

The Fatal Flaw in the Sri Lanka Constitution

And a possible remedy for it from the U.S. Constitution

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Introduction

The United States is increasingly being accused of exporting only belligerence, war, and destruction to the rest of the world, instead of more positive and pleasant things. For instance, conservative commentator Paul Craig Roberts, writing in *Counterpunch* magazine, has said, “US government officials routinely criticize other governments for being undemocratic and for violating human rights. Yet, no other country except Israel sends bombs, missiles, and drones into sovereign countries to murder civilian populations. The torture prisons of Abu Ghraib, Guantanamo, and CIA secret rendition sites are the contributions of the Bush/Obama regimes to human rights.”¹ No doubt there is a great deal of truth in what he says. As for me, being a Sri Lankan, I like to leave criticism of America to Americans. My interest in America is simply this: I want to know what aspect if any in the American system can be instructive or helpful in improving my own country. Having lived in the United States for many years, I am convinced that there is at least one invaluable resource in that country, which can be of immense benefit to other countries, namely, the US Constitution, certain core principles of which Americans themselves seem to have forgotten. The purpose of this paper, therefore, is to highlight one such principle.

The present Sri Lanka Constitution was enacted in 1978, and is generally termed a “hybrid,” meaning that it combines elements from the British, French, and American systems.² The British influence is on the structure and powers of Parliament. The French influence is on the Executive Branch, i.e. a Strong Executive, and the American influence, purportedly, is with respect to separation of powers. In my view, the problem with the “hybrid” is that what the Constitution-makers have really done is to replicate primarily the British system, characterized as it is by a “Supremacy of Parliament,” without also importing the traditional safeguards that accompany that concept and its application in England.

In other words, in Sri Lanka, as far as the *making* of laws, there really is no “check” on Parliament. Such a situation, when combined with a Strong Executive deriving from the French tradition, is a recipe for disaster because if the Executive manages to bring the legislature under his sway, he can get any law passed, and thereby rule without any Constitutional or legal impediment. This is where the American notion of “Separation of Powers” is supposed to come in. The claim and perhaps also something of the intent, was to ameliorate the deficit with regard to the failure to import the British safeguards by substituting a separation of powers scheme akin to the American system. But this, in fact, has not happened, and the American notion has been imported only in form and not in

¹ Paul Craig Roberts, “World’s apex bully leads world into lawlessness,” *Counterpunch*, April 13-15, 2012

² Professor A. Jeyaratnam Wilson, generally regarded as the leading Sri Lankan political scientist of his generation, and one of the prime consultants on the ’78 Constitution, has said of it, “It is a hybrid, a cross between the French and British styles of government with a little bit of the United States thrown in.” (A. Jeyaratnam Wilson, *The Gaulist System in Asia*, Macmillan, London, 1980, p. xiii)

substance. Thus, the “fatal flaw” in the Sri Lanka Constitution is its lack of a meaningful separation of powers i.e. a meaningful systems of checks and balances between the three branches of government, which leads to the legislature, and through that the Executive, having untrammelled powers.

Any Constitution worth its name has to impose controls on Government. Therefore, it cannot be that Sri Lanka’s Constitution-makers failed to devise such controls. So what has gone wrong, and why? To find out, one would have to first understand the controls the Constitution-makers did create, or conceptualize, and then compare it with the controls in the two models on which they drew for inspiration—in this case, the British system, for “Supremacy of Parliament,” and the American system, for “Separation of Powers.” One would then be able to isolate inadequacies and shortcomings in the “hybrid.” So this is what this paper proposes to do. The paper is comprised of four sections. Section One briefly explains the provisions in the Constitution that create the problem. Section Two is devoted to discussing the issue of “Separation of Powers,” and consists of four parts. Parts 1-3 discuss the “rationales” underlying the systems of governance, respectively, of Sri Lanka, Great Britain, and the United States, with respect to “checks” on Government. Part 4 consists of a brief comparative analysis of all three.

Section Three is devoted to discussing the recent 18th Amendment to the Constitution, enacted through the expedient of an “Urgent Bill.” In my view, this Amendment is as perfect an example as any of the practical consequences—indeed, the predictable end—of the flaw inherent in the Sri Lanka Constitution, and is therefore the best means possible to appreciate the sad state of affairs to which Sri Lanka has been reduced as a result of the aforementioned flaw. In the course of this Section, I also propose to present an interesting argument against the 18th Amendment, one, to the best of my knowledge, that has never before been used. It is now too late to be of any effect against the 18th Amendment itself due to restrictions placed by Article 80(3) of the Constitution. Nevertheless, it is something valuable for Sri Lankans to have in hand, in case the government tries to resort to the same tactic again. Finally, in Section Four, I discuss “solutions.”

Although the focus of this paper is Constitutional Law, and that also Constitutional Law of Sri Lanka, I believe it can nevertheless be relevant to a general audience, particularly one with interests in US foreign policy. This is because the ideas raised here suggest certain new, or under-utilized, ways in which America and Americans can engage with the rest of the world, and vice versa, for the mutual benefit of both. In my view, the types of core principles to be discussed here, if properly imported, can really help bring stability and peace to a lot of countries, particularly in the “Third World” and the “Second World”—countries precisely like Sri Lanka—whose perennial problems include, among other things, tendencies towards chaos and internal violence, especially based on ethnic, religious or linguistic differences. Readers from different countries can apply ideas discussed here to contexts important and relevant to their own respective countries, if they detect similarities between the latter contexts and any of the matters raised with regard to Sri Lanka’s predicament.

Section One: The Problem

As mentioned earlier, the fatal flaw in the Sri Lanka Constitution is its lack of a proper separation of powers. Specifically, it makes the judicial branch utterly subservient to the legislative branch. The relevant provisions of the Constitution are Articles 80(3), and 4(c). I will take each in turn.

Article 80(3) is as follows:

Where a Bill becomes law upon the certificate of the President or Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.³

The provision is self-explanatory: once a Bill is passed, no one can do anything about it, even if the Bill turns out to be unjust or unreasonable. Under Article 121 (1), however, the Supreme Court has a chance to review intended legislation. But this is only for a short period of three weeks, and often the problem is that the full repercussions and ramifications of a piece of legislation are felt years after its enactment. We have to add to this a new wrinkle. What happens if a piece of legislation is passed circumventing even the brief period of judicial review, by pushing it through, say, as an Urgent Bill? Then, even the tiny safeguard of Article 121 is lost.

To my knowledge, no other country that purports to have separation of powers in its system of governance has as drastic a provision nullifying the powers of the court *vis a vis* the legislature, as in the Sri Lanka Constitution. Under the US Constitution, for instance, a citizen can challenge the constitutionality of legislation at *any* time. In England, meanwhile, the Judicial Branch is nothing less than a second source of law, and hence a *co-equal* to the legislature.

In my view, the only instance where one finds a blanket provision such as the one in the Sri Lanka Constitution is in the Apartheid-era South African Constitution. There, in the 1950's, in response to the courts' reluctance to endorse some of the more egregious excesses of the nationalist legislature particularly in relation to the series of cases starting with the famous *Ndlwana v. Hofemeyer*, which dealt with the withdrawal of franchise rights of colored people, the Senate was forced to pass an Amendment to the Constitution. The South African Amendment Act of 1956 said, in part,

No court of law shall be competent to inquire into or pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of sections 137 or 152 of the South Africa Act of 1909.⁴

Note that the first part of this provision is virtually identical to its Sri Lankan counterpart. But the South African Senate, to its credit, did not emasculate the judiciary completely—i.e., it did not abrogate the entrenched provisions of the Constitution, sections 137 and 152—hence, the courts still retained a role, albeit a diminished one, in holding the legislature at bay. The Sri Lanka Constitution, on the other hand, takes away every vestige of the courts' power to review legislation. The last part of 80(3) says, for instance, that courts will not pronounce or question legislation “on any ground whatsoever.” In short, the Sri Lanka Constitution does even the Apartheid-era South African Constitution one better! So that's the position to which Sri Lanka's courts have been reduced by virtue of Article 80(3).

I next turn briefly to Article 4(c), which reads as follows:

The judicial power of the People shall be exercised by Parliament through courts, tribunals, and other institutions created and established, or recognized, by the Constitution, or created and established by law, etc, etc.⁵

³ Article 80(3)

⁴ H.R. Hahlo and Ellison Kahn, *The British Commonwealth: The Development of its Laws and Constitutions, South Africa*, London, 1965, p. 160

The operative words here are “*by* Parliament” and “*through* courts.” Only one interpretation of this is possible if we go by the plain meaning of words. “*By* Parliament” means that the writers of the Sri Lanka Constitution intended Parliament to be the primary agent in wielding judicial power; the courts were to be merely the *instruments* or *tools* that Parliament used to carry out that power. In short, with respect to judicial power, the courts were meant to be completely subservient, indeed at the beck and call, of Parliament.

Even if we take an ordinary statement that has nothing to do with law, say, “The money for the picnic will be collected *by* the teachers *through* the parents and the student council,” what do we normally understand by those words? We understand that the *power* to collect money for the picnic is with the teachers, but that the actual physical collection of the funds is to be done by the parents and the student council. The latter two are to be the *instruments* of the former.

To return to the Sri Lanka Constitution, if the Constitution-makers wanted Parliament *not* to have a role in judicial power, they could have simply said so. More important, if they wanted the courts to have the *primary* or lead-role in the matter, they could also have said so very clearly. In the US Constitution, for instance, there’s absolutely no ambiguity. It says, “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish” (Article 3, Section 1). So the writers of the Sri Lanka Constitution could have used some such unambiguous statement. The fact is that they didn’t, which means that they intended the relationship to be exactly what they set out: i.e., that it was to be exercised *by* Parliament *through* the courts.

Now, Sri Lanka’s Supreme Court, in interpreting this section, has tried to get over the difficulties entailed by the plain meaning of the words by trying to tie judicial power to the courts through the concept of “Sovereignty of the People,” to argue, in short, that the courts derive their authority directly from the Sovereignty of the People, and that it was never intended to subjugate or subsume the authority of the courts under that of Parliament. This is quite understandable. The court has had to make the best of a bad situation. In my view, however, if the government were to bring a sustained challenge to the aforementioned trend in interpretation, the latter will not be able to stand for very long. There is simply no way to get around the plain meaning of the words in the section. Fortunately, such a challenge has not yet been brought, because the need or occasion for it has not arisen. But what if the occasion were to arise in the future? In that case, all Sri Lankans will be in serious trouble.

As with Article 80(3), then, Article 4(c) also places the courts in a most abject situation *vis a vis* the legislature. As things stand now, and indeed as history and experience have shown, if the government manages to gain a 2/3 majority in Parliament, even temporarily, it can do almost *anything*, and once the Bill is passed, a citizen has absolutely no chance of challenging it.

Section Two: “Separation of Powers”

In this Section I undertake a broad and general discussion of “Separation of Powers.” As-mentioned at the start of this paper, before one tries to generate solutions or reforms to the problem in the Sri Lanka Constitution—and this “problem” clearly is the lack of a proper separation of powers—one has to first have a firm grasp of the controls Sri Lanka’s Constitution-makers did

⁵ Article 4(c)

devise to affect “checks” on government. One can then compare them with the controls in the British and American Systems, the two systems that inspired the Constitution-makers the most on the matters in question and isolate inadequacies and shortcomings. This Section consists of four parts, in the first three of which I discuss the “rationales,” with respect to checks, underlying the systems of governance of Sri Lanka, Great Britain, and the United States. Part 4 consists of a brief comparative analysis of all three.

Part 1: Sri Lanka

One of the best and most extensive discussions in recent years of the rationale behind the Sri Lanka Constitution with regard to “checks,” including the general issue of separation of powers, is in the Supreme Court ruling in *Re the Nineteenth Amendment to the Constitution*. It suffices for my purposes, therefore, to focus exclusively on this ruling.

The facts of the case are briefly as follows. In 2002, a Bill was introduced which sought to amend certain provisions of the Constitution with respect to the appointment of the Prime Minister, the power of the President to dissolve Parliament, and other related matters. The common element in all the proposed amendments was that they tended to derogate from, or diminish, executive power. The intended Bill was therefore challenged in the courts, under Article 121 of the Constitution. The court agreed with the contention of the petitioners, and said that the Bill did in fact derogate from and diminish the powers of the executive, and therefore, was illegitimate. In the course of this argument the court commented on the rationale behind the Constitution, with respect to checks, as well as separation of powers generally.

There are a number of passages that are particularly important for my purposes, and it is necessary to quote them at length. The passages are self-explanatory, and, by and large, make my argument for me. The first passage deals with the court’s assessment of the basic structure of the Constitution:

The powers of government are separated, as in most Constitutions, but unique to our Constitution is the elaboration in Article 4(a), (b), and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that subparagraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President, and judicial power by Parliament through courts, but also specifically state in each subparagraph that the legislative power “of the People” shall be exercised by Parliament, the executive power “of the People” shall be exercised by the President, and the judicial power “of the People” shall be exercised by Parliament through courts. This specific reference to the power of the People in each subparagraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.”⁶

The second series of passages deal with the court’s assessment of how the respective branches of government are supposed to relate to, and interact with, each other:

⁶ *Re: 19th Amendment to the Constitution*, (2002) 3 SLR 85, p.97

Therefore, shorn of all flourishes of constitutional law and political theory, on a plain reading of the relevant articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ cannot be transferred to another organ of government or relinquished or removed from that organ or government, and any such transfer, relinquishment or removal would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution.

It necessarily follows that the balance that has been struck between the organs of government in relation to the power that is attributed to each such organ, has to be maintained if the Constitution itself is to be sustained.⁷

The third and final series of passages deal with the issue of “checks and balances,” the very heart of any system of separation of powers:

The balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute checks incorporated in our Constitution.

Mr. H.L. DeSilva [President’s Counsel] submitted forcefully that they are “weapons” placed in the hands of each organ of government. Such a description may be proper in the context of a general study of constitutional law, but would be totally inappropriate to our Constitutional setting, where sovereignty, as pointed out above, continues to be reposed in the People, and organs of government are only custodians for the time being, that exercise power for the People. Sovereignty is thus a continuing reality, reposed in the People.

Therefore, executive power should not be identified with the President and personalized, and should be identified at all times as the power of the People. Similarly, legislative power should not be identified with the Prime Minister or any party or group in Parliament and thereby given a partisan form or character. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power, or for one to tame and vanquish the other. Such use of power which constitutes a check, would be plainly an abuse of power totally antithetical to the fine balance that has been struck by the Constitution.

The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust.⁸

The gist of all of the above-mentioned passages reduces to two points: First, with respect to how the respective branches are supposed to relate to each other, what Sri Lanka’s constitution-makers strove for was a *balance*, i.e., they wanted to delineate or circumscribe the powers of each branch of government with as much exactitude as possible so as to contain each within its own sphere of action. It was never intended for one branch to take a competitive or antagonistic stance to each other. Second, and more important, in the lack of a “check” coming from other branches of

⁷ Ibid, p.99-100

⁸ Ibid, p. 99-100

government, the basic mechanism or rationale that was to keep the officers of one branch of government from trying to encroach on the powers held by officers in another branch was the “Public Trust Doctrine”—i.e., the view that governmental officers hold their power in “trust” for the People, and therefore must always act, not with their own interests and advantages in mind, but the interests and advantages of the People.

The above is another way of saying that if and when a public officer is tempted to exceed his powers, or in some other way to act inappropriately, his personal morality, allegiance to the Constitution, and sense of professionalism should prevent him from succumbing to that temptation. Thus, under the Sri Lanka Constitution, the basic rationale as to what would prevent a particular branch of government from exceeding its powers reduces to the *personal* morality and professionalism of the officers of that branch of government—i.e., the commitment of each officer to the view that he or she holds power only as a “custodian” for the People, and therefore is under obligation to do only what is “best” for the People. The important point, in other words, is that the “check” is an *internal*, rather than *external*, one.

I shall discuss, later, whether or not this is an efficacious or realistic way to ensure good governance. But let’s turn to the British and the American systems of governance.

Part 2: Great Britain

The British Constitution is very interesting in that, first, it is unwritten, and second, it is generally understood to be one that *doesn’t* have a separation of powers. C.F. Strong, an eminent British historian, puts it as follows: “The strangest thing about the emergence of this theory of separation of powers is that it was first propounded as the peculiar virtue in the stability of the British Constitution, of which it is absolutely untrue, and to which it does not in the least apply.”⁹ Meanwhile, the great British Constitutionalist, Dicey, has observed that the British Constitution is based on two fundamental principles: “Supremacy of Parliament” on the one hand, and the “Rule of Law” on the other¹⁰—note that there is no mention at all there of “separation of powers”.

In my view, however, even though it is true that the British system lacks a strict or formal separation of powers, and consequently, is characterized by a “Supremacy of Parliament,” there are certain internal as well as external checks on Parliament to prevent it from ever having untrammelled power. There are, in fact, three such “checks.” Let’s consider each in turn.

First, the British Parliament itself is divided into three branches: The Executive, or the “Government,” the House of Commons, and the House of Lords. By historical convention, which in England has the effect of unshakeable law, each of these branches can impose certain important checks on the others. Two of the most important of these checks are on the House of Commons, given the extraordinary powers enjoyed by this branch relative to the others. They are the power of the Monarch to pick a Prime Minister and thereby give assent to a new majority in Parliament, and also the power to dissolve Parliament.

⁹ C.F. Strong, *Modern Political Constitutions*, London, Oxford, p.215

¹⁰ See, A.V. Dicey, *The Law of the Constitution*, London, 1908

The second check is external and is also specifically aimed at the House of Commons. It comes from the very nature or form of British democracy. Normally, when we think of “democracy,” we have in mind a system where people choose “representatives,” who in turn carry on the government. The “representatives” are expected to share and reflect the interests and sentiments of the constituents who elect them, and to act in the legislature to further and advance those interests. In England, however, there is a fundamentally different concept in operation, but it is best to let an Englishman explain it. We shall turn therefore to an essay by the Rt. Hon. L.S. Amery, a Member of Parliament for thirty four years, and later, a professor at Oxford. He explains the matter as follows:

What cannot work, as Mill himself admitted, and as Cromwell decided somewhat more forcibly before him, is government by an elected assembly or subject to continual direct dictation and interference by such an assembly. In any case that is not the kind of government under which we live ourselves. Our system is one of democracy, but of democracy by consent and not by delegation, of government of the people, for the people, with, but not by, the people.¹¹

And again,

The British Constitution has never been one in which the active and originating element has been the voter, selecting a delegate to express his views in Parliament as well as, in his behalf, to select an administration conforming to those views. The starting-point and mainspring of action has always been the Government. It is the government which, in the name of the Crown, makes appointments and confers honors without consulting Parliament. It is the Government, in the name of the Crown, which summons Parliament. It is the Government which settles the program of Parliamentary business and directs and drives Parliament in order to secure that program. If Parliament fails to give sufficient support it is the Government, or an alternative Government, which, in the name of the Crown, dissolves Parliament.¹²

Thus, according to Amery, the British House of Commons doesn't *initiate* legislation: it has the role only of giving, or withholding, assent to the proposals of the 'Government.' It is certainly a critical role, nevertheless, only a reactive rather than a pro-active one. The following remark of Amery is also important in this regard: “The two-party system is the necessary concomitant of a political tradition in which government as such is the first consideration, and in which the views and preferences of voters or of members of Parliament are continuously limited to the simple alternative of ‘for’ or ‘against.’”¹³ If Amery is right, and there's no reason to think he isn't, it means that even if the House of Commons has extraordinary powers, there is very little chance that circumstances will arise where it will gain complete and untrammelled influence or ascendancy over the other branches.

Finally, a third check on Parliament—and this one is on Parliament as a whole, not just on the Commons—is imposed by the courts. As-mentioned earlier, Dicey says that the British Constitution is based on *two* fundamental principles: “Supremacy of Parliament” on one hand, and the “Rule of Law” on the other. In England, however, the concept “Rule of Law” has a slightly different meaning than what it has in other countries, and this difference is very important.

¹¹ L.S. Amery, *Thoughts on the Constitution*, London, Oxford, 1953, p. 21

¹² *Ibid*, p. 16

¹³ *Ibid*, p.16

Normally, if someone says that a particular country is governed by, or is characterized by, “The Rule of Law,” we understand that the law is supreme in that country and applies equally to everyone: in other words, no person enjoys any special privilege, or suffers any special disadvantage, not shared by his or her peers. Even the king and his ministers are subject to the same law. This is the sort of idea that, in other countries, is given concrete form in various Constitutional provisions—for instance, the 13th Amendment in the US Constitution, or Article 12 in the Sri Lanka Constitution. The British notion of the “Rule of Law” certainly includes this universal aspect, but it also includes certain other elements, coming from the unique manner of operation in that country of the Common Law. Let’s look at the matter in a little more detail.

What exactly is the Common Law, and how does it operate in England? First, the Common Law is judge-made law: the product of a centuries-long process of successive generations of English judges applying their knowledge, experience, and wisdom to solve the day to day legal problems that come before them. It is a sort of compendium or encapsulation of British institutions and history, being constantly renewed and perpetuated by application to the concrete present of each successive generation.

How does the Common Law operate in England? This is the crux of the matter. First, the Common Law is an entire second source of law, *parallel* to statute law. Yet, it is also a “residual law” in that it is the law of the land and applies to all matters *except* where it is restricted by statute law. The way this works in practice is as follows: when a matter comes before court, and there is an apparent conflict between what the statute says on the matter and what the Common Law says, judges will tend to give a certain presumption to the statute. This presumption, however, is not automatic, court may, on certain fundamental issues, decide to go against the statute. But more on this in a moment.

To return to the concept “Rule of Law,” the important point to note is that in England, “Rule of Law” really means “Rule of the Common Law.” So, the “check” it imposes on the legislature has two particular elements not found in countries where “Rule of Law” can be traced purely to Constitutional provisions. First, the status of the Common Law as the general law of the land means that the People are never cut off from having access to the courts to challenge legislation. A situation such as the one under the Sri Lanka Constitution, where Parliament, by legislation, excludes the courts from looking into certain matters, “for any reason whatsoever,” is unthinkable under the British system.

The second method of operation of the Common Law is more subtle. With respect to this matter, consider the following remark of Dicey’s: “The Rule of Law...may be used as a formulation for expressing the fact that with us the law of the Constitution, the rules which in foreign countries form part of a Constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.”¹⁴

What does this mean? It means, in essence, that individual rights, as developed, confirmed, and recognized over the years under the Common Law comprise a sort of bedrock on which the concept “Rule of Law” rests. Legislation cannot take away those rights. Legislation may restrict those rights under certain circumstances, but never take them away. As-mentioned earlier, British judges will tend to give a presumption to legislation where the latter conflicts with the Common

¹⁴ A.V. Dicey, *The Law of the Constitution*, London, 1908, p. 199

Law. But it is a presumption only: where a piece of legislation might impinge on and violate certain individual rights to a grievous extent, the British system leaves open the option, and indeed British judges are fully capable, of repudiating the legislation in question.

Now, I realize that the above claim seemingly runs counter to the statement of Lord Reid, in the famous *Madzimbamuto v. Lardner-Burke* case, (1969 1AC 645) which is generally considered the definitive statement of the law on the issue in question. Lord Reid said,

It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political or other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did those things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do them, the courts could not hold the Act of Parliament invalid.¹⁵

It is not my intention to dispute with Lord Reid's pronouncement. In my view, however, the pronouncement can be distinguished from my claim. My claim relates to instances where a legislative act blatantly violates the Common Law, and not merely where it offends, "moral, political or other things." The Common Law is part of the law of England, and, as far I know, there is no precedent for the contention that where an Act of Parliament violates the *Common Law*, judges have to automatically and without question give assent to the former. So my overall point remains valid.

In any event, in my view, the genius of the British system is that by leaving open the above option to judges to oppose legislation that violates the Common Law, and also ensuring that the People have access to the courts at all times and on any issue whatsoever, it compels Parliament to be reticent and restrained when it comes to framing laws: Parliament has to be careful, not just in framing laws, but also in the types of laws it chooses to pass, so as not to tempt the courts to take drastic and unprecedented action. In other countries, "Rule of Law" is dependant on, and follows, legislative action. In England, "Rule of Law" is *independent* of legislative action, and entirely the province of the courts: it is, in essence, a *counterbalance* to legislative action.

To summarize, then, the assertion that the British system is characterized by "Supremacy of Parliament" does not mean that Parliament is literally supreme, or has untrammelled power. As we have seen, there are three distinct checks on the Parliament: one, from the internal divisions within Parliament itself; two, from the very nature of British democracy; and three, a check coming from the courts, and constituting an entire second source of law! Let's turn to the American system of governance.

Part 3: The United States

The American Constitution, unlike the British, is set up explicitly and expressly around a separation of powers framework. The first three Articles establish the three branches of government. The powers allocated to each branch are then listed under each Article. It is a marvelously simple and clear scheme. Nevertheless, it contains a certain unique element that is often not given the credit or the notice it deserves. That element is this: though the American system sets up what can be described generically as a "separation" between the three branches of government, what it in fact

¹⁵ Richard Clements and Jane Kay, *Blackstone's Law Questions and Answers*, Blackstone's Press, London, 2001, p. 26

does is set up a certain *relationship* between these branches. The distinction is crucial, and I will now consider the matter in some detail.

For my basic source of commentary on the American Constitution, I rely on *The Federalist*, generally considered the best commentary on the American Constitution. Thomas Jefferson even called it, “the best commentary on the principles of government which ever was written.”¹⁶ In any event, to present the basic principle behind separation of powers as it applies in the American Constitution, all I need is a single passage, which occurs in Federalist 51, written by James Madison. Madison says:

But the great security against the gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions.¹⁷

There are two important ideas in this passage. First, separation of powers is an “auxiliary precaution” in that it is intended to function independently of, and in the absence or failure of, other more traditional controls. As Madison makes abundantly clear, “A dependence on the People is, no doubt, the primary control on government, but experience has shown mankind the necessity of auxiliary precautions.” Second, the mechanism that is to drive the whole scheme is self-interest, pure and simple—i.e. the self-interest of the officers of each branch of government to protect their privileges and powers from encroachment by the other branches. As Madison puts it, “Ambition must be made to counteract ambition. The interest of the man must be connected to the constitutional rights of the place.”

Thus, the heart of the separation of powers as applied in the American Constitution is this: the three branches of government are pitted against each other in a competitive or even antagonistic relationship. In other words, as suggested earlier, the scheme involves not so much a *separation* but a *relationship*. Normally, to “separate” means to isolate, to pull apart, contain. For instance, when we say, “separate the odd numbers from the even,” or, “separate the guilty from the innocent,” or, “separate the persons who passed the exam from those who failed,” what we are trying to do is to pull apart, to remove, to differentiate, one group from another. The important point is that the above is not the sense in which the Americans mean “separation” in “separation of powers.”

¹⁶ James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, (ed. Isaac Kramnick,) Penguin, London, 1987, p.11

¹⁷ *Ibid*, p. 320

To put the matter in a somewhat crude way, under the American scheme, the officers of one branch of government are expected to check the officers of another branch if and when they try to exceed their powers, not because the former think it is the right thing to do, or the moral thing to do, or because they feel it is what is “best” for the People, but simply and purely because they are jealous of their own powers and don’t want the latter encroached upon or diminished in any way whatsoever.

The essence of the American system of separation of powers, then, is the relationship it sets up between the three branches of government. That relationship is supposed to be one of rivalry and antagonism. To repeat Madison’s words, “The provision for defence must, in this as in all other matters, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” The idea, in other words, is that when an attack takes place—i.e. where one branch senses that another is encroaching on its “territory”—resistance is natural, immediate, and spontaneous.

It is very important to grasp this element about the American system. True, the powers of each branch are carefully and distinctly enumerated. So, it would be possible for one branch, looking dispassionately at another branch, and seeing the latter, say, exceeding or breaching its own powers, cry foul, and activate or use the “checks” at its disposal to push the other back into its proper place. But this is not how the American system is supposed to work: the trigger for action on the part of any one branch against another is when the former senses that its powers and prerogatives are being impinged on by the latter.

In other words, the system presupposes a certain jealousy on the part of each branch, to protect its powers and prerogatives. This is what Madison means by, “Ambition must be made to counteract ambition.” If the “ambition” of the officers of one branch of government begins to coincide or conflate with the “ambition” of the officers of another branch, the system begins to break down. To put it another way, the more “tension” there is between the branches, the better for the health of the overall system, because it means that the government as a whole is controlling itself.

Now, I realize that the above element of the American system has been diluted and compromised in recent years due to certain segments of the American legal and political elite developing and pursuing the theory of the so-called “Unitary Executive.” But to discuss these matters will take us far afield. The point, as far as I’m concerned, is that in the way the Founding Fathers conceived of it, and as indeed made clear by the words of no less than James Madison—the Founding Father *par excellence*—the system was predicated on each branch of government jealously and robustly guarding its powers.

To summarize, then, under the American system, separation of powers is an “auxiliary precaution”: i.e., first, it is expected to function in addition to other controls, particularly where latter controls have failed. And second, the mechanism that is to drive the whole scheme is self interest, i.e., the self-interest of the officers of each branch of government to guard their respective powers, which in turn requires that there exist, not a separation *per se*, but a certain type of dynamic and competitive *relationship* between the three branches.

Part 4: Analysis

We have now considered three distinct and different “rationales” with respect to the issue of “checks.” The Sri Lankan system, as interpreted by no less than its Supreme Court, is set up, from the start not to have a separation of powers but rather a sort of perfect equilibrium or “balance” between the different branches of government. If “checks” are needed, they are to come from within each branch, by way of the “Public Trust Doctrine.” The British system, meanwhile, seemingly sets out not to have a separation of powers, but in practice has a very comprehensive and effective system of “checks” coming both from within, as well as without, Parliament. Finally, the American system is based on a straightforward separation of powers scheme, with the distinctive characteristic that the relationship between each branch of governance is supposed to be driven by rivalry and competitiveness.

Let’s consider the Sri Lankan and the British systems first. To begin with, there is no question that what Sri Lanka’s Constitution-makers have done, at least with respect to the structure and powers of Parliament, is to replicate the British system. The problem, as we have seen, is that the British version of “Supremacy of Parliament” operates in the context of a comprehensive system of safeguards coming from inside as well as outside Parliament. Of these, Sri Lanka’s Constitution-makers have replicated only some of the internal checks. For instance, under the Sri Lanka Constitution the President can dissolve Parliament, just as under the British system the Queen can dissolve Parliament.

The external checks on Parliament under the British Constitution cannot be replicated so easily, and they certainly have not been reproduced in the Sri Lankan system. For instance, if we consider the two versions of “democracy” that Amery discussed—i.e. democracy by “consent” and democracy by “delegation”—there is no question that what Sri Lanka has is democracy by “delegation,” and it is impossible to think of a set of circumstances where the Sri Lankans would switch to the other version, or, for that matter, whether it would be wise, given the particular circumstances of this country, to make such a switch.

The same is true with respect to the Common Law. True, part of Sri Lanka’s law is also based on the Common Law, but the Common Law by no means operates in Sri Lanka in the same way as it does in England. For instance, the Common Law is not a residual law as it is in England. The Common Law is also not a *source* of law. In Sri Lanka, there is one and only one source of law, and that is legislation.

Just as important, on the subject of individual rights, in Sri Lanka individual rights derive from, and are ultimately based on, the Constitution, i.e., in fundamental rights, and not, as in England, in the Common Law. This fatally undercuts the salutary effect the Common Law can have not only in allowing the People access to the courts on any issue whatsoever, but also in acting as an indirect control on the very process of law-making, by reminding lawmakers that the legislation they pass will have the effect, in one way or another, of restricting the common law, and hence, due to the antiquity, prestige and credibility of the latter, to tread as carefully as possible.

So, to repeat, none of these “safeguards” exist in Sri Lanka. In this country, “Supremacy of Parliament” literally means absolute and untrammelled “Supremacy.”

To turn to the American system, as we have seen, that is precisely the system that has been rejected by Sri Lanka’s Constitution-makers. The essence of the American system is the relationship of competitiveness and rivalry it sets up between the three branches of government. It’s the tension

created by this rivalry that is supposed to affect the “checks” on each branch. In contrast, Sri Lanka’s Constitution-makers have sought to create a perfect “balance” or equilibrium between the three branches, leaving the “checks,” if there are to be any, to come largely from within each branch, by way of the Public Trust Doctrine.

The only remaining question, then, is whether The Public Trust Doctrine, by itself, is an efficacious way to ensure good governance. In my view, a clear and unambiguous answer can be given to this question: the Public Trust Doctrine is not an efficacious way to ensure good governance. The Public Trust Doctrine can certainly be effective in any situation where laws have already been framed, and the doctrine is applied to persons in authority acting under those laws, but it cannot be effective against the law-makers themselves, at the point where they are generating the laws.

This is for two very good reasons. First, any politician (i.e. lawmaker) can claim, on any given piece of legislation, that the policy he or she is following benefits the public, and it is virtually impossible to disprove the claim. This is because, in political argument, as opposed to legal argument, it can always be shown, with regard to any given policy, that there is *some* benefit accruing to *some* segment of the populace. So, a politician can always claim that in supporting the policy in question he or she is only following his or her obligations under the Public Trust Doctrine.

Second, a politician may genuinely believe that the policy he or she pursues is beneficial to the public, while at the same time recognizing, and conceding, that it also has certain deleterious effects on the public. In such a case, how can one argue that the politician in question is violating the Public Trust Doctrine? He or she is, after all, pursuing what he or she feels to be the right and proper policy. In both these situations, the Public Trust Doctrine cannot be of any help as a preventive mechanism: the politicians in question will pass the laws they want and then use the Public Trust Doctrine to either justify or rationalize it.

The only recourse open to the public is to vote the law-makers out at the next election. But even this is not really a solution to the problem, because the public still has to suffer the consequences of the laws that were passed out of the impugned policy, at least until the next election. And this is exactly what James Madison also pointed out in the famous quote cited earlier: “A dependence on the people is, no doubt, the primary control on government, but experience has taught mankind the necessity of auxiliary precautions.” Separation of powers *is* that “auxiliary precaution,” and it is precisely the precaution the Sri Lanka Constitution does not have.

To summarize, Sri Lanka’s Constitution-makers have failed to impose the natural safeguards that come with the concept “Supremacy of Parliament,” safeguards implicit in the British system. They have also rejected a separation of powers system, which can affect the necessary safeguards. Instead, they have settled for a mechanism—i.e. the Public Trust Doctrine—which is entirely inadequate to the task. It need hardly be mentioned, meanwhile, that the Public Trust Doctrine is nowhere mentioned in the Constitution itself: it is something the court has been obliged to invoke and impose on the Constitution, because otherwise, there really is no control at all on a run-away legislature! So that, in short, is the system bequeathed Sri Lanka by its Constitution-makers.

Section Three: 18th Amendment

I hope I have so far made clear at least the theoretical dimensions of the flaw in the Sri Lanka Constitution. But to truly appreciate the magnitude of this flaw, one has to see it in terms of its

practical consequences. In my view, no discussion of the flaw in question is complete without also a discussion of this practical side of things. So, I take up the matter now, and turn to the recent 18th Amendment to the Constitution. As I indicated earlier, in my view, this Amendment is as perfect as example as any of the practical consequences of the aforementioned flaw in the Sri Lanka Constitution.

This Section is divided into two Parts. In Part 1, I pursue the question of what exactly is “wrong” with the 18th Amendment. In Part 2, I consider an argument that, in my view, constitutes a decisive rebuttal to the Amendment. This argument, to the best of my knowledge, has never been used before. Though it is now too late to be of any use against the Amendment itself, owing to the restrictions imposed by 80(3), I feel it is worthwhile for Sri Lankans to have in hand just in case the government resorts to a similar tactic again.

Part 1: What exactly is wrong with the 18th Amendment?

The 18th Amendment was enacted in September 2010. It was actually a package of Amendments, with clauses intended to repeal, not one, but an entire series of provisions in the Constitution. The most famous of these clauses was the one which sought to repeal Presidential term-limits. Another important clause sought to repeal the 17th Amendment. The 17th Amendment established the Constitutional Council, a mechanism to check the power and discretion of the President to make certain important appointments, such as the Police Commissioner, and the Elections Commissioner.

The controversy with the Amendment is that the Government, instead of moving it according to the regular procedure for Constitutional Amendments set down in the Constitution itself—i.e., Article 82 and its subsections—adopted a novel tactic and filed it under a provision dedicated to “Urgent Bills.” The regular procedure allows a period of at least three weeks where the Amendment can be debated and discussed, and also reviewed by the Supreme Court, to see if there are inconsistencies with existing provisions in the Constitution.¹⁸ Under the “Urgent Bills” provision, the Supreme Court gets only a maximum of three days to give a determination.¹⁹

The “Urgent Bills” provision was clearly intended to give the President and the Cabinet leeway in pushing through certain Bills which they might feel were in the national interest and therefore needed to be passed quickly, but which, for whatever reason, were getting held up in Parliament.²⁰ A Bill dealing with some urgent economic measure or other, in my view, is the sort of thing that this provision was intended to cover. The “Urgent Bills” provision, however, doesn’t explicitly *prohibit* filing a Constitutional Amendment under it. So, in effect, what the Government did was exploit this loophole. The main “problem” with the Amendment, then, is that technically, it is perfectly commensurate with the “letter” of the law. Yet if we look at it from the point of view of what can be called the “spirit” of the law—i.e., general concerns having to do with justice, fairness, and well-established practices and institutions of democracy—it is a travesty. So, let’s look at this matter in a little more detail.

There are two ways to illustrate the incongruity between the 18th Amendment’s compliance, on the one hand, with the “letter” of the law, and, on the other hand, its clash with the “spirit” of the law. The first is to briefly review the general arguments that were leveled against it. The second is to

¹⁸ Article 121(2)

¹⁹ Article 122(1)(c)

²⁰ Such Bills, even if passed as “Urgent Bills,” can always be repealed by a simple majority in Parliament.

look at the more specific arguments put forth at the hearing before the Supreme Court. We shall do both. For the first, it is convenient to turn to the speech given by Mr. Sumanthiran, President's Counsel and Member of Parliament, at the Parliamentary debate just prior to the vote on the Bill. It captures quite well the arguments that were being leveled against the Amendment by the general public at the time, plus, it has a technical argument that is interesting in its own right.

Mr. Sumanthiran, in his speech, presented three basic objections to the Amendment: first, on grounds of principle; second, on the substantive question as to what if anything was "urgent" about this particular Bill; and finally, on a technical argument with respect to two clauses in the Amendment, having to do with proposed changes to the Provincial Public Service Commission and the Provincial Police Service Commission, which, in his view, clashed with Article 154. Let's consider each in turn.

The objection on principle, basically, is that given the gravity of some of the proposed changes for instance, removal of term-limits for the President, why rush? Why not go through the normal procedure set out for enacting Constitutional amendments, a procedure that allows for at least three weeks for Supreme Court review. In fact, the Bar Association of Sri Lanka had raised a similar argument, and had written to the government, both when the very idea of using the "Urgent Bill" provision to move a Constitutional amendment was first mooted, and also on the very day of the Parliamentary debate. Mr. Sumanthiran quotes from the letter:

The Bar Association of Sri Lanka is perturbed by the move of the Government to introduce the 18th Amendment to the Constitution as an "Urgent Bill"....As the professional body representing all lawyers of this country, we strongly urge the Government not to move this proposed Bill without a further public discussion and debate on such an important matter.²¹

No doubt, Mr. Sumanthiran, the BASL, and everyone who was relying on "principle" had a very good point. The reply, however if one were to argue from the Government's point of view, is that, technically, there's nothing prohibiting the use of the "Urgent Bills" provision to enact Constitutional amendments. In other words, nowhere in that provision, or anywhere else in the Constitution, does it say explicitly or expressly that the "Urgent Bills" provision does not apply to Constitutional amendments. So, technically, the Government is perfectly within its rights to resort to the tactic. And that's the end of the matter.

The second objection is related to the first, and involves the substantive question as to what exactly is "urgent" about this particular Bill. Article 122(1)—i.e., the "Urgent Bills" provision—says, in essence, that it may be resorted to, "In the case of a Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest, and bearing an endorsement to that effect under the hand of the Secretary to the Cabinet."²² So, Mr. Sumanthiran asks:

The issue with regard to the removal of the term limits of the President will not be faced by this country at least for another four years and two months. How then can this Bill be "urgent in the national interest" to warrant such indecent haste?²³

²¹ "18th Constitutional Amendment" (Full text of address by Tamil National Alliance Parliamentarian M.A. Sumanthiran on September 8, 2010,) *www.transcurrents.com*, September 9, 2012

²² Article 122(1)

²³ "18th Constitutional Amendment," *www.transcurrents.com*, September 9, 2012

He also points out that the Cabinet in this instance may not even have been given the final version of the proposed Bill, because there is a discrepancy between the version given to the Cabinet, and the one submitted to the Supreme Court. A reference to a “Constitutional Council” in the former had turned into “Parliamentary Council” in the latter.

The gist of the objection is that the people who were supposed to consider the Bill on its merits and determine that it was indeed “urgent in the national interest” did not do their job properly. The principle here is actually a very interesting and important one in Administrative Law as well as in cases dealing with Fundamental Rights: namely, that where a person in authority has been given the power to make a decision, and he makes it, it has to be reasonable and proper not just “in his view,” or “to his satisfaction,” but must also conform to general standards of reasonableness and propriety. In other words, we ought to be able to evaluate the decision by standards independent of the subjective or personal perspectives of the person making it.

To digress a moment, one of the leading Sri Lankan “Fundamental Rights” cases in regard to this matter is *Sunil Kumara Rodrigo v. Secretary, Ministry of Defense*.²⁴ There, the court ruled that the Secretary of Defense acted *ultra vires* in ordering the arrest of two persons on suspicion of conspiring to assassinate the President. The court reasoned that the relevant provision in the law imposed an obligation on the Secretary to make the decision as to arrest not on his subjective belief or impression of the threat posed by the individuals in question, but on criteria that could be judged reasonable and appropriate generally, and independently. In short, if the suspects posed a threat, it really had to be a threat: it couldn’t be something that was a threat only in the Secretary’s “view,” or one just because he says so.

To return, the crucial question is whether the above type of principle applies in the present case. For instance, in this case there is no specific individual whose rights have been violated, and who is now turning to the courts for redress and remedy, which is one of the prerequisites for invoking Fundamental Rights jurisdiction. Article 122(1) indicates very clearly that only two things are necessary to activate the “Urgent Bills” mechanism: one, the proposed Bill has to be urgent in the national interest, “in the view of the Cabinet of Ministers,” and two, it has to also bear an endorsement to that effect “under the hand of the Secretary to the Cabinet.” Nowhere does it say that the “view” of the Cabinet has to be correct, i.e., that it should pass muster in terms of independent criteria of reasonableness or propriety. In fact, nowhere does it say that the Cabinet ought to even read the Bill. For instance, the Cabinet could be of the “view” that the Bill is “urgent in the national interest” simply because the President says so. And this would be perfectly consistent with the provision.

If we look at the matter from the Government’s point of view, then, there’s absolutely nothing in the Constitution that says that to resort to the “Urgent Bills” provision, the Cabinet has to be convinced that the issue in question is *genuinely* urgent in the national interest: technically speaking, all that is required is the endorsement under the hand of the Secretary. Thus, again, technically speaking, the Government is perfectly within its rights to use the provision.

Mr. Sumanthiran’s final objection is technical, and has to do with two of the clauses in the Amendment that involve the Provincial Public Service Commission and the Provincial Police Commission, which, according to him, entail a clash with Articles 154 G (2) and (3). He says that

²⁴ *Sunil Kumara Rodrigo v. Secretary, Ministry of Defense* (1997) 3 SLR 265

the case law is clear on the matter, and cites two rulings: *Water Services Reform Bill* (2003) and *Local Authorities (special provisions) Bill* (2010). In both these cases, court had ruled that since the Bills in question involved matters set out in the Provincial Council List, the proposed amendments could not be placed in the order paper of Parliament without first being referred to each of the Provincial Councils. Mr. Sumanthiran's general point, then, is that in the extremely short time the Supreme Court had to review the matter, the above two cases and their ramifications had somehow slipped past the court's attention. He then makes the following interesting comment:

I am now aware that the Supreme Court in this urgent and hurried determination has held that such a procedure was not necessary, forgetting that it has previously determined otherwise. Those were not urgent bills and the Supreme Court had a little more time to consider the law at that time. This principle is known as *per incuriam*, which means that the court had ruled in forgetfulness of a relevant provision of law or precedent. Such rulings are set aside later as a matter of course when court becomes aware of its mistake. This Bill therefore is in danger of being later ruled as not having become law. I am only referring to a well-established rule of law called the *per incuriam* rule. I am not being disrespectful to the judges of the Supreme Court.²⁵

Let us, for the sake of argument, say that Mr. Sumanthiran may indeed have a point with regard to the relevance of *The Water Services Reform Bill* and *The Local Authorities (Special Provisions) Bill*. What would that mean in terms of the 18th Amendment as matters stand now? Unfortunately, nothing. The *per incuriam* rule cannot come into play in this case—for the simple reason that there is a categorical restriction placed by Article 80(3) of the Constitution. Recall, Article 80(3) says, among other things, that once a Bill is passed into law, “no court or tribunal shall inquire into, pronounce or in any manner call in question the validity of such Act on any ground whatsoever.” So, the government can simply point out the above, and it is “checkmate” as far as any critics are concerned.

That brings to a close, more or less, the general arguments against the Amendment. I next turn to the Supreme Court hearing. I shall confine myself only to the clauses concerning the repeal of Presidential term limits, and also the Constitutional Council, since these were the most serious of the proposed changes under the Bill.

With respect to the clause to repeal Presidential term-limits, the petitioners' argument was that it interfered with, or undermined, Article 4(e) of the Constitution, i.e. the Franchise of the People. The argument was that if the President were given unlimited terms of office, it would somehow reduce the opportunity that voters had to choose other candidates to that high office, and therefore constitute a restriction of their franchise. By extension, it would also violate Article 3 of the Constitution, which says that “sovereignty” is in the People, and is inalienable. It is generally conceded that Articles 3 and 4 have to be read together. Therefore, as per the dictates of Article 83, where Article 3 is threatened, the proposed Amendment has to be put to a referendum of the People.

The court replies to this as follows:

²⁵ “18th Constitutional Amendment,” www.transcurrents.com, September 9, 2010

It is to be noted that the aforesaid Article 4(e) of the Constitution refers to the Franchise of the People and the Amendment to Article 31(2) of the Constitution by no means restricts the said franchise. In fact, in a sense, the Amendment would enhance the franchise of the People granted to them in terms of Article 4(e) of the Constitution, since the voters would be given a wide chance of candidates including a President who had been elected twice by them. It is not disputed that the President is directly elected by the People for a fixed tenure of office. The Constitutional requirement of the election of their President by the People of the Republic strengthens the franchise given to them under Article 4 of the Constitution.²⁶

There is no question that the court is perfectly right. Allowing a sitting President to contest an election beyond a second term of office does, in fact, increase the possibilities or options the voters have to pick a President—i.e., the available pool of candidates is always increased by one. No doubt the petitioners were relying on certain ancillary or presumptive arguments—for instance, in practical terms, allowing a sitting President to contest elections indefinitely means that he or she can then bring to bear on those elections the entire weight of the organization, party apparatus and political machinery at his or her disposal, and which, it is reasonable to suppose, would put the other candidates at a certain disadvantage. In other words, letting a President contest elections indefinitely means that, in practical terms, the voters' choice is *reduced*.

But the problem with the above type of argument is that it still has to be proved, with *evidence*. Unfortunately, when it comes to the particular circumstances of Sri Lanka, no such evidence exists at present, for the simple reason that we have never had a President go beyond a second term of office: we simply do not have any experience of the consequences of having a President with unlimited terms of office. So, again, strictly speaking, it is perfectly correct to say that there is nothing “inconsistent” with the proposed amendment and Article 4(e) of the Constitution.

Let's turn next to the argument involving the 17th Amendment. The petitioners' argument here was that the attempt to do away with the Constitutional Council impinged on, and undermined, again, Article 4 of the Constitution, but this time 4(c), having to do with the Judicial power of the People. Part of the function of the Constitutional Council was to place certain restrictions on the President's discretion to appoint Supreme Court judges. The petitioners' argument, therefore, was that by removing the Constitutional Council, the proposed Amendment compromised the independence of the judiciary.

Court replies to this by first conceding that the purpose and intention behind the 17th Amendment was indeed to impose certain restrictions on the discretion of the President to make key appointments, including that of Supreme Court judges. But then, court says that even prior to the 17th Amendment, which latter was passed only in 2001, there were restrictions on the President claiming untrammelled discretion, and cites two important cases as having established this point. The two cases are: *Silva v. Bandaranayake* (1997), and *Premachandra v. Jayawickrema* (1994).

In *Silva*, court had queried the proposition whether Article 107 of the Constitution, which gave power to the President to make appointments to the Supreme Court and the Court of Appeal, gave carte blanche power in the sense that it carried with it absolute discretion. The court said that the discretion given was, “neither untrammelled nor unrestrained, and ought to be exercised within

²⁶ “Text of Supreme Court determination on 18th Constitutional Amendment,” www.transcurrents.com , September 11, 2010

limits. Article 107 does not expressly specify any qualifications or restrictions. However, in exercising the power to make appointments to the Supreme Court there should be cooperation between the Executive and the Judiciary, in order to fulfill the object of Article 107.”²⁷

More important is a quote from *Premachandra v. Jayawickrema*: “There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretion is to be judged by reference to the purposes for which they were entrusted.”²⁸

In short, prior to the 17th Amendment, the People of Sri Lanka still had these basic protections to help maintain the independence of the judiciary. The 17th Amendment merely enhanced or extended these restrictions and controls. The court’s overall argument, then, is that the 18th Amendment proposed only to change or modify the enhancements, not to jeopardize or threaten in any way basic and more fundamental protections. The court says,

On a consideration of the totality of the provisions dealing with the establishment of the Parliamentary Council, it is abundantly clear for the reasons aforesaid that the proposed amendment is only a process of redefining the restrictions placed on the President by the Constitutional Council under the 17th Amendment in the exercise of the executive power vested in the President, which is inalienable. Accordingly, these clauses have no inconsistency either with Articles 3 and/or 4 of the Constitution.²⁹

Someone might say, “Yes, but redefining in a way that *increases* the President’s discretion!” That may be true. But the fact is that they don’t destroy the basic protections alluded to earlier—i.e., those that existed prior to the 17th Amendment. For instance, under no stretch of the imagination can it be said that the 18th Amendment seeks to give the President completely unfettered and untrammelled discretion to make appointments to the Supreme Court. Strictly speaking, therefore, it is perfectly correct to say that there is no “inconsistency” between the relevant clause in the Amendment and Article 4(e) of the Constitution.

That exhausts, then, the main arguments raised against the Amendment at the hearing before the Supreme Court. As we have seen from the quite reasonable counters to all those arguments, both the general ones as well as the ones at the hearing, it would appear that the Amendment is on very solid legal ground, at least with respect to its compliance with the “letter” of the law. Or is it? As indicated earlier, there is at least one argument that has not yet been raised, and which, in my view, constitutes a decisive rebuttal, not just to the Amendment, but to the entire practice of resorting to the “Urgent Bill” provision to enact Constitutional Amendments. Let’s briefly turn to this argument.

Part 2: The Argument

Most reasonable people would agree that the real danger with the Amendment is the Pandora’s Box the Government has opened in successfully resorting to the “Urgent Bills” provision to enact a Constitutional Amendment. The ramifications of this are that, henceforth, if the Government wants to pursue a measure contrary to the Constitution, and perceives that it will not be able to make the

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

necessary changes to the Constitution using “normal” channels, due to public outcry, and so on, all it has to do is ensure a temporary two thirds majority in Parliament, lasting even just for the day on which the crucial vote on the Bill is taken, and submit the Bill as an “Urgent Bill.” This is not to say the Government will resort to this tactic invariably, and whenever it wants to pursue Constitutional Amendments: but it does mean that the option is now available.

So this is the situation we face today. The only way to take away this option is to establish beyond any reasonable doubt that resorting to the tactic in question is illegitimate and illegal—and that the illegitimacy and illegality derives from the very “letter” of the law, rather than, say, the “spirit” of the law. As we have seen, arguments based on the “spirit” of the law invariably flounder. Is there any way to make such an argument?

In my view, there are only two ways such an argument can be made on the “letter” of the law. The first is to show that the Constitution itself, by express words, prohibits the tactic in question. The second is to show that our Constitution-makers never *intended* the “Urgent Bills” provision to be used for purposes of enacting Constitutional Amendments. Of these two, the first is clearly unavailable in this case: nowhere does the Constitution explicitly bar the use of the “Urgent Bill” provision being used to enact Constitutional Amendments.

The second method—i.e., looking to the “intention” of the Constitution-makers—is difficult, because it entails looking outside the Constitution in order to help interpret crucial passages. For instance, it involves looking at writings, commentaries, and discussions by the Constitution-makers on the issues in question at or around the time they were also writing the Constitution. This method of interpretation suffers from the well-known infirmity that, for one thing, it is difficult to determine which set of writings or discussions is the most pertinent to the issues in question.

For instance, it is quite possible that different Constitution-makers have, at different times, made contradictory or inconsistent statements with respect to the same issues. In those instances, which statements get priority? Due to these reasons, courts have shown a reluctance to resort to secondary sources when interpreting statutes in general—and that reluctance has been even stricter when it to interpreting a Constitution. Our courts, when it comes to interpreting the Constitution, have tended to follow a policy of relying more or less on the literal meaning of the words as they appear in the document itself, and no doubt this is a wise policy.

In addition to this, with regard to Sri Lanka, there is a further difficulty: Sri Lanka’s Constitution-makers simply did not leave behind a great deal of secondary writings or commentary on the Constitution. For instance, this country doesn’t have the equivalent of something like *The Federalist* that the Americans have, which is a detailed exposition by some of the leading Founding Fathers of the American Constitution of their reasoning as they went about framing the latter Constitution.

Given this situation, what is one to do with respect to generating any effective arguments against the 18th Amendment, as well as the larger issue of using the “Urgent Bill” provision to enact Constitutional Amendments? This is where my argument comes into play.

The argument itself is quite simple and straightforward. All attempts thus far to challenge the 18th Amendment on the “letter” of the law have tried to show that there is an inconsistency between the various clauses in the new Amendment and some provision or other already existing in the Constitution. For instance, as we saw with the arguments at the Supreme Court hearing, there the

attempt was to show that relevant clauses in the new Amendment contradicted Articles 3 and 4 of the Constitution.

In my view, however, something has been forgotten in this process. It may certainly be true that the various clauses of the proposed Amendment don't contradict certain other Articles of the Constitution, but it *has* to be the case, both logically and by definition, that each clause in the proposed Amendment contradicts, or is inconsistent with, the provision in the Constitution it is intended to replace. For instance, an Article that imposed Presidential term-limits, logically and by definition, would be inconsistent with any new Amendment which sought to repeal those limits. The same would also be true for any other Amendment and its "twin" in the Constitution.

The key to this whole matter is that we are dealing here with a Constitutional Amendment and not an ordinary piece of legislation. Obviously, in the case of an ordinary piece of legislation, there could be inconsistencies and contradictions with existing provisions. But in that case, once the Bill is forwarded to the Supreme Court, the court detects the inconsistency and advises on what to do about it. With a Constitutional Amendment, however, there is no question of whether or not there is an inconsistency between the proposed change and some existing provision in the Constitution: as I have pointed out, it is invariably and inexorably the case that there is such an inconsistency. More crucially, the inconsistency cannot be cured: as long as the new Amendment seeks to repeal, alter or change its "twin" in the Constitution, those two provisions will *always* be inconsistent with each other.

The "normal" procedure to amend the Constitution takes full cognizance of the above situation, and, in fact, addresses it. Article 82(1) explicitly says that any Bill intended to amend the Constitution has to expressly specify this function in its long title—i.e. that it is "An Act for the Amendment of the Constitution."³⁰ In other words, the first step when attempting to amend the Constitution is to designate with absolute clarity the purpose of the Bill in question. Once this is done, there is no question of looking for any "inconsistencies" with other provisions of the Constitution other than those specified under Article 83, to which we will turn in a moment.

Meanwhile, Article 82(5) says, "A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favor thereof amounts to not less than two-thirds of the whole number of members (including those not present)."³¹ In other words, the obvious inconsistency between the proposed Amendment and its "twin" already existing in the Constitution doesn't matter: if two-thirds of members of Parliament support the new Amendment, it passes into law.

Article 82(6) then says: "No provision in any law shall, or be deemed to, amend, repeal or replace the Constitution or any provision thereof, or to be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article." We shall consider the full relevance of this provision in a moment, but first let's turn to Article 83.

Article 83 is crucial, because it is the only occasion where "inconsistencies" become relevant—namely, where the proposed Amendment clashes with Articles 1,2,3,6,7,8,9,10, and 83 itself, or, with Articles 30(2) and 62(2). In these cases, the Amendment in question becomes law "If the number of

³⁰ Article 82(1)

³¹ Article 82(5)

votes cast in favour thereof amounts to not less than two-thirds of the number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.”³² In other words, on those occasions where there are clashes between the proposed Amendment and the Articles listed under Article 83, two basic things are needed for the Amendment to pass: a two-thirds majority in Parliament, *plus* approval by the People at a Referendum.

The question then is, “What happens when a Constitutional Amendment is filed as an “Urgent Bill”? In that case, the provisions set out in Article 82 and its subsections, i.e. the “normal” procedure to enact Constitutional Amendments, no longer apply. That means the court, when reviewing whether the proposed Amendment has inconsistencies with existing provisions of the Constitution, *has* to consider the inconsistency that the proposed Amendment has with its “twin” already in the Constitution. Court will not— indeed *cannot*—proceed to review the Bill as if the “twin” doesn’t exist, or has already been repealed. The Constitution is the Supreme Law of the Land, the ultimate and definitive expression of the “sovereignty” and “will” of the People, and not a comma in such a document can be removed or altered except by proper and prescribed procedures.

So, there we have the conundrum: Article 82(5) allows a Constitutional Amendment to be passed regardless of whether there are inconsistencies with existing provisions, other than those listed under Article 83. All that is required is a two-thirds majority in Parliament. But 82(5) cannot be resorted to if one files the Amendment under Article 122(1), i.e., the “Urgent Bills” provision. This is where Article 82(6) becomes crucial. Recall, it says that no provision in any law shall be deemed to amend the Constitution “or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article.” Article 122(1), by no stretch of the imagination, can be deemed a “preceding provision” of Article 82(6)! If one files under 122(1), and there is an inconsistency, then the remedy is in Article 123(2), not 82(5).

So, let’s turn to Article 123(2). It says:

Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state-

- (a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or
- (b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or
- (c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.³³

³² Article 83

³³ Article 123(2)

To turn to Article 84 for a moment, this Article is very interesting, because, other than Article 82(5), it is the only other Article which explicitly addresses the issue of enacting Bills into law which are *inconsistent* with the Constitution. Article 84, however, relates to Bills *other* than Constitutional Amendments. It explicitly says, “A Bill which is not for the Amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, but which is inconsistent with any provision of the Constitution may be placed on the Order Paper of Parliament without complying with the requirements of paragraph (1) or paragraph (2) of Article 82.” The 18th Amendment, for example, would most definitely not come under this Article, because its long title explicitly says that it is a Bill for the Amendment of the Constitution.

To return to Article 123(2), in the case of a Constitutional Amendment which contains the abiding and inherent inconsistency with its “twin” already in the Constitution that we discussed earlier—an inconsistency that is incurable—what are the options available? Clearly, the only option available is sub-paragraph ‘a’ of 123(2), meaning, the Bill is referred back to Article 82(1) and the normal procedure is triggered. The other two options are expressly intended for Bills which fall under the purview of Article 84, which latter, as we have seen, is for Bills other than Constitutional Amendments. If a Bill comes under paragraphs (1) and (2) of Article 82, it has to also go through 82(5), and perhaps also Article 83, if necessary. But the important point is that there is no way to “short cut” this process by leaping to Article 122(1)—because, even if we start at 122(1), by virtue of 123(2), we are taken right back to 82 (1). Hence, by the inexorable logic of the Constitution itself, the “Urgent Bills” provision cannot be used for purposes of enacting Constitutional Amendments.

Earlier, I said that there were only two ways to counter the practice of resorting to the “Urgent Bills” provision to enact Constitutional Amendment on the letter of the law: one was to show that the Constitution itself explicitly prohibits the tactic, an option unavailable in the present case. The other was to look into the intention of the Constitution-makers and show that they never intended the “Urgent Bill” provision to be used for such a purpose. We found that this also was difficult, since it entailed looking outside the Constitution for material that could be used to interpret key passages within the Constitution. But now we see that the Constitution itself—in terms of the logic inherent in the literal meaning of its own words—does not, indeed *cannot*, allow the “Urgent Bills” provision to be used to enact Constitutional Amendments.

That, then, is the argument. Once again, the key to the whole thing is that when a Constitutional Amendment is submitted as an “Urgent Bill,” and, in fact, any form other than the “normal” procedure set down under Article 82 and its subsections, there is an inherent inconsistency between the proposed Amendment and its “twin” already existing in the Constitution. Article 82(5) allows the new Amendment to be passed, as long as it has a two-thirds majority in Parliament to support it. Article 82(6), meanwhile, emphasizes that the “preceding provisions of this Article,” i.e., Article 82, set out the only way to amend the Constitution in the face of inconsistencies with existing provisions, other than those listed under Article 83. To submit an Amendment that is already, and always, inconsistent with the Constitution and to expect to pass it into law by circumventing Article 82 is therefore a clear violation of the “letter” of the law as set down in 82(6).

That it was done, and all perfectly “legally,” is, as I have said, the most eloquent possible testimonial as to the fundamental weakness of the Sri Lanka Constitution. Reform, therefore, is essential.

Section Four: “Solutions”

From the foregoing discussion, and as per the conclusions reached at the end of Section Three, it seems to me two particular solutions suggest themselves, which, in my view, should top any list of possible future Constitutional reforms.

First, the Sri Lanka Constitution must have a genuine and meaningful separation of powers, and this means separation of powers as an “auxiliary precaution,” in my view, along the lines of the American system. There is absolutely nothing wrong with relying on things like the “Public Trust Doctrine,” and even elections. With regard to the latter, for instance, as Madison himself put it, “A reliance on the People is, no doubt, the primary control on government.” Nevertheless, Sri Lanka needs a mechanism independent of all the other mechanisms. Without it, in the final analysis, the People are left only with the internal or personal morality, ethics, and sense of propriety and decency of politicians, to help the latter control themselves, something which, though no doubt devoutly to be hoped for, is hardly to be expected, even in the best of times.

The second solution follows directly from the first, and it is this: Sri Lanka needs a new Constitution. In my view, the changes involved in instituting a proper system of separation of powers go to the very heart of the Constitution, and can’t be carried out piece-meal, through one or two “Amendments.” If the job is to be done right, the entire Constitution has to be re-vamped and re-ordered.

This last suggestion, however, raises an important and interesting issue, which I have not alluded to thus far, but which, under the circumstances, has to be touched on even in passing. That matter is the following: Sri Lanka is today embarked on a great project of reconciliation and “mending of fences,” particularly with its Tamil community, after three decades of civil war. One of the continuing and abiding complaints made by certain Tamils, however, is that they continue to be discriminated against, and that it is impossible for them to live in dignity, or expect justice, in this country. Hence, they say, their only hope is a separate state.

With respect to the latter, for instance, Mr. R. Sampanthan, a leader of the TNA,³⁴ has been extraordinarily candid. In a recent speech at a political Convention of ITAK—“Illangai Tamil Arasu Katchi,” the chief constituent party of the TNA, and of which Sampanthan is also the official leader—he has said, among other things,

The softening of our stance concerning certain issues, and the compromise we show in other issues, are diplomatic strategies to ensure that we do not alienate the international community. They are not indications that we have abandoned our fundamental objectives....Our expectation for a solution to the ethnic problem of the sovereignty of the Tamil people is based on a political structure outside that of a unitary government, in a united Sri Lanka in which Tamil people have all the powers of government needed to live with self respect and self sufficiency....Our acceptance of this position does not mean that we consider the 13th Amendment to be an acceptable solution, nor that, in the event of our right to internal self-determination is continuously denied, we will not claim our right under international law to external self-determination. It only means that this is the only realistic solution today. ³⁵

³⁴ “Tamil National Alliance,” a conglomerate of Tamil political parties

³⁵ “Text of Presidential Address by Rajavarotheyam Sampanthan at 14th National Convention of ITAK in Batticaloa,” *www.dbsjayaraj.com*, May 27, 2012

He has also pointed out,

The current practices of the international community may give us an opportunity to achieve, without the loss of life, the soaring aspirations we were unable to achieve by armed struggle.³⁶

In other words, what Mr. Sampanthan and his friends want to do is to pull the wool over the world's eyes for as long as possible, by saying they are seeking only "internal self-determination," i.e., the capacity to "manage" their own affairs in their "regions" as they see fit. And then, when the majority Sinhalese balk at the proposal, for the obvious reason that one cannot have complete "internal self-determination" for just one group of people in a country which has multiple ethnic groups, and which, purportedly, is also "unified," to immediately raise a hue and cry before the international community that the Sinhalese are being recalcitrant, and push for "external self-determination," i.e. a separate and independent state. So, that is the long-term plan.

Their hope is that "the current practices of the international community"—by which I can only presume is meant the increased tendency of powerful nations to pursue their national interests with unmitigated abandon, usually at the expense of weaker nations, and the attendant tendency or proclivity to take a more relaxed and flexible attitude towards the norms of international law, and, in fact, on occasion, to violate those norms with gusto and with impunity³⁷—will give them (i.e. Sampanthan *et al.*) the edge necessary to win over the "international community," (i.e., the powerful nations), and thereby help them achieve the goal they were "unable to achieve by armed struggle." Given the premise of his argument, namely, the "current practices of the international community," no doubt Mr. Sampanthan and his friends have every reason to be optimistic. In a lawless world, truly, *anything* is possible.

This paper is certainly not the place to assess the sentiments of Mr. Sampanthan and his friends in detail. I hope, however, that in the course of this paper I have shown, at least as far as Constitutional matters are concerned, that the "grievances" are shared by all Sri Lankans, and not just limited to Tamils. But that's not the important point. The important point, as demonstrated by the above quotes, is that secessionist or separatist tendencies are once again trying to raise their heads in this country. Therefore, as long as fundamental problems of the type I have discussed in this paper exist in the Sri Lanka Constitution, they can only act as fuel to the arguments of these secessionist forces.

It is essential to counter these tendencies and nip them in the bud, before they plunge the country right back into chaos and violence. But how does one do this? The obvious answer, it seems to me, is that every legitimate reason that a minority might want to demand a separate state has to be considered, and, as far as is reasonably possible, ameliorated. Indeed, the above is more or less what

³⁶ Ibid

³⁷ Much evidence can be adduced with regard to this matter, but for the moment just one example should suffice. And it is a classic. I refer to the "Downing Street Memo," the leaked minutes of a briefing that Richard Dearlove, the then-head of Britain's M16 (foreign intelligence service) gave Prime Minister Tony Blair and other top national security advisors regarding his assessment of the Bush Administration's preparations for war against Iraq. Dearlove had visited the US and met personally with Administration officials prior to the briefing. He reported categorically to the Prime Minister, that in his view, with respect to the case for war, "the intelligence and the facts were being fixed around the policy." ("Text of the original Downing Street 'Memo', as originally reported in *The Sunday Times*, May 1, 2005), www.downingstreetmemo.com

even the LRRC Report (Lessons Learnt and Reconciliation Commission) has pointed out. The Report, in its recommendations, says that the ending of LTTE terrorism has “provided a great window of opportunity—an opportunity to forge a consensual way forward to address a range of governance issues in a manner that will promote reconciliation, amity and cooperation among all communities, provide political solutions to the grievances of minorities and ensure the realization of the legitimate rights of all citizens.”³⁸

The question is how to do this. How does one, on the one hand, “provide political solutions to the problems of the minorities,” and at the same, time, on the other hand, “ensure the realization of the legitimate rights of all citizens”? The moment one tries to make some special accommodation with any minority group, persons who belong to the majority community can always claim, rightly, that it is a violation of their own rights. In other words, any “political solution” for the minorities *has* to be a “solution” for the majority also, if it is to “ensure the legitimate rights of all the citizens.”

This is not a problem unique to Sri Lanka. It is, in fact, one of the fundamental problems in democracy. It is also, if we want to think of it, precisely the problem faced by the Founding Fathers of the American Constitution—in that case, to balance the rights of the States against the need to develop a stronger and more unified country. And what was their solution?

In my view, there is no better way to unify a country than a good Constitution, which protects the rights of all the citizens, without distinction, and in which those citizens feel they have a genuine stake and investment. In fact, this may be the *only* way to develop lasting unity, because the Constitution is the Supreme Law of the Land. If the different groups in the country can’t agree on the “Supreme Law of the Land,” how can anyone expect them to agree on any subordinate laws, laws which, in the end, derive their authority and life from the Supreme Law. At the same time, even if a “political solution” is accorded the minorities, what good would it be, if the very Constitution on which it is based is flawed—where, in effect, the majority can nullify or take away that “solution” by a stroke of a pen, or, to be exact, if they can muster a two-thirds majority in Parliament? What minority would feel secure under such a system?

So, in my view, the only real solution that would address minority concerns while at the same time allowing the majority its rightful place in a democracy is one that would have the following two components: first, it must have fundamental protections for individual rights, irrespective of whether the individual in question belongs to a minority or the majority. The Fundamental Rights chapter of the Sri Lanka Constitution already does this. But second, and more important, there has to be a system of controls so that the legislature can be held in check if it tries to pass laws that violate the above fundamental rights. This would, in effect, “entrench” the fundamental rights in the Constitution, and give an iron-clad guarantee—as iron-clad a guarantee as is reasonably possible—to minorities, or anyone else, that they always have recourse and redress if their rights are violated. The only remaining question then is, “What kind of system would be best to affect such controls?”

I, for one, cannot think of a better system than separation of powers. This is because, in my view, separation of powers offers the only way to impose a credible *external* check on any branch of government. In the lack of a system of separation akin to the British system—which latter is based on the unique history, institutions, and historical sensibilities of the British people, and has to be

³⁸ *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, p. 368

transplanted, if at all, along with those other components—the only option one is left with is the classical American model. Hence, in my view, if the need is to give an iron-clad guarantee to the minorities that their rights will not be tampered with by the majority, and that if they are, the minorities always have avenues for recourse and redress, the best and only thing to do is to adopt a separation of powers along the lines of the American system, or at any rate as envisioned for the latter by the Founding Fathers of the US Constitution.

A Constitution based on such a system could then be a beacon, a common point of reference, for all the different groups in the country, irrespective of any other differences—linguistic, cultural, religious, etc.—they may have. And isn't that exactly what this country needs with respect to its "ethnic problem"—some unifying element on which all the parties can fundamentally *agree*? Thus, a new Constitution, based on a proper system of separation of powers, which, as I have argued, is the answer to Sri Lanka's general need to re-establish good governance and the Rule of Law, can also become a prime solution in terms of furthering the reconciliation process between the ethnic groups. A happy coincidence!

Conclusion

I have, in this paper, argued that the "fatal flaw" in the Sri Lanka Constitution is its lack of a proper separation of powers, stemming, specifically, from Articles 80(3) and 4(c), which neutralize the power of the courts *vis a vis* the legislature. The result is that there is absolutely no oversight on the legislature when it comes to the making of laws. I have pointed out that the root cause of this problem is that the Constitution-makers have replicated in Sri Lanka the British concept of "Supremacy of Parliament," but without the traditional safeguards that accompany the concept in England. They have instead relied on the notion of a "Public Trust Doctrine" to affect the necessary checks, which is fundamentally inadequate, since the doctrine relies, in essence, on politicians controlling themselves. The obvious solution is to institute a genuine and meaningful system of checks, and I have argued that the obvious candidate for such a system is the classical model found in the American system. I have argued, further, that a Constitution based on such a system would have the ancillary effect of addressing one of Sri Lanka's burning issues of the moment, namely, the need for some sort of unifying element to bring the different ethnic groups together. A Constitution from which all the different groups can expect to get justice will, if anything is capable of the task, draw those groups together, and be a basis for reconciliation, peace, and harmony in the future.

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