presidential "duties," powers and functions. These include ensuring the Constitution is respected and upheld, and promoting national reconciliation and integration.[63] The President[64] continues to have the power to submit to the People at a referendum "any matter which in his opinion is of national importance." There is also a wide "omnibus" clause giving other powers in defined areas that are not inconsistent with the Constitution. He can be sued for violation of fundamental rights guaranteed by the Constitution, but this liability is excluded in regard to some defined matters. He makes recommendations to the Constitutional Council on all appointments to high posts

[62] Art 30 (1) (2); (2) Art 31(2); Art 42 (3).
[63] Art. 33 (1) (A0 (B); Art. 33 (2).

[64] Art 86, Art 33 (2) (h), Art 35 proviso (1) and (2), Art 41 (c), Art. 41 (B), 41 (C) and Schedules.

though their approval is required. The President[65] determines who can be appointed as Prime Minister on the basis of his capacity to command the confidence of Parliament. Limitations on the dissolution of Parliament and removal of the Prime Minister, and the mandatory duty of consultation in making Cabinet appointments, can hardly justify the view that the President is now just a figurehead, and a ceremonial holder of this office.

The 19th Amendment has confused concepts and principles in the new Chapter VIII on the Executive. The President's in ability to hold Ministerial office is anomalous. Article 43 (2) suggests that only a Member of Parliament can be a Minister, and the President in making Ministerial appointments must act on the advice of the Prime Minister. However, other provisions in the chapter give discretion in regard to consultation with the Prime Minister on Cabinet appointments, and also describes the President as a member of the Cabinet and the Head of the Cabinet.[66] These provisions, combined with his other powers, and his dominant role in governance under the Constitution as Head of the Executive and Government, and Commander in Chief, must mean that future Presidents cannot be denied the overriding executive authority in regard to matters of National Security and Defence. Article 51, which specifically assigns Defence to the current President, must be read as a transitional clause in light of all the provisions on powers, duties and responsibilities of an elected President under the 1978 Constitution as amended in 2015.

This Amendment did not deal with the subject of devolution of power, which is regulated by the 13th Amendment. The authority of the central Government remains in this area. The important powers of the President and Parliament in regard to impeachment of Chief Justice Shirani Bandaranayake that created a conflict between the courts and Parliament also remain.[67] Presidential powers and the legal status of the office continue to be important after the 19th Amendment, and cannot change the role of Parliament in governance.

In 2018 a Full Bench of the Supreme Court interpreted the 19th Amendment as an initiative that clarified that the President was required to act within the powers and responsibilities given to him by the Constitution.[68] The Court rejected the argument that there was some "residuary plenary executive powers" rather like a "Royal prerogative," not subject to restrictions. Citing previous case law, the Full Bench concluded that "since 1972 this country has known no monarch," and that "the President has not inherited "that mantle." The court referred to Article 33 as amended, and the concept of Presidential "duties, powers and functions," the President's responsibility to Parliament

[65] Art. 42 (4), Art. 31(2) (c) qualified by Art. 70 (1) proviso, Art. 46 (2) (A), (B), 43 (2).
[66] Art. 42 (1), (3), 43 (1).
[67] Art 107 (2) (3).
[68] R Sampanthan and Others v AG and Others, SC FR Appl 351-361 (2018) HNJ Perera CJ (FB) pp 31, 38, 69; the court considered Art 33 and 33 (c) qualified by Art 70 (1) (dissolution of Parliament) Art 33A reenacting Art 42 (responsibility to Parliament) Art 35 (1) proviso (immunity restricted by fundamental rights) Art 4 (a) Art 4 (b)(Presidential powers derived from the People).

in exercising his role, and the new provision taking away his immunity for violation of fundamental rights. In determining that the Presidential order on dissolution of Parliament in October 2018 violated the Constitution, the Court emphasized that the Presidential power was derived from the people, and all his powers are limited by the specific provisions of the Constitution. This is powerful jurisprudence on Constitutionalism and accountable governance.

Even as some argue that the 19th Amendment made the President a powerless, ceremonial Head of State, others say that the Executive Presidency is essential to prevent Parliament giving into pressures from within and outside Parliament that will inevitably lead to separatism. According to this view, an Executive Presidency is much more important than an empowered and accountable legislature elected by the people. There is ongoing debate but no consensus within Parliament on the future of the Executive Presidency. The 19th Amendment tried to limit Presidential powers, and was passed by a two thirds majority in Parliament, though it is now disowned on political platforms. Yet the problems created by an Executive Presidency have not gone away. Arguments on a post-19th Amendment shadowy President as a ceremonial head of government, must not encourage us to retain this institution.

B. The Courts

The Rule of Law and the Courts

At the age of thirty, Sir Ivor Jennings began a critique and debate on the eminent jurist A.V. Dicey's definition of the Rule of Law in 1885. In his own admission, "having examined the Dicey problem by 1933," he "attacked, not always politely, ideas cherished" in law books and legal scholarship across the globe that address this discourse. He remarks that initially his book was "received in significant silence."[69] His views on the connection between the Rule of Law and Constitutional conventions in the Westminster model of governance, and the academic debate on his views, has little general relevance today. However, as observed earlier, Sir Ivor's exposition of the Rule of Law and its sources as something broader than Dicey's definition, has enriched the discourse on the concept, and its relevance for Constitutionalism. His critique of the separation of law and politics in Dicey's definition, and Dicey's exclusive focus on the supremacy and authority of positive law developed and enforced by the courts as the source of Constitutional law, has contributed to a broader definition of the Rule of Law.

The Rule of Law today incorporates the idea that a political revolution can give legal authority to a new Constitution. However the principle that the content and procedures of law are not arbitrary, is included in the definition. Both Dicey and Jennings, despite

[69] Ivor Jennings, Autobiography, op cit, p 68; A V Dicey, Law of the Constitution, 1885, 10th ed. 1959.

their different formulations, recognise that the Rule of Law makes governance accountable to ensure that State power is limited and not exercised arbitrarily. In a broader meaning today the Rule of Law extends beyond the State to include Non-State actors, a concept absorbed into international human rights law.[70] The Rule of Law is therefore linked to the idea of Constitutionalism in democratic systems of governance.

The Rule of Law gives a special role to the courts of law in a country. Ensuring that the Rule of Law is respected by the courts also means that the Judiciary must be independent of political pressure and control. As law students and teachers know the concept goes back in Westminster Constitutionalism to the contribution of an individual - Chief Justice Coke (1552-1634), but was also incorporated in early British legislation.[71] Even where there is no clear separation of powers between the three branches of Government, the independence of the Judiciary is considered the foundational aspect of Constitutionalism, in order to prevent abuse of power, and create a balance between the three organs of Government, the Legislature, the Executive and the Courts. The values on judicial independence are linked to separation of powers and incorporated in many Constitutions across the globe.

When Parliament is considered the dominant organ of Government, there is inevitably a conflict between the idea of Parliamentary supremacy and the role and responsibility of the courts. Westminster Constitutionalism in Britain has struggled with this tension.

Parliamentary Sovereignty and the Courts

Dicey's classic formulation of Parliamentary supremacy recognised Parliament as the representative of the people, and the sole law-making organ of Government. This dominance meant that one Parliament could not restrain and bind a future Parliament or change enacted laws passed earlier. Though the "Common law" was judge made law in Britain, Parliamentary sovereignty meant that court decisions could be changed by legislation.

Sir Ivor challenged the traditional interpretation that restricted the role of the courts. His views generated academic debate among eminent British scholars.[72] The Jennings' view was that Parliament was sovereign, but when Parliament set out entrenched provisions on "manner and form of legislation," restricting how laws could be passed, as by a two thirds majority, Courts had the power to declare legislation *ultra vires* or not valid. Constitutional Conventions with the force of law could also, in his view, limit Parliamentary Sovereignty. Judges had an obligation, in Sir Ivor's view, to exercise "self restraint," and avoid making decisions on public policy. Sir Ivor did not include a Bill of

[70] Chief Lesapo v North Western Agricultural Bank 2000 1 SA 409, cited Currie and de Waal, op cit, p 78.
[71] Act of Settlement 1701, Curry and De Waal, op cit, p. 18.
[72] HWR Wade, Hamlyn Lecture, op cit, p 27-29; G Marshall, Constitutional Theory, Oxford Clarendon 1971, p 7, Ch. 3.

Rights as a method of "entrenchment." He also thought the notion of equality in Dicey's formulation only referred to a limited concept of formal equality. He believed in the concept of judicial restraint, and also considered that civil liberties were protected in English Common law.[73] One of the eminent critics of Sir Ivor was Professor H.W.R. Wade, who argued that entrenching restrictions on Parliament in any way could make courts a superior authority and conflict with "the dogma of Parliamentary Sovereignty."[74]

Scholars struggled with the idea of entrenching a Bill of Rights in Constitutions without eroding the concept of Parliamentary Sovereignty. Professor Wade discussed this issue later in the context of the problem of the United Kingdom having to conform to the European Convention on Human Rights. His contribution was that the Jennings' form and procedures limitation was in conflict with Parliamentary Sovereignty, but the minds of judges who interpret Constitutional norms could be adjusted to a new perspective on a Bill of Rights. He thought this could be done through the oath of office administered to judges.[75] Sir Ivor perhaps had also come to change his own views on the entrenchment of a Bill of Rights in a Constitution, as a strategy for preventing abuse of State Power. In 1961 he said, "if I knew then as much about the problem of Ceylon as I do now, some of the provisions (of the Constitution of 1948) would have been different".[76] Britain enacted a Human Rights Act in 1998, also giving courts a limited power to review Acts of Parliament. A Bill of Rights or entrenched provisions also enable courts to use norms and standards of treaties ratified by the State and international law in interpreting rights.[77]

The power of the courts to review Acts of Parliament and State action (judicial review), gives the courts a role in limiting State power that cannot be ignored.[78] The legitimacy of unelected judges playing a role in balancing social and economic interests when Parliament decides to legislate, has been controversial.[79] It is argued that they cannot be a third policy-making organ of Government. Yet, courts interpreting a Bill of Rights have a duty to avoid "judicial populism." Adopting a literary interpretation that goes back to the intention of Parliament, rather than making decisions on rights in the context of political, economic and social realities, can contribute to undermining their responsibility under the Constitution to prevent abuse of power, by either the State or Non-State actors. Constitutionalism can be strengthened when judges do not avoid giving decisions in areas where "political questions" arise, exercising the kind of self

[73] Law and the Constitution, op cit, Ch IV, VII and VIII.
[74] Note 72 supra, p 23-24.
[75] Ibid p 35.
[76]. Wilson, op cit, p 97.
[77]. Constitution South Africa 1996 Art 39(1).
[78] Marbury v. Madison 1803, cited Currie, op cit, p 21.
[79] Currie and de Waal, ibid, p 20-21,37, 115-117 citing National Constitution for Gay and Lesbian Equality v. Minister of Home Affairs 2000 SA 1 CC; Marshall, op cit, Ch. 4 and pp 90-96; Wilson, op cit, p 125; R K W Goonsekere, "Arm of the Law" Occasional Paper Series, Law and Society Trust, July 2009.

restraint that Sir Ivor Jennings referred to in his criticism of the concept of "judicial review." Development of Common Law as judge made law in many countries, demonstrate how judges have contributed to peoples' rights before written Constitutions were adopted.

These later developments in regard to the role of the courts therefore qualifies the traditional ideas, and Sir Ivor's own views on Westminster Constitutionalism.[80] Parliamentary dominance in Government can be rejected in a written Constitution. Public engagement in Constitution making as in South Africa can ensure that State power is circumscribed and limited, displacing the idea that it is the elected representatives of the People that must have a dominant role in governance. When a Constitution protects the Peoples' rights through entrenched provisions like a Bill of Rights, this can reinforce democratic and accountable governance in the wider public interest. Constitutional supremacy becomes a safeguard against oppressive authoritarianism in all its manifestations.

Sri Lankan Constitutions and the Judiciary

1948

The 1948 Constitution drafted by Sir Ivor Jennings with provisions in regard to the appointment and dismissal of judges was meant to ensure the independence of the Judiciary. However, it did not have specific provisions on the courts' power of judicial review or the separation of powers. In the well known case of *Queen v. Liyanage* the Supreme Court decided that a provision in an Act of Parliament that gave the Minister of Justice the power to appoint judges to try the "coup case" (1962) was contrary to the Constitution. This view was upheld by the Privy Council, a Superior Court at the time, which said that a separation of powers was implicit in the 1948 Constitution, and the judicial power could only be exercised by the courts of law. The provisions on the independence of the Judiciary were interpreted as creating a principle that judicial power is vested only in the Judiciary, and not shared by the other organs of Government.[81]

Judicial views expressed by the Privy Council in later cases on the method of Constitutional amendment by a two thirds majority in Article 29(4), and minority rights in Articles 29 (2) and (3), considered them "entrenched" and "unalterable" provisions of the Constitution. The power of the judges to review Acts of Parliament that infringed "entrenched" provisions in the Constitution, contrary to Sir Ivor Jennings' own views, on

[80] See HWR Wade, Hamlyn Lecture, op cit; de Waal and Currie, op cit.
[81] Liyanage cases, note 49 supra; see Bribery Commission cases, Senadheera v Bribery Commissioner1961 63 NLR 313, Piyadasa v Bribery Commissioner1962 64 NLR 385, reinforced in Ranasinghe v Bribery Commissioner 1962 64 NLR 449 (SC) and Bribery Commissioner v Ranasinghe 1964 66 NLR 73(PC).

"entrenchment", ironically provided the conceptual underpinnings for this jurisprudence. The decisions have been supported and critiqued by scholars and could have been a factor influencing the political decision to adopt a "home grown, autochthonous Constitution."[82]

1972

The Constitution of 1972 as we have seen, entrenched the concept of Legislative Supremacy and undermined the role of the judiciary. As there was no method for enforcement of the Chapter on Fundamental Rights, judicial review of State action was not possible. Some Articles provided for the appointment and dismissal of judges, and were drafted in such a way as to conform to the concept of a judiciary independent of parliamentary and executive control. The power of the highest court to issue writs - an important legal basis for preventing abuse of executive power - could be restricted by laws enacted by the Legislature.[83] A special procedure and a two-thirds majority were required for amendment of the Constitution. A Constitutional Court was established but it could only review laws before they were enacted.[84]

The Soulbury Commission report on constitutional reform had stated clearly "that there can be no question about the Minister of Justice having any power of interference in, or control over the performance of any judicial or quasi judicial functions or Institution or the supervision of prosecutions!"[85] The legal norms and the jurisprudence that Sir Ivor had incorporated in the 1948 Constitution were retained only in the areas of appointments and promotions of the judiciary. The erosion of judicial independence after 1972 was the very reverse of the traditions of separating the Judiciary and the other organs of Government in Westminster Constitutionalism. [86]

1978

When the Constitution of 1978 was adopted, President Jayewardene spoke on the importance of judicial Independence. He said that the object of the new Constitution was to create the condition for judges to be "men of courage, men of wisdom, to live thrive and prosper. If they feel that they will be subject to pressure from Governmental

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[82] See Bribery Commissioner v Ranasinghe 1964 66 NLR 73(PC), Ibralebbe v Queen 1963 65 NLR 433 (PC), AG v Kodeeswaran 1969 72 NLR 337 (PC)-(the PC did not decide on the validity of the Official Languages Act challenged, but recognised judicial review, referring the issue back to the SC which had in dicta (1967 70 NLR 121 p138) expressed reluctance to do so) LJM Cooray, op cit, pp 63-70; CF Amerasinghe, The Doctrine of Sovereignty and the Separation of Powers in the Law of Ceylon, Lake House Colombo 1970. For a recent review, Asanga Welikala,"Jennings' Constitutional Experiment in Ceylon" in Asanga Welikala (ed.), The Sri Lanka Republic at 40, CPA Colombo 2010;

[83] Art 121 (3). Ch XIV Art 122, 124.

[84] Ch XX, Art. 5, 52, 54, 55(1).

[85] Soulbury Commission Report p 101, cited S Goonesekere, The Constitution and the Attorney General, Monograph, Sarvodaya Colombo 1994, p 10.

[86] ARB Amerasinghe, op cit, 84 and p 94; Wilson, op cit, Ch 7.

forces or from those elected by Parliament, they will not be able to perform their duty."[87] He forgot to mention the women who held or could hold office as judges!

The 1978 Constitution incorporated a new concept of an Executive Presidency, but retained like 1972, some values of the 1948 Constitution drafted by Sir Ivor in regard to the independence of the judiciary in the matters of appointments and dismissal. These provisions were stronger and placed in a separate section of the chapter on the judiciary with the heading "Independence of the Judiciary." The judiciary was also to exercise the "judicial power" of "A Sovereign People." However, the reference to this judicial power being exercised "by Parliament through courts and tribunals recognised by the Constitution" reflects the 1972 approach, conflicting with the concept of the judiciary as a separate organ exercising the "Sovereignty of the People."[88] There may have been a drafting error. A reference to Courts and tribunals "established by Parliament and recognised by the Constitution" would have been appropriate, harmonising with the independence of the judiciary, and Courts exercising judicial power without any oversight by Parliament.

This Constitution has "entrenched" clauses on amendment, which are stronger than the two-thirds majority recognised in earlier Constitutions. Constitutional Amendment requires the two third majority in Parliament, the familiar "form and procedures" restraint that Sir Ivor recognised as compatible with Parliamentary Sovereignty. The Constitution also requires in addition, a referendum for certain amendments. [89]

Fundamental rights are enforceable in the courts but with some limitations.[90] Actions must be brought within a very limited time, if the violation is by the state, or executive or administrative action. The President can be sued for a violation of fundamental rights when acting in his official capacity, but with restrictions. An Act of Parliament can be challenged for violation of fundamental rights during a very limited time during its passage through Parliament. There is no opportunity for post-enactment review of legislation, and existing laws continue in force despite being inconsistent with the chapter on fundamental rights. Fundamental rights do not provide relief and remedy when violations are committed by private actors unless there is proof of State inaction. Provisions on some rights must be changed by the above demanding amendment procedures, others require only a two thirds majority. Our Bill of Rights is therefore not the type of entrenchment in a written Constitution that restricts with any consistency law making by Parliament, or administrative action.

[87] Wilson, op cit, p 125
[88]. Ch XV Art 107, Art 4 (c).
[89] Art. 82 (5), (6), Art 83 and Ch. 13.
[90] Art. 126 (1) (2); Art35 (1) proviso; Art. 16; Art 80 (3), 120; Faiz v. Attorney General (1993) and Upaliratne v. Tikiri Banda (1995) cited ARB Amerasinghe, note 97 infra, pp 2-3.

Judicial Review

The concept of judicial review and the distinct role of the judiciary in reviewing the exercise of Presidential power has been recognised in jurisprudence, and stated as a fundamental concept in the Full Bench decision of 2018.[91] The Full Bench decision reiterated that the President cannot exercise plenary powers outside the specific provisions of the Constitution.

The recent decision of the Court of Appeal in the dual citizenship case however, referred to a different concept of the President as the "repository" of Executive power.[92] This analysis was the basis of their Lordships' decision that the President could grant dual citizenship to his brother two days after assuming office, even though the relevant Minister, authorised to do this under the Citizenship Act, had not been appointed by him. The word "repository" means holder of an Executive power. It is respectfully submitted that the President could not have acted outside Constitution Article 44(2), now repealed, which allowed him to assign to himself any subject or functions not assigned to a Cabinet Minister. In the absence of any official document or a Gazette notification of an assignment, there was no Minister authorised to exercise powers under the Citizenship Act. Even if it is argued that the President is not fettered in allocating Ministries to himself under Article 44(2), without a Cabinet appointed under Articles 43 (1), and 44 (1), it is respectfully submitted that he was required to conform with the requirement of assigning himself Ministerial office under Article 44 (2). The Court of Appeal referred to a discrepancy between the English and Sinhala wording of Article 44 (2) and decided that the Sinhala Constitution refers to the President having a "duty to be in charge" rather than "remaining in charge" of the Ministries not assigned to anyone else. It is respectfully submitted that this difference of language does not qualify the legal requirement of "assigning" to himself a Ministry under Article 44 (2).

The Court of Appeal recognised that it could not engage in Constitutional interpretation, but did so in interpreting Article 43 and 44, and defining the relevant authorised Minister to issue a dual citizenship certificate under the Citizenship Act. Their Lordships accepted that the President could use Article 44 to take charge of Ministries even without appointing a Cabinet. This interpretation can have serious negative implications for governance.

Their Lordship's opinion on the President's "repository" Executive power and their interpretation of Article 44 need not be a precedent, since these Articles have been changed by the19th Amendment. Besides, the idea of the President having a "repository" Executive power is in conflict with the Full Bench decision that he has no

[91] Sampanthan and Others v. AG and Others, note 68 supra; Sripavan CJ on repository executive power in Nineteenth Amendment Determination, note 61 supra pp 6-7.
[92] Viyangoda and Thenuwara v. Ratnayake and Others, CA Writ Application 425/19, Yasantha Kodagoda PC J.

"plenary power" that is not circumscribed by the Constitution. In the Determination in the 19th Amendment cited to support their Lordships' analysis, Sripavan J too accepted that the Constitution did not intend the President to function as "an unfettered repository of executive power" unconstrained by the other organs of Government. It is important that the Full Bench decision and the 19th Amendment Determination on Presidential power will prevail as precedents to be followed.

The scope of Presidential powers in the 1978 Constitution, despite the 19th Amendment and the jurisprudence in the Supreme Court, has altered the balance in governance that the doctrine of separation of powers envisages. Despite these limitations, and changes from the approach to judicial power as understood in the 1948 Constitution drafted by Sir Ivor, the provisions on the courts in 1978 were hailed as a welcoming and significant change from 1972 by the Bench and Bar. Chief Justice Samarakoon commented that the Supreme Court has become "the guardian of fundamental rights," when the ceremonial sitting to welcome the judges appointed under the new Constitution was held. The Attorney General in his address said that "the Supreme Court was now truly supreme."[93]

Public Perceptions today about the Administration of Justice

During Presidential election time criticism mounted against the conduct of our legislators, the Executive, bureaucrats, and public officials. Indeed the justice sector has been the subject of even greater public disenchantment, with anger at what is perceived as a rotten legal system.[94] The negative developments that have taken place particularly in the last two decades and political interference with the Judiciary have weakened the institution, and public confidence in the administration of justice. Constitutional changes and political pressures on all institutions have ultimately led to the decline of Constitutionalism and governance that is accountable to the people.

Professors of Law may perhaps be excused for coming to the defence of the "black coated fraternity." Current public sentiments require us as citizens to reflect on how and why institutions can fail public expectations.

Late Justice A.R.B. Amarasinghe, a distinguished alumni and teacher in the Law Department of the University of Ceylon, Peradeniya, records in his classic work "The Supreme Court of Sri Lanka" the contributions of generations of distinguished judges and lawyers to the administration of justice in this country. We must recall that it was the Supreme Court in the 1962 Liyanage case that resisted a politicised executive effort

[93] ARB Amerasinghe op. cit 94-96.
[94] Usvattearrachchi, "Rotten Judicial Processes", Island 24th September 2019, p 7; Editorial "Cop or Thug" Island 2nd October 2019; Goolbai Gunesekere, "We Need Strong Leadership", Island 30th September 2019.

to undermine the court's judicial responsibilities and powers under the 1948 Constitution in the coup case, and deny accused their legal rights. It was the Supreme Court that gave its Full Bench decision in 2018 in a powerful judgement on the limitations on Presidential powers and resolved the Constitutional crisis that had grave implications for the country.[95] Presidential elections have been fought, and also challenged, in the courts through long and intense legal proceedings providing an opportunity for the winner and loser to have their grievances heard, proved, and decided by a court, without being subject to political pressure.[96]

There is an evidence base of impressive jurisprudence of the Supreme Court on the subject of fundamental rights, expanding these remedies so that even private actors can become responsible for violation when they link to a state agency.[97] Though our Constitution does not recognise economic and social rights as enforceable rights, the jurisprudence developed on equality in substance, result, and impact, has given relief when there has been denial of educational opportunities or access to health care in State hospitals. Jurisprudence on an intergenerational right to a sustainable environment has prevented state projects that infringed individual economic rights. It was possible to say at the end of the 20th century that "the Judiciary has emerged stronger and won public confidence, even if there remain criticisms that no solution has been found to the problem of the laws delays".[98] Other publications on the legal profession recognise the important contribution made by lawyers and judges to the administration of justice, and accountable exercise of State power in Sri Lanka.[99]

There were also traditions and professional ethics that influenced the conduct of judges and senior lawyers connected with the administration of justice. For instance, it is alleged that a senior judge who was superseded in an appointment as Chief Justice was asked to sign one of the notorious "advance resignation" letters issued during J.R. Jayewardene's Presidency. He refused to do so and was overlooked. When asked to go public on this episode after retirement, he declined, saying that "individuals don't matter but maintaining the dignity of the court is important." Justice Mark Fernando one of the most distinguished alumni of Peradeniya's first Law Department was superseded by President Kumaratunga in appointing the Chief Justice, though he was the most eminent and most senior judge. Lawyers wanted him to go public on the

[95] Sampanthan and Others v AG and Others, note 68 supra.
[96] Sirima Bandaranaike v R Premedasa 1988- 1993 (Presidential election petition case).
[97] Note 90 supra; Fundamental Rights Jurisprudence : RKW Goonesekere, Fundamental Rights and the Constitution, Case Books 1 and 11, Law and Society Trust Colombo (nd); Justice ARB Amerasinghe and SS Wijeratne, Human Rights Human Values and the Rule of Law, Legal Aid Foundation 2003; ARB Amerasinghe, Our Fundamental Right to Personal Security and Liberty, Sarvodaya 1995; Chief Justice S Sharvananda, Fundamental Rights in Sri Lanka, Arnold International 1993; Law and Society Trust Colombo Annual Surveys Human Rights.
[98] RKW Goonesekere, "Changes in Constitutional Government", ADV de S Indraratne (ed.), Fifty Years of Sri Lanka's Independence , SLISES Colombo 1998 pp 35 at 50.
[99] Legal Personalities of Sri Lanka, op cit; Sriyan de Silva, The Giants of the Legal Profession of the Past, Employers Federation Colombo 2019.

reasons for his early retirement. Once again he declined, saying that he thought that the dignity of the apex court must be maintained by his silence on these matters. Similarly, when a controversial judicial appointment was made and challenged in the Supreme Court, lawyers were privy to the information that the Constitutional Convention of consulting the Chief Justice had not been followed by the President. They did not wish to "compromise" the Chief Justice, and did not bring this information to court. They lost the case for failure to prove a lack of consultation. [100] When the Minister of Justice Felix Dias Bandaranaike wanted to "inaugurate" the Supreme Court after the 1972 Constitution was adopted, Chief Justice Victor Tennekoon in a letter, protested in writing, "I have heard of the inauguration of "schemes" where a Minister presses a button and some machinery starts working. But … the Judges of the Supreme Court have already taken their oaths and are installed in office.... one begins to wonder whether there will be a curtain drawn by the Minister to expose the judges to the public gaze, or whether on the pressing of a button we are expected to start acting judicially like puppets."[101]

Despite the sentiments expressed by President Jayewardene on judicial independence and the rejection of the ideas incorporated in the previous Constitution of 1972, erosion of judicial Independence came during his term of office. Apart from the resignation allegation, it is a fact that the senior most and eminent judge of the Supreme Court was overlooked in the appointment of the Chief Justice, due to political reasons and a dissent on what was considered a "political question." The notorious acts of violence perpetrated against the judges of the Supreme Court who gave a decision on the infringement of activist Vivian Gunewardene's fundamental rights during a public demonstration, were manifestations of ugly political interference with judicial independence, that we have forgotten.[102]

The period after 2009 saw a more serious erosion of accepted norms on judicial independence and protection from political interference. Controversial judicial appointments of "favourites" with political connections to the superior courts sullied the reputation of the court. One Chief Justice gave special privileges to the first family by taking a photograph in Chambers with them, and the son who took his oaths as a lawyer. Another Chief Justice after retirement apologized to the public for giving a wrong decision in favour of a potential Presidential candidate. The public also knows that a former Chief Justice arrived at the Presidential residence during the conclusion of the 2015 elections. The appalling behaviour of senior Parliamentarians of the former Government in politically motivated impeachment proceedings against Chief Justice Shirani Bandaranayake is now in the public domain.

[100] Edward Silva v Shirani Bandaranayake 1997 1 S LR 92.
[101] Amerasinghe, op cit, p 84.
[102] Ibid p 95.

The anger of the Bar against the interference with the judiciary at this time manifested itself in the serious conflict between the legislature and the judiciary in the impeachment case against Chief Justice Shirani Bandaranayake, resulting in her removal from office. She therefore lost all her service benefits. The desire to rectify this injustice resulted in this country having three Chief Justices in three days. The former Chief Justice was deemed by the new Government of 2015 not to have held office, or "disappeared" from the court. Chief Justice Bandaranayake was reinstated and resigned the next day. A new Chief Justice was then appointed on the third day!

The 19th Amendment provided for a new method of appointment of judges through a Constitutional Council, a measure agreed to by a two thirds majority as preventing political interference with the judiciary. Despite the experience with the last impeachment, the 19th Amendment did not contain new provisions on this aspect. The new procedures of appointment have not, in general, attracted public attention, and allegations of political interference. However, the non-prosecution of emblematic cases, and delays in prosecution are striking. A new judicial practice supported by arguments of leading lawyers has prevented the arrest of important persons, by alleging "imminent threat" of violation of the right to freedom of arrest. These developments inhibit investigations and prosecutions, and are seen negatively by the public as a systemic failure of the justice system.

Recently a former Bribery Commissioner acknowledged that she had a conversation with the accused in the Avant Garde Floating Armoury case, alleging political interference in the case. A senior prosecutor went public on his meetings at Temple Trees with the Prime Minister and other Ministers, and claimed that he was pressurized to prosecute in an important case. As law officers of the state there is nothing wrong with an official of the Attorney General's department meeting Government officials and decision makers. However, if he was pressurised on matters relating to prosecutions, he should have recorded this political interference in writing, and brought this to the attention of his own superior the Attorney General. Together they could have resisted the pressure, and even gone public on the interference. This was done in one university in 2015, which went public on the political interference with a staff appointment. The negative public response compelled the Minister of Higher Education at the time to backtrack, and prevented further actions of that nature.

If Liyanage's case and the Full Bench decision of 2018 are the high points in the history of judicial independence in the country, the decision of the Supreme Court on the 18th Amendment, brought to Parliament by the previous Government and extending Presidential terms, can be considered a low point in Constitutionalism in this country. The decision,[103] based on the concept of the Peoples' voting rights, has been critiqued

[103] Determination on the 18th Amendment Bill, discussed RKW Goonesekere, "Constitution and the People", Desmond Fernando Oration, July 1 2011, Law and Society Trust Review 25 2015 pp 54-58.

for undermining core values on governance in the Constitution and giving further powers to an Executive President. There has been public demand for decades on the need to abolish the powerful Executive Presidency, as it is inconsistent with the balance of power within organs of the state required for accountable governance. It is ironical that the Supreme Court extended term limits by reference to the rights of the people. We have seen that the 19th Amendment enacted in 2015, by consensus in Parliament, brought back the concept of term limits for the Presidency. [104]

When the legal profession and the judiciary in particular, do not sufficiently connect to the broader values of constitutionalism, in the justice system, and in the governance of public and private institutions, we as citizens lose an important safeguard that can prevent abuse of power by the state and non-state actors.

In the recent dual citizenship case in the Court of Appeal, [105] lawyers and the Court, attributed ulterior motives to the Petitioners who challenged the grant of a dual citizenship certificate. The petitioners were questioning the procedure of public administration, in what they alleged was a violation of the Citizenship Act. Records were missing and the certificate had been issued to a former President's brother, two days after the President took office. The case was not based on merely the technicalities of procedures to be followed in citizenship applications, but a substantive legal issue of the power to issue the certificate. These matters with respect, are clearly issues of public interest upon which the petitioners could claim legal standing to bring a case to court. The lawyers for the petitioners did not (very surprisingly) refer to the aspect of public interest.

It is respectfully submitted that despite this omission, their lordships could have considered the alleged illegality in public administration on a citizenship matter, one of public interest, that was of concern to the general public of this country. The impact of a court order in disqualifying a Presidential candidate was not, it is submitted respectfully, even a "political question" that merited judicial restraint. Their lordships however discussed the political context, and accepted the argument of the respondents' lawyers that the case had been filed with an ulterior motive, and a collateral purpose of disqualifying a potential Presidential candidate. They held that the petitioners should have made his political party a respondent, and that they had not come to Court with "clean hands." They used their discretionary powers in granting the writ if certiorari, and dismissed the petition.

The decision and the initial order of the Court have been accompanied by vicious hate mail against the petitioners, and threats of murder and grave acts of violence. It is respectfully submitted that a different level of argument and analysis by lawyers and

[104] Art. 31 (2).
[105] Note 92 supra.

their Lordships, could have contributed to jurisprudence on accountable governance. Besides, the "chilling effect" of this decision on citizens who desire to bring cases challenging official acts in public administration in an adversarial political environment cannot be underestimated. Citizens right of access to courts to assert rights was recognised in the vibrant voice of the Full Bench in the Dissolution of Parliament Case in 2018. The Court of Appeal decision on citizen standing, it is respectfully submitted, does not harmonise with that approach to Constitutional interpretation, or citizens' rights to seek accountability in governance through access to the justice system.

Chief Justice H.N.J. Perera for a Full Bench in 2018 clarified the importance of citizens' right to litigate violations of fundamental rights considering this and "inalienable right," and the "grundnorm" of the Constitution. The Court expressed its commitment to give full meaning (to those rights), thus giving "life and meaning to the sovereignty of the People." The Court decided that when the President acts in his official capacity, his actions and omissions can be challenged as "executive and administrative" action that gives the Court jurisdiction and power to review those acts. This is a powerful recognition of citizens' rights, judicial review, and the role and responsibility of the Courts to ensure that State powers are exercised within the limitations placed by the Constitution. There are recent cases decided by the Supreme Court that have contributed to an impressive jurisprudence on fundamental rights, and accountable governance. [106]

A new Court of Appeal was established as the highest or apex court of the country when the 1972 autochthonous Constitution deemed Sri Lanka a Republic within the Commonwealth. [107] Speeches were made on this occasion by eminent Justices like the late Victor Tennekoon and TS Fernando. Justice Tennekoon as Attorney General at the time remarked that "in establishing a new Court and appointing new judges particularly to the Superior Court a Government is always under test in the eyes of the public as to whether it is a true believer in democracy, the Rule of Law and the independence of the judiciary. … The Court of Appeal Act makes it perfectly clear that the Government in power is a firm believer in those basic concepts … not interested in establishing Courts which are Courts in name only … without those characteristics which are essential to make a true Court." [108] President of the new Court Justice T S Fernando said, "We are inheritors of a fine judicial tradition."[109]

[106] E.g. Sampanthan and Others v AG and Others, note 68 supra HNJ Perera CJ ; Pelaketiya v Sec Minister of Education and Others, SC FR 76 /2012 (sexual harassment); Kariiyawasam v CEA SC FR Appl 141/ 2015 Prasanna J PC, (environment) ; Dr Ajith Perera v Gamage and Others ,SC FR Appl 273/2018(Disability Rights; Ishara Anjali v (Minor) and W Chulangani v W Bogahawatte Police Station Matara SC FR Appl 677/2012 I (Unlawful detention and guidelines).
[107] Act of 22 October 1971.
[108] ARB Amerasinghe, op cit, p 79.
[109] Ibid p 81.

When Chief Justice Samarakoon and other judges were welcomed as judges of the new Supreme Court under the 1978 Constitution, he said "my brothers and I have been members of the old Supreme Court (under the 1972 Constitution) and would have wished for it an honourable demise and decent burial … what more is in store I do not know. What I did know is … that the court itself will come out of it with its reputation untarnished and its pristine glory treasured at all time."[110] We have seen from later events how much confidence in this vision of Constitutionalism and accountable exercise of State Power was misplaced. What is important is that unlike in later decades senior judges and officials felt free to articulate these values in public statements.

The judgement of the Supreme Court in the Full Bench case (2018), in some ways, reaffirms our faith in these values and traditions even though today such commitments are made only within and not outside the courts, thus failing to reach the average citizen. Interestingly, the Sunday Times recently carried a banner headline appreciating the leadership given to the courts by the last three Chief Justices, their Lordships, Sripavan, Dep and Perera. "Political questions" will arise, and yet require the wisdom of the court in giving judgements that seek to reinforce Constitutionalism rather than these other ideologies. As Chief Justice H.N.J. Perera citing a dictum in a case from another jurisdiction said, "the Court's authority possessed of neither purse nor the sword ultimately rests on sustained public confidence. Such faith must be nourished by the Court's complete detachment in fact and in appearance from political forces in political settlements."[111]

In Conclusion

Written Constitutions have provided the framework for governance in this country for seven decades. However the idea of limiting the exercise of State power, which is a foundational value in Constitutionalism, has not been integrated effectively in these Constitutions.

Sir Ivor's 1948 Constitution reflecting his views as a scholar and jurist did not entrench a Bill of Rights. It did not articulate what he may have considered "nationalism"- an irrelevant "ism" regarding the sovereignty of the People in an independent nation. Yet he drafted a Constitution that incorporated ideas based on the lived experience of the struggle between the Rulers and the People in his own country. The objective of institutional arrangements for governance was to limit State power giving central importance to the need for accountability to the People, when exercising State power. So an advocate of the Supremacy of Parliament nevertheless incorporated constraints that were later interpreted as seeking a balance between the three organs in

[110] Ibid p 84.
[111] Sampanthan v. Attorney General, note 68 supra, p 69 citing Baker v. Carr US 1962 Sunday Times 2 October 20th 2019, p 4.

Westminster governance - Parliament, the Executive and the Judiciary. The concept of Parliament's mandate on legislation to achieve "peace order and good government" incorporated values on the Rule of Law and the need for some separation of powers.

The concept of the "Sovereignty of the People " was incorporated for the first time in the autochthonous Constitution of 1972 and later, in the current Constitution of 1978. But these Constitutions in fact transferred the Peoples sovereignty to an elected Parliament and an Executive Presidency. The first organ in governance that suffered in the balance of power equation of the Constitution 1948 was the judiciary.

The Supreme Court prior to 1972 tended to follow the Jennings idea of judicial restraint when it came to some political questions, thus failing to use Art 29 to limit State power and protect minority rights as Sir Ivor had intended. However the *Liyanage* decision asserted judicial independence and their power of review. The independence of judges and lawyers resisted the crude erosions of judicial power in the 1970's and later, when fundamental rights became justiciable under the 1978 Constitution. Yet the record of the apex court in protecting Peoples' rights has not been consistent. We have decisions that swing from cases like the 18th Amendment Determination, to the Full Bench decision of 2018. While the concept that an Executive President has "plenary powers" with the "prerogative mantle of a monarch," and is not subject to limitations in the Constitution, has been rejected, a concept of "repository Executive power" in the recent dual citizenship Court of Appeal case, undermines that interpretation. The Court conceded that it had no powers of constitutional interpretation, but went on to explain and interpret this concept. This may cause confusion in the field of constitutional interpretation, in the absence of clarification by the Supreme Court.

The judicial review of legislation and policy under the 1948 Constitution is sometimes considered a reason for the inclination to give a dominant role to an elected parliament in 1972. It is ironical that most of the key decisions on judicial review and separation of powers were in fact pronounced by the Privy Council- the apex Commonwealth Court. Besides we tend to discount the importance of individual personalities and their political persuasions in Constitutional reform. Individual lawyers dominated the process of Constitutional reform. In 1972 leadership came from those who had a Marxist/Communist preference for State regulation and centralised power, even if within the framework of an ideological Trotskyite commitment to peoples' empowerment and participation. The idea of peoples committees in all public institutions supervising the work of officials had a profound negative impact on our understanding of the role and responsibility of the public service as professionals who should withstand political interference. Judicial review and independence also came to be viewed as an illegal intrusion on State power.

The 1978 Constitution too was drafted by lawyers, to reflect President JR Jayewardene's vision of "stable government " protected from "intrusive" pressures within and outside Parliament. The Constitutional reform process of 2015, was initially participatory. Yet again individual lawyers and politicians captured the drafting process. It became non inclusive, creating tensions within a Select Committee tasked with preparing the preliminary draft.

The abolition of the Executive Presidency and the incorporation of a Westminster model of governance, with a Prime Minister and executive responsible to Parliament and a concept of separation of powers recognizing the independence of the judiciary, have been suggested for decades. But based on our experience we must move beyond Westminster Constitutionalism. We require a review of many areas, including the public service and the judiciary. A stronger and entrenched Bill of Rights, with wider powers of judicial review is critically important. We need to remind ourselves that without the limitations on justiciability of rights from 1948 - 1978 we may have prevented the years of armed conflict and ethnic and religious violence that we have experienced. Majoritarian and oppressive populism that infringes citizens human rights can be contained by enforcement of rights in the courts, for there is a value base upon which to review laws and policies of the state.

A more nuanced rights approach which may not have conformed to Sir Ivor's ideas on Constitutionalism, can also help to integrate rights values in economic development, helping to ensure balanced public and private sector engagement. Sir Ivor's concept of rights focused on civil and political rights of the People, though the manner in which Article 29 was drafted could have ensured economic and social rights friendly law making. Modern constitutions incorporate these rights and do not consider them areas for discretionary policy decisions. Some of these rights have been recognised in the areas of education, shelter and environment by our Supreme Court as a dimension of equality rights. Sir Ivor, with his ideas on formal or de jure equality would probably have critiqued this approach, as an unjustifiable intrusion on “policy”. Our Constitutional reform even endorsing core values of Westminster Constitutionalism must resist the tendency of lawyers and politicians to reject enforcement of economic and social rights as non-affordable or giving unelected judges a role in policy formulation. If fiscal profligacy, corruption and irresponsible waste of national resources is addressed, and prevented, the State will be able to implement economic and social rights for the People.

The eminent development economist Amartya Sen has, in his recent work on India,[112] demonstrated that the failure to integrate a rights approach into planning contributes to skewed economic growth, that does not impact on the lives of a majority of the People. Recent statements by aspiring political leaders and commentators that the

[112] Jean Dreze and Amartya Sen, An Uncertain Glory, Princeton University Press, NJ USA 2013.

people are tired of politics, and must now focus on policies, can contribute to the dangerous idea that political rights must be sacrificed to achieve economic development. It is argued that the People are demanding "authoritarian capitalism," a unique combination of private liberty and public despotism.[113] The idea that what is still termed the "Old Left" and a "vibrant multi-party system" can prevent dictatorship contradicts the reality of transformations that have taken place, and their dismal contribution to national politics. Besides, we deny centuries of history on the abuse of power in suggesting that private liberty and state despotism can be combined to achieve the wellbeing of nations. People are tired of politicians, but nothing in our history of seven decades indicates that we wish to sacrifice our political rights, including voter rights at elections, or our demand for accountable governance and freedom from abuse of state power.

Leadership from justices, the traditional co-operation of Bench and Bar and their commitment to delivering impartial justice to the People are all important to help ensure that Constitutionalism is not replaced by a new norm of strong leadership and authoritarian governance. Our experience clearly indicates that a participatory inclusive process is essential if Constitutionalism is to be a foundational value in reforming a written Constitution conducive to realizing the wellbeing of a Sovereign People. This has been done in other countries and there are best practices. The Rulers and the People must demonstrate a commitment to make Constitutionalism work in a nation. The importance of citizen participation is recognised in Peoples' movements, and in scholarship including from this University's Department of Law.[114] When we reflect on the national failures in governance over many decades, we need to ask ourselves whether we as citizens are also not responsible by leaving processes of constitutional reform to be determined exclusively by our rulers, and disengaging ourselves from issues of governance until we exercise the power of the vote. Sir Ivor Jennings pointed out that lawyers could draft Constitutions but only the People could make them work. Our challenge now is to prevent the rulers and lawyers dominating the process, getting involved in constitutional reform as an urgent priority for our country.

The role of Universities including law schools in Constitution making and implementation also seems critical to the survival and development of Constitutionalism. We need law schools that can create good public lawyers committed to the ideas and norms of Constitutionalism.

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[113] Gotabaya Rajapakse, Presidential Candidate 2019, Daily Mirror 18th October 2019 p 2. DCP Amerasekere, "Beyond the Story of Doom; The Social Base of new Authoritarianism In Sri Lanka", The Island 28th October 2019 p 6

[114] Deepika Udugama, "We the People", 17th Nandadasa Kodagoda Memorial Oration 1st August 2014, Currie and de Waal, op cit Ch. 2.

The first Law Department of the University of Peradeniya produced great lawyers in Constitutional and Administrative law who contributed as judges and advocates to advancing the human rights of the People. They are role models to be followed, with an understanding of how important this contribution can be for a country. The jurisprudence on torture and abuse of state power that these lawyers and judges helped to develop must inspire university students and teachers to give leadership in responding to the serious violation of rights in universities in the horrendous and institutionalised practice of ragging. Leadership and a collegiate commitment among staff and students and accountability in university administration at the highest levels is essential to ensure that Constitutional rights and the Anti-Ragging Act are enforced and implemented. Such engagement is also necessary to ensure that university autonomy, a concept central to Sir Ivor's vision of university and academic life, is not eroded completely, legitimized, and accepted passively.

What has been described as the "bahu bootha " Constitution of 1978 with its executive Presidency needs urgent reform. However this does not mean that we need governance according to a new normative framework of an autochthonous Constitution with no links to the past, rejecting the idea of constitutionalism in governance. Sir Ivor Jennings who had very limited understanding of the Sri Lankan cultural heritage may have been surprised that the ideal of governance he incorporated in the Constitution of 1948 Art 29(1) as Parliaments power to make laws for "peace order and good government on the island" resonates with the well-known Buddhist text quoted at the end of our current 1978 Constitution :

Devo vassatu kalena - May the rains fall in season

Sassasampatti hotu ca - may there be a good harvest

phito bhavathu loco ca - May there be wellbeing in the world

Raja bhavathu dhammiko - May the Ruler be righteous

These values of a centuries old tradition link to abiding human values that are universal and represent lived experience on human wellbeing and accountability in the exercise of power. Let us hope that ideologies, based on the need for strong leadership in what is being described as failed governance, and the desire to reject "suddah law", will not destroy for all time those aspects of Constitutionalism in governance that we have retained for decades in our country, despite the many political, economic and social challenges we have had to experience.

I thank you.