

# **INDEPENDENCE OF THE JUDICIARY IN SRI LANKA – AN INSTITUTIONAL ANALYSIS OF ITS WOES**

*Post-independence Sri Lanka enjoyed a deserved reputation for the high professional and ethical standards maintained by its judiciary and legal profession. In the past two decades this reputation has suffered with international bodies commenting adversely on the health of the judicial system and the condition of the rule of law in the country. This essay investigates the causes of the dramatic decline in the standards and reputation of the Sri Lankan judiciary. The two republican constitutions weakened constitutional safeguards, but they do not fully account for the problems of the judiciary. Many countries with weaker safeguards maintain higher standards. This inquiry finds that the causes lie in the broader crisis of institutional decay in the country that resulted from factors such as ethnic conflict fostered by language and cultural policies, economic stagnation, virtual one-party government, prolonged emergency rule and the politicisation of all organs of government. After introducing the subject, the paper examines the successive constitutional and political changes affecting the judiciary before identifying and discussing the institutional causes of the judicial woes. The paper concludes with some prognostic comments on the prospects for rebuilding the strength and reputation of the judiciary.*

## **1 Introduction**

Sri Lanka, known previously as Ceylon, once held an enviable reputation as a developing country with a strong, independent and highly competent judiciary. The Sri Lankan judiciary was created by the British colonial administration. Initially the courts were predominantly served by British judges but by Independence in 1948, the judiciary was comprised entirely of British and locally educated Sri Lankan lawyers with very high reputations within the Commonwealth. The final court of appeal remained the Privy Council until such appeals were abolished in 1971. The judiciary was supported by a highly proficient legal profession comprising proctors (solicitors) and advocates (barristers). The judiciary enjoyed a high degree of constitutional protection and was aided by a strong legal and political culture that regarded the sanctity of the judicial branch as a core value of the political system.

However, during the past decade there has been a rising tide of criticism both domestically and internationally of Sri Lanka's judiciary. Intolerably long case lists, unsophisticated and often questionable rulings have pointed to a significant decline of

professional standards. But more seriously, recorded incidents of misconduct have increased dramatically and suspicions and accusations of political and personal bias on the part of certain judges of the superior courts have surfaced leading to a serious erosion of public confidence in the entire judicial system.<sup>1</sup> The Asian Legal Resource Centre (ALRC) a body having general consultative status with the Economic and Social Council of the United Nations made these observations about the state of the judiciary in Sri Lanka.

The Asian Legal Resource Centre (ALRC) is alarmed at recent events and practices in Sri Lanka that are eroding the independence of the judiciary and further jeopardising the rule of law in the country. These include the lack of protection for the country's judges; poor security of tenure inhibiting the ability of judges to carry out their work; issues relating to contempt of court; overall limited powers of the judiciary; the intimidation of lawyers by police; collecting of fees by police for directing certain cases to particular lawyers; and the weak ethical practice of lawyers before courts of law.<sup>2</sup>

The ALRC also reported that a Supreme Court Justice Honorable Vigneswaran as having asserted that ‘the independence of the judiciary in Sri Lanka has been so eroded that perhaps it may be necessary to look for alternative ways to find justice’.<sup>3</sup> The *2007 Global Corruption Report* of Transparency International reports survey results that found 84 percent out of 441 legal professionals questioned ‘did not think that the judicial system was ‘always’ fair and impartial, and one in five thought it was ‘never’ fair and impartial’.<sup>4</sup> Concerns about judicial integrity reached the highest levels. Two parliamentary motions to impeach the Chief Justice were submitted in 2001 and 2003 on

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<sup>1</sup> International Bar Association, *Sri Lanka Failing to Protect the Rule of Law and the Independence of the Judiciary*, (2001) International Bar Association, <http://www.ibanet.org/images/downloads/HRISriLankaReportNov2001.pdf> at 15 October 2007

<sup>2</sup> Asian Legal Resource Centre *Submission of Asian Legal Resource Centre to the Commission on Human Rights Sixty-first Session* (2005) [1] <http://www.alrc.net/doc/mainfile.php/61written/294/> at 15 October 2007.

<sup>3</sup> Ibid.

<sup>4</sup> Transparency International, *Global Corruption Report* (2007) 277 [http://www.transparency.org/publications/gcr/download\\_gcr](http://www.transparency.org/publications/gcr/download_gcr) at 15 October 2007

charges of abuse of official power, case fixing for political interests, and shielding subordinate judges and officials engaged in corruption.<sup>5</sup> The allegations concerning the Chief Justice prompted an inquiry by the International Bar Association (IBA) about the state of the rule of law in Sri Lanka. The inquiry was conducted by a distinguished panel led by Lord Brennan, Chairman of the Bar of England and Wales. The details of the allegations against the Chief Justice and the negative perceptions about the administration of justice in the country make compelling reading.<sup>6</sup> It must be emphasized though that parliamentary motions against the Chief Justice were not carried through and the charges remain unproven.

This essay discusses some of the possible causes of the decline in domestic and international perceptions about the integrity and competence of the Sri Lankan judiciary. The three constitutions of independent Sri Lanka have provided high degrees of formal protection for the judiciary. They are not without defects but many successful liberal democracies including Australia have fewer constitutional protections in the formal sense but have achieved greater levels of judicial independence and constitutional government. Hence it is my view that we cannot fully understand the reasons for the decline in judicial standards in Sri Lanka solely by identifying constitutional deficiencies. Some of the major causes, in my view, are related to the broader political, economic and social problems that beset the country after its first decade of independence. It is hoped that this study will make a useful contribution to institutional theory by illustrating the economic, political and cultural conditions necessary for judicial independence, and hence constitutional government and will lead to a better understanding of what it takes to secure the rule of law and constitutional government in emerging democracies.

The judiciary of a modern democratic state is an institution of paramount importance underpinning its stability. An independent and impartial judiciary is an essential building block of a society that strives to achieve the rule of law. As Wade and Philips observes judicial independence is essential to ensure that there is ‘effective control of, and proper publicity of delegated legislation, particularly when it imposes penalties; that when

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<sup>5</sup> Ibid, 276.

<sup>6</sup> International Bar Association, above n 1.

discretionary power is granted the manner in which it is to be exercised should as far as practicable be defined; that every man should be responsible to the ordinary law whether he be private citizen or public officer; that private right should be determined by impartial and independent tribunals; and that fundamental rights are determined by the ordinary law of the land'.<sup>7</sup> According to this view, the supremacy of Parliament is balanced by the independence of the judiciary. The Wade and Philips' view is applicable to multiple forms of government shaped by different models of constitutions.

Judicial independence as a constitutional value requires not only the independence of the judicial branch from the legislative and executive branches of government but also the independence, impartiality and competence of individual judges. Independence without impartiality is dangerous. Independence is a condition necessary for impartiality. Equally, lack of judicial competence leads to miscarriages of justice and the failure of the rule of law.

The number of judges in Sri Lanka represents the ratio of 1.4 judges per 100,000 people. They comprise judges of the Supreme Court (SC), Court of Appeal, the High Courts, District Courts, Magistrate Courts and Primary Courts. There are approximately 220 judges in all and 3000 court employees.<sup>8</sup> The original court judges form a career judicial service.

In Part 2 of the essay I discuss the political and constitutional history of Sri Lanka with a special focus on the provisions affecting judicial independence. In Part 3, I undertake an institutional analysis of the factors that have adversely impacted on judicial standards. Part 4 contains my brief concluding remarks.

## **Political and constitutional history affecting judicial independence in Sri Lanka**

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<sup>7</sup> E C S Wade and G G Philips, *Constitutional and Administrative Law* (1978) 74-76.

<sup>8</sup> International Bar Association, above n 1, 13-14.

### **The Soulbury Constitution, 1948<sup>9</sup>**

Sri Lanka's three post-independence Constitutions displayed the separation of powers to various degrees. However, it was only under the 1948 Constitution (drafted by a commission chaired by Viscount Soulbury) that the judiciary had full judicial review power over legislation. I mean by full judicial review, the power of the courts to review legislation and executive actions including the power where necessary to annul Acts of Parliament after they are enacted. The 1972 Constitution permitted and 1978 Constitution now permits only judicial review before enactment. The judgment in *Liyanage v The Queen*<sup>10</sup> affirmed that laws passed by the Parliament are subject to judicial review. Despite strong criticisms that this allowed the Privy Council (a United Kingdom court) to control the local legislative process, the Sri Lankan judiciary under that ruling enjoyed more freedom and independence than at any other time in the country's constitutional history.

According to section 52 of the Soulbury Constitution, the Governor General in accordance with Westminster constitutional conventions appointed judges on the advice of the Cabinet. The Minister of Justice was by law a member of the Senate.<sup>11</sup> A judge of the Supreme Court could not be removed without an address of both Houses of Parliament and their salaries could not be diminished during their term of office.<sup>12</sup> The Senate comprised thirty members, fifteen elected by the Lower House and fifteen appointed by the Governor-General selected from among people distinguished in their professional careers.<sup>13</sup> It is my view that that this gave some extra protection to the tenure and the independence of the judiciary as the Senate, at least in theory, was less driven by party politics. There was a Judicial Service Commission (JSC) composed of Superior Court judges to appoint original court judges. According to sections 52-55 of the

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<sup>9</sup> *Ceylon (Constitution) Order in Council 1946* known as the Soulbury Constitution after its principal author Viscount Soulbury, the first Governor-General of independent Ceylon.

<sup>10</sup> *Liyanage v The Queen*, [1967] AC 259.

<sup>11</sup> *Ceylon (Constitution) Order in Council 1946* s 48.

<sup>12</sup> *Ibid* s 2

<sup>13</sup> *Ibid* s 8

Constitution the JSC was charged with transfers, dismissals and disciplinary control of these judges.

The Soulbury Constitution established a Westminster model democracy with universal adult franchise. The independence of the judiciary was maintained at a high standard for a long time period. The judiciary as an institution was strong enough to protect the public as a whole as well as the interests of the minority groups in the country as shown in a number of constitutional rulings. The Privy Council's high standards of juridical competence and its detachment from local political and ethnic issues was a major factor in the overall professionalism and integrity of Sri Lanka's judiciary. This was illustrated vividly in cases such as *Liyanage v The Queen* and *Kodeswaran v Attorney-General*.<sup>14</sup> In *Liyanage*, the Privy Council struck down *ex post facto* legislation designed to facilitate the prosecution of persons accused of an attempted coup d'état and to retrospectively increase punishment. In *Kodeswaran*, the Privy Council returned the case to the Ceylon Supreme Court to address the issue it had not considered, namely the constitutional validity of the Official Language Act that made Sinhala the state language. The government did not proceed with the case, effectively conceding the claim of discrimination on linguistic grounds contrary to s 29(2) of the Ceylon Constitution. The judiciary was supported by constitutional safeguards and the British political and administrative traditions that were in place in the first decade of Independence. Contributing to this stability was the fact that the people responsible for the administration of justice, the judges and lawyers, were well-educated upper and middle class people immersed in the British legal culture and the professional and judicial ethics associated with that culture.

Economic conditions in the first independence decade were favourable to institutional stability. The economy was well ahead of those of its Asian neighbours and the country rated highly in human development, infrastructure and functioning democracy.<sup>15</sup>

However, the economic policies that sustained the country's relative prosperity were

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<sup>14</sup> (1968) 72 NLR 337.

<sup>15</sup> S Abeyratne, *Economic Roots of Political Conflict: The Case of Sri Lanka* (2002-2003) 4 Australian National University, <http://rspas.anu.edu.au/papers/asarc/sirimal.pdf> at 15 October 2007.

radically changed in the late 1950s leading to extensive regulation of trade and commerce and the nationalisation of key sectors of the economy such as banking, public transportation and ports leading to a degree of economic stagnation.<sup>16</sup> As argued presently, economic pressures played a significant role in the weakening of the institutional safeguards of judicial independence and competence.

## **2.2. 1956 - The rise of nationalism and the ‘cultural revolution’**

1956 was a significant year in the modern history of Sri Lanka. This was a year, which brought radical changes to the social, economic and cultural life of the nation that had far reaching consequences felt even to this date. The Mahajana Eksath Peramuna (People’s United Front) led by Mr S.W.R.D Bandaranaike won a landslide victory at the 1956 general election gaining the overwhelming majority of the Sinhala-Buddhist majority of the country. A major factor in the election was the adoption by Mr Bandaranaike of the so-called ‘Sinhala Only’ policy under which Sinhala, the majority language replaced English as the official language of administration and education. The impact of this transition on the legal system generally and the judiciary particularly was not immediately felt but as discussed presently it had manifold effects in the longer term. The new government, pursuant to the Sinhala Only policy, introduced racially discriminatory laws and administrative practices to fulfil pledges to its electoral support base among the Sinhala peasantry and petit bourgeoisie.<sup>17</sup>

Sinhala became the official language of the State and, at the same time, it became the language of education and the working language of important sectors of government. The official language of the courts became Sinhala in law but in practice it remained English because the English educated legal profession was unable or unwilling to work in Sinhala. The downgrading of English in primary, secondary and tertiary education was to take a heavy toll on the legal profession and the judiciary two decades later. Before Sinhala became the official language of education, higher education was limited to the

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<sup>16</sup> Ibid.

<sup>17</sup> Suri Ratnapala, ‘Securing constitutional government: The perpetual challenge (2003) VIII (1) *The Independent Review: A Journal of Political Economy* 5, 21.

elite English speaking minority and those who under adversity gained English proficiency. When Sinhala became the official language of higher education the Sinhala educated rural youths were able to have the privilege of higher education. These changes had a two-fold effect over the social structure of the country.

The first was that a greater number of youths completed tertiary education creating the demand for more ‘white collar’ jobs. Most of these jobs had to be provided by government as the private sector was constrained by increasing economic regulation and nationalisation of productive sectors of the economy. Many of these Sinhala speaking students graduated with general arts degrees (BA) that were not in great demand in the private sector. The welfare demand of the growing population also placed severe burdens on the system and the economy was too weak to be able to create enough jobs for the emerging young work force.<sup>18</sup> The second consequence was that the weaker economy made people more dependent on the government for jobs and subsidies for their livelihoods.

This period witnessed the emergence of a new class of Sinhala educated graduates who were to become the mainstream in almost all the professions. The legal profession, however, was still dominated by the elite minority although that position was increasingly under threat. Ominously though this emancipation did not touch the Tamil rural population for Sinhala was not their language. In fact the Sinhala Only program served to alienate them from the political mainstream and public sector economy, thereby sowing the seeds of what was to become a violent secessionist movement.

Mr Bandaranaike was assassinated in 1959 by a group of disaffected Sinhala nationalists. He was succeeded by his widow Mrs Sirima Bandaranaike whose party the SLFP won power in 1960. Mrs Bandaranaike continued to advance the Sinhala nationalist and command-economic agenda of her late husband. In 1965, the United National Party returned to power with a slim majority. Despite some market reforms the basic social and economic structure remained that of a Sinhala dominated state with a strong government

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<sup>18</sup> S Abeyratne, above n 16, 19-20.

role in the economy. In 1970, Mrs Banaranaike's SLFP won a two-thirds majority in coalition with the Communist Party and the Trotskyite LSSP. The progressive nationalisation of the economy and the demise of English continued under this regime. The English oriented cultural underpinnings of the legal and administrative systems continued to unravel.

There was only one significant formal constitutional change that directly affected the judiciary during the period 1949 to 1972. This was the abolition of the appeals to the Privy Council in 1971. One of the strongest connections to the British legal tradition was thereby broken. This came at a time when the judiciary was beginning to feel the effects of the radical shifts in economic and social policy and in particular the language policy. The legal system of Sri Lanka was based on concepts and traditions of English liberal-legal dogma which was somewhat foreign to the rising new social class. The new class wanted change and it was willing to depart from English legal traditions that stood in their way. The first major constitutional changes affecting the judiciary were wrought by Sri Lanka's First Republican Constitution that was adopted in 1972.

### **First Republican Constitution, 1972**

The General Election of 1970 was the last held under the Soulbury Constitution. Although the centre-right United National Party gained the highest total number of votes, the first past the post electoral system handed the United Front, a coalition of left wing parties, 116 of the 151 seats in Parliament.<sup>19</sup> The Parliament declared itself to be the Constituent Assembly and after a short period of deliberation adopted by an autochthonous process, the First Republican Constitution of 1972. The 1972 Constitution established a Westminster type parliamentary democracy with an all powerful unicameral legislature, the National State Assembly (NSA) which was declared to be the 'supreme instrument of State power.'<sup>20</sup> This Constitution brought about radical changes to the judiciary. The courts were denied the power of judicial review of legislation. The Constitution established instead a Constitutional Court with power to determine whether

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<sup>19</sup> The UF comprised the Sri Lanka Freedom Party (SLFP), the Lanka Samasamaja Party LSSP and the Communist Party (CP).

<sup>20</sup> *Constitution of the Republic of Sri Lanka 1972* s 48 (2).

a Bill presented to Parliament was inconsistent with the Constitution. The judges of this ‘court’ had no security of tenure and were appointed for a term of 4 years.<sup>21</sup> A challenge to a Bill had to be made within seven days of its presentation to Parliament.<sup>22</sup> A Bill declared to be inconsistent with the Constitution could be enacted with a two-thirds majority.

The other major change to the judiciary concerned the tenure of judges in the lower courts. Judges of the Court of Appeal and the Supreme Court were appointed by the President (himself a prime ministerial appointee) until the retirement age of 65 and could only be removed by Parliament.<sup>23</sup> The judges of other courts were appointed by the Cabinet from a list of recommended applicants supplied by the Judicial Service Advisory Board (JSAB).<sup>24</sup> The Cabinet was not bound by the recommendations and was able to appoint a person not so recommended.<sup>25</sup> A Judicial Service Disciplinary Board (JSDB) was established to advise the Cabinet on matters of disciplinary control of the lower court judges including dismissal for misconduct.<sup>26</sup> The JSAB and the JSDB were not fully independent bodies. Members of the JSAB other than the Chief Justice held office for renewable terms of 4 years. The Cabinet had power to regulate the functioning of this body by laying down rules. Although the dismissal of lower court judges had to be done by address of Parliament, the determination of misconduct by the JSDB could not be questioned. The Cabinet had power to lay down rules of conduct for judges and to determine the procedure in disciplinary inquiries.<sup>27</sup> The executive branch therefore had a high degree of indirect control over the judges of lower courts.

The United Front Government that created the First Republican Constitution ruled the country under a State of Emergency from March 1971 to February 1977. The initial reason for emergency rule was a youth insurrection led by the far left and nationalistic Janatha Vimukthi Peramuna or Peoples’ Liberation Front (JVP). Even after the

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<sup>21</sup> Ibid s 54 (1).

<sup>22</sup> Ibid s 54 (2).

<sup>23</sup> Ibid s 122 (1) and (2)

<sup>24</sup> Ibid s 126(2)

<sup>25</sup> Ibid s 126 (4)

<sup>26</sup> Ibid s 127

<sup>27</sup> Ibid s 127 (5)

insurrection was militarily crushed and the threat had passed, the government with the endorsement of its overwhelming parliamentary majority maintained the State of Emergency. It allowed the government to regulate all facets of social and economic life, to severely curtail free speech, political and trade union activity and to suspend many of the regular processes of justice. The *Public Security Ordinance 1947* which makes possible emergency rule was one of the last legislative enactments of the Colonial Administration. It grants the executive branch extraordinary legislative powers including the power to suspend all laws except the Constitution. From the constitutional standpoint, it is a depressing statistic that Sri Lanka has been governed under emergency laws for more than 17 of the last 19 years.

Despite constitutional shortcomings and the protracted emergency rule, the Sri Lankan judiciary was able initially to maintain a high degree of independence, impartiality and integrity under the 1972 Constitution. We must look outside the formal constitutional structure to understand some of the major causes of the dramatic decline in judicial standards. I will address these after discussing the constitutional changes that occurred under the Second Republican Constitution of 1978.

### **Second Republican Constitution, 1978**

The United Front came to an end in 1977. The government of Mrs Bandaranaike suffered a catastrophic defeat at the 1977 general election. Five years of oppressive emergency rule, economic stagnation, widespread scarcities of basic consumer items and the reaction to the brutal suppression of the 1971 insurgency combined to give the opposition UNP 80 percent of the seats in Parliament.

The victorious UNP government led by Mr J R Jayewardene immediately set to work on a new constitution. The Constitution promulgated in 1978 introduced a presidential system of government akin to the French system but with even greater presidential powers. It was proposed as a means of securing more stable and effective government. However, in hindsight most observers agree that it was also an attempt to perpetuate UNP

rule. Under the 1978 Constitution judicial power was formally vested in Parliament but the power has to be exercised through the courts. Article 4 (c) provided:

The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

The Constitution like its 1972 predecessor excluded judicial review of Acts of Parliament after enactment. However, unlike the previous arrangement, the power of pre-review was given to the Supreme Court.<sup>28</sup> Under the original constitutional provisions, the President appointed superior court judges and they cannot be removed except by an address of Parliament on grounds of proved misbehaviour or incapacity.<sup>29</sup> The Constitution established a Judicial Service Commission for the appointment of lower court judges and for exercising disciplinary control of these judges.<sup>30</sup> Following growing fears of the politicisation of the judiciary and other key organs of government such as the Elections Commission, Public Service Commission, the Permanent Commission against Bribery and Corruption, the Parliament in 2001 enacted *The Seventeenth Amendment*. The Amendment established a 10-member Constitutional Council with power to recommend and approve presidential nominations to a number of independent commissions. It specifically required appointments to the Supreme Court, the Court of Appeal and the Judicial Service Commission to be approved by the Constitutional Council. The Council is chaired by the Speaker of Parliament and comprises members chosen through a process that includes the participation of opposition parties in Parliament. This is an important reform that needs to be measured in the context that Sri Lanka's judges are eligible for appointment from the lower ranks of the judicial system to the higher. This is a virtual promotion system that potentially undermines judicial integrity. Unfortunately political

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<sup>28</sup> *Constitution of the Democratic Socialist Republic of Sri Lanka 1978* Art 121

<sup>29</sup> *Ibid* Art 107 (2)

<sup>30</sup> *Ibid* Art 114

wrangling delayed the appointment of the Constitutional Council, thus frustrating the reform and increasing public disquiet.

Judicial tenure is crucial for the independence of the judiciary. We assume that judges are more independent if they are appointed for life (or to a mandatory retirement age) and cannot be removed from office, save by due process of the law overseen by Parliament. Judges are less independent if their terms are renewable because they have reason to please those who can reappoint them<sup>31</sup>. The retirement age of a Supreme Court judge in Sri Lanka is 65, that of a Court of Appeal judge is 63 and of a High Court judge is 61. It is also the practice that judges are promoted to higher office from the District and Magistrates Courts. Judges of lower courts routinely seek appointment to higher courts. Before the Seventeenth Amendment the President was the sole authority to effect these ‘promotions’. This is one reason, which has significantly affected the independence of the judiciary. The system does not ensure that persons of competence and integrity alone are appointed to judicial office.

Feld and Voigt comment:

If the allocation of cases to the various members of the court is at the discretion of the chief justice, his influence will be substantially greater than that of the other members of the court. It follows that in such an institutional environment, it could be worth trying to ‘buy’ just the chief justice. We expect independence to be greater if there is a general rule according to which cases are allocated to the responsibility of single members of the court.<sup>32</sup>

This is in fact one of the concerns expressed by the International Bar Association in its 2001 Report.<sup>33</sup> The Chief Justice is also the Chair of the Judicial Service Commission, which is responsible for the appointment, and disciplinary control of the judges of original courts. Hence the Chief Justice carries a heavy burden in ensuring that

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<sup>31</sup> Ibid

<sup>32</sup> Lars P Feld and Stefan Voigt, ‘Economic growth and judicial independence: Cross country evidence using a new set of indicators, (2003) 19 *European Journal of Political Economy*, 497, 502

<sup>33</sup> International Bar Association, above note 1, 27

appointments and disciplinary processes are not only unbiased but also seen to be unbiased by the people whose confidence is essential for maintaining the moral authority of the judicial system. The International Bar Association Inquiry reported that it had found credible evidence of disciplinary actions taken by the JSC against judges that made politically unpalatable rulings<sup>34</sup> On February 2, 2006 two of the three members of the Judicial Service Commission, Justice Dr. Shirani Bandaranayake, and Justice T.B. Weerasooriya resigned from the Commission on grounds of conscience.<sup>35</sup>

### **AN INSTITUTIONAL ANALYSIS OF THE CAUSES OF THE DECLINE IN JUDICIAL INDEPENDENCE, INTEGRITY AND COMPETENCE**

It is easy to attribute the dramatic decline in judicial standards to the defects of the two Republican Constitutions. However, a comparative inquiry suggests that Sri Lanka since Independence enjoyed in the formal constitutional sense, a degree of judicial independence that would be the envy of most nations aspiring to liberal democratic constitutionalism. All these constitutions were imperfect and were major contributory causes, but to gain a fuller understanding of the problems faced by Sri Lanka's judiciary we must take account of broader historical, political, cultural and economic factors. The debilitating effects of these factors did not spare any part of government or civil society. The major factors were the following.

- Disastrous economic consequences of the twenty year experiment with central planning and state directed economic management that had direct and indirect effects on the judicial system.
- Effects of the 'Sinhala Only Policy' on legal learning and legal traditions.
- Destabilisation of the legal system by the ethnic conflict and its ramifications.

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<sup>34</sup> Ibid 23-24.

<sup>35</sup> 'Resignation of two senior Supreme Court judges', *Newsletter of the Bar Association of Sri Lanka*, March 2006.

- Long periods of virtual dictatorship created by lop sided elections, emergency rule and the powerful executive presidency under the 1978 Constitution.
- State condoned lawlessness that contributed to the loss of confidence in the judicial system.
- Politicisation of judicial office - unresolved questions about misconduct at the highest judicial level

### **Consequences of the economic decline**

Sri Lanka endured adverse terms of trade right from the late 1950s to the late 1970s as prices for its main products (tea, rubber and coconuts) sank and import costs rose. The government responded with progressively harsher import controls and import substitution and in general with tight economic regulation. The experiment of the command economic model commenced in 1956, after the election of the first centre-left government led by Mr S W R D Bandaranaike and continued with little interruption and little success until 1977. The period witnessed the establishment of central economic planning, progressive nationalisation of major sectors of the economy, increasing regulation of prices and wages, commodity and capital markets and foreign exchange, subsidisation and import substitution. Like almost every other socialist country, Sri Lanka was forced to abandon this path but not before it had taken a heavy toll on the institutions of the country. The command and control economic policies created a population dependent on government assistance. The public sector expanded rapidly at the expense of the private sector. As Ratnapala describes:

Nationalization of all key sectors of the economy – including the public transport system, the banks, the insurance industry, wholesale trade, and, most damaging of all, the plantation industry, which was the backbone of the economy – converted the people into a population of public servants. Controls on prices, rents, house ownership, imports, and currency exchange drove foreign investors out and choked off local enterprise. As the universities and schools produced more and more unemployable general arts and science graduates, the government created more jobs to keep them off the streets. Armies of youth did little more than open

doors, bring cups of tea for senior officials, and move documents from one office cubicle to another. Real incomes declined as a shrinking economic pie was divided into ever smaller slices. Essential goods became scarcer and dearer, and queues stretched longer. The Tamil youth suffered the most. Not only did private sector jobs dry up, but the young Tamils were also squeezed out of public service employment through language policy. It is not difficult to imagine the impact on constitutional government of the efforts of a nation of public servants seeking to make a decent living off the government.<sup>36</sup>

The centrally planned and regulated economy required authoritarian measures that produced a proliferation of legal regulations and controls and extensive state intervention in all areas of economic life which in turn stimulated rent seeking and corruption. Under these extreme circumstances, the judiciary, along with all other institutions of government, fell into decay. The people became more dependent on the government for jobs and subsidies. The extension of the government welfare state beyond the provision of a safety net disrupted the traditional institutions that nurtured the culture of justice and beneficence, such as family, temple church, and school. The traditional social structures that nurtured the society were displaced by a system of political patronage and dependence that was the inevitable result of the high concentration of the political power. In the course of time this new political culture affected most of the norms that lay down the unwritten laws of the society that support its more formal legal structures. It was inevitable that ultimately this moral erosion would take its toll on the judicial system. This did not become visible for a long time, as the judiciary was the last sector to be infected by this culture.

Dependence of citizens on government tends to corrupt both government and citizens. As the economy was contracting the government became the main source of employment. This led to a bigger problem, which still affects economic development and key institutions, which protect the rights, and liberties of the people. With more and more graduates produced by the universities, an expanding job market was needed to provide

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<sup>36</sup> Suri Ratnapala, above n 17, 21-22.

employment for these graduates, but the shrinking economy was not in a position to do that. The government's response was to create more unproductive jobs just to keep the youth off the streets.<sup>37</sup> The increasing dependence of the people on government for their livelihoods created a new source of political power for governments, the power of large-scale patronage.

This steady growth of patronage weakened almost all the institutions of government. The government controlled most of the job market and people depended on government to find a reasonable living. Every party in power used this dependence to manipulate people for political advantage. This started in the lower levels of government at the beginning but gradually it reached the higher levels of government. The erosion did not reach the judiciary for a long time but this was the beginning of the institutions getting weaker. The judiciary of a country does not work in isolation. There are many organisations that are involved in the administration of justice such as the court registries, Attorney General's Department, the Police, Prisons Department, and other units concerned with forensic science. Political patronage and manipulation first appeared in these organisations.

The economic stagnation had a more direct impact on the legal system as a whole and the judicial system in particular. The expansion of the public sector and the increasing public expenditures had a depressive effect on the salaries of judges and other public servants engaged in the system. This created a strong disincentive for successful and able lawyers to take up judicial office. At the same time the growing financial hardship faced by public servants working in judicial administration made them more prone to inducements and corruption. As Transparency International observes, poor pay and conditions of service makes judges susceptible to corruption, leads to brain drain, and lowers them in public esteem.<sup>38</sup> In its 2001 Report, the International Bar Association (IBA) observed that some judges could not meet their financial responsibilities without a second or private income.<sup>39</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> Transparency International, above n 4, 168.

<sup>39</sup> International Bar Association, above n 1, 25.

### **Effects of the ‘Sinhala Only Policy’ on the judiciary**

A major contributory cause of the deterioration in judicial standards was the decline of English competency. Mr S W R D Bandaranaike was swept to power in the 1956 General Elections on the back of the Sinhala majority vote swayed by the promise to immediately make Sinhala the official language of Ceylon for all purposes. He delivered on this promise by the Official Language Act which declared that ‘The Sinhala language shall be the one official Language of Ceylon’.<sup>40</sup> The Tamil people, fearing that this was the first step towards the assimilation of their race into a Sinhala nation, engaged in widespread protests. The Tamil Language (Special Provisions) Act 1958 was passed to appease Tamils but was considered by them to be mere window dressing as it contained no enforceable language rights. The 1978 Constitution belatedly granted Tamil people the right to use their own language in courts, dealings with government and education but the implementation of these provisions have been patchy. The Sinhala Only Policy sowed the seeds of the ethnic civil conflict that has taken a heavy toll on the institutions of the country. The most direct consequence of this policy for the legal system generally and the judiciary specially was in the effect upon them of the demise of English.

The Sri Lankan law is drawn from many sources. The general law of persons, property and obligations is the Roman-Dutch Law. Commercial law, company law, criminal law, administrative law as well as procedural and evidentiary law is essentially English law. Special laws applying to Kandyan Sinhalese, Tamils of Jaffna and Muslims supplement the Roman-Dutch law and the English law that applies generally. Treatises, judicial precedents and statutory instruments in all these fields are found in English with only few translations in Sinhala and Tamil. (The statutory instruments are published in three languages and although the Sinhala versions have legal precedence, the judges and practitioners in the superior courts in practice consult the English versions. The system has other common law features such as the adversarial procedure and the doctrine of precedent. The proceedings of the superior courts (the Supreme Court and the Court of Appeal) to this day are conducted and reported in English. These difficulties are multiplied as the country’s economy and hence its legal system locks into international

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<sup>40</sup>*Official Language Act 1956, s 2*

legal regimes such as those governing world trade, intellectual property, commercial arbitration, human rights and climate. In short, English remains the language of the law. Legal competency requires English proficiency.

The decline in English proficiency also loosened the connection of the legal profession to the English legal traditions and legal culture. Literature and precedents in professional and judicial ethics within the common law system is found in English. There are also values and norms of professional etiquette that a lawyer absorbs during the course of legal training and practice. It was not impossible to transfer this heritage to the new generation of Sinhala and Tamil speaking lawyers but it required a positive effort by the previous generation which unfortunately did not happen. Shortage of jobs made many liberal arts graduates turn to the legal profession, the admission to which no longer required English proficiency. These graduates had little familiarity with professional ethics, the sanctity of judicial office and the trust and interdependence of the bench and the bar.

English deficiencies affect research skills within the judiciary. The judges of the original courts are members of a career judicial service. Owing to the economic factors discussed previously, persons are appointed to entry-level positions in the magistracy with only three years of experience in practice. These junior lawyers are expected to develop themselves into highly knowledgeable and skilled jurists who must be able to decide not only routine cases but also highly complex legal questions and sensitive issues that attract a high degree of political and social pressure at the higher levels of the judiciary. In addition they must gain competence in corporate and commercial law fields where litigation is increasing exponentially with the expansion of the market economy. Most of the Attorneys-at-Law who graduate from the Sri Lanka Law College have not been taught any research skills in their academic years in the College. The students graduating from the University of Colombo Law Faculty have more research skills, but they are insufficient for judicial work. The lack of research skills limits the capacity of judges, lawyers and law students to access essential legal information. Knowledge and skill deficiencies make the system prone to miscarriages of justice.

It is worth mentioning that another set of legal reforms introduced by the *Administration of Justice Law 1974*, in my view, had the unintended consequence of diminishing the stature of the judiciary. This legislation was not concerned directly with language policy but was nevertheless intended in part to demystify the judicial system for the non-English speaking public. The Act made many important changes to the existing system including the creation of the office of the Director of Public Prosecution, provisions for pre-trial hearings in civil cases, the radical restructure of the appellate system, the amalgamation of the divided profession and changes to the traditions and trappings of the bar and bench.

Two of these changes had unfortunate effects on the legal system and the judiciary. The first was the amalgamation of the profession. This reform had the benefit of making access to the legal profession easier. However it came at a certain cost to professional accountability to clients and the courts that the earlier division between proctors and advocates promoted. The second was the egalitarian ethos that was introduced into the judiciary by the dismantling of the symbols and trappings of judicial office including the removal of judicial robes and wigs and many of the ceremonial aspects of court sittings.

Prima facie, these two changes may seem salutary but they have to be viewed in the context of the other changes to the social and economic life of the country. As Professor Ratnapala reminds us, institutions are not independent and self-sustaining, but exist as part of a complex web of interacting constraints.<sup>41</sup> These changes must be viewed against the background of the cultural inclinations of ordinary Sri Lankans; the language change that took place in 1956 and the economic situation of the country.

Sri Lankans placed judicial officers high on the social ladder and treated judges with a degree of awe. The changes mentioned above altered the public's attitude towards the dignity and respect commanded by the judiciary. The egalitarian ethos promoted by the *Administration of Justice Law 1974* encouraged the newer entrants to the profession to regard judges as their peers leading to lowered respect and expectations. This may have

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<sup>41</sup>Suri Ratnapala, above n 17, 17.

increased the judiciary's exposure to pressures as the judge appeared to be an accessible person.

### **Consequences of the ethnic conflict**

The language policy was a primary cause of the ethnic conflict that continues to this date. Its impact on the judicial system is immeasurably negative. Civil strife of any kind creates strains on constitutional government. The Liberation Tigers of Tamil Eelam was founded in 1975 with the aim of fighting for an independent Tamil state of Eelam. It is a ruthless fighting force that has been listed as a terrorist organisation by 32 countries including the United States, the United Kingdom, Canada and Australia as well as the European Union. It has decimated rival Tamil political parties and intimidated the democratic elements within the Tamil community. It has carried out attacks against civilian targets and continually threatens military and infrastructure targets in Sri Lanka. The government forces in their military responses have also caused large scale civilian casualties. Innocent Tamils have also been victimised in counter-terrorist measures. The expulsion of 376 Tamils from Colombo on June 7, 2007 on the ground that they had no reason to be in the city provides a vivid case in point. (The Supreme Court to its lasting credit enjoined this action the next day.) The ethnic conflict is estimated to have cost in excess of 70,000 lives thus far.

The ethnic conflict in the North and East of the country has a quadruple effect on the rule of law and on the administration of justice. The first is that the government is unable to hold regular courts and carry out other important governmental functions that are essential for the administration of justice in the troubled areas under separatist control or threat. As a result, the population of these areas are left to endure the arbitrary rule of a terrorist organization. The executive gained extraordinary powers under emergency legislation. Tamils lawyers were well represented in the ranks of the Bar and judiciary but ordinary Tamils began to lose faith in the legal system equating it with state policy.

The second effect was the arbitrary power assumed by the government because of the war situation. Professor Ratnapala highlights this dilemma in the following observation:

The greatest cost inflicted by terrorism, however, is not in the lives and property lost (though these costs are horrendously unacceptable), nor in increased defense spending, but in the jeopardy of the rule of law that results from the extraordinary powers that the state gains in times of national emergency. Terrorists cause more harm to free societies through the reactions they precipitate than by the physical destruction they wreak.<sup>42</sup>

In the Sri Lankan context this threat to public security has made the President who is already powerful even more powerful because of the extraordinary legislative powers granted by the Public Security Ordinance. Sri Lanka has been governed under emergency regulations from more than 16 of the last 18 years. Censorship, limitations on political action, detention without trial, and extraordinary investigative powers tend to be abused to the point that people lose confidence in the legal system as a whole including faith in the courts as a protector of rights and liberties of the citizen.

The third effect is the collateral damage to the law and order situation in the country a whole. The war bred new forms of corruption as the armed forces grew in size and the vast amounts of military procurement generated opportunities for commissions and kick backs. It also introduced into the general community a great number of fire arms (mainly through army deserters) that strengthened criminal gangs and spread violence. The pre-occupation of the security forces and police with the separatist war meant that civil policing suffered badly, further contributing to the spread of organized and small time criminal activity

The fourth effect is the economic impact of the conflict. The cost of conducting the war is enormous for a poor country. Military expenditure in 2006 was 2.6% of GDP.<sup>43</sup> This is money that otherwise would improve infrastructure, health, education and basic law and order. The war deters foreign investment and tourism leading to job losses. The

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<sup>42</sup> Ibid 7.

<sup>43</sup> Central Intelligence Agency, *The World Fact Book*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html> at 15 October 2007,

monumental cost of the civil war increases inflation adding pressure on judges and public servants within the judicial system.

### **Conditions of virtual dictatorship**

As mentioned before, the country has been under emergency rule for very long periods of time during which the executive enjoyed extraordinary legislative powers that were often used to suppress free speech and democratic political activity. The ‘first past the post’ electoral system also produced overwhelming parliamentary majorities in 1956, 1970 and 1977. In 1956, the MEP won 51 of 95 seats. In 1970, the UF won 116 of 151 seats. In 1977 the UNP won 140 of 168 seats. A highly controversial referendum held in 1982 extended the life of the Parliament elected in 1977 to 1989.<sup>44</sup> The opposition during these periods was decimated and the governments had a virtual free hand in conducting its affairs and in suppressing what opposition remained. A major consequence of this state of things for which both political parties are guilty is the politicisation of all government institutions including law enforcement authorities.

The 1978 General Election not only annihilated the opposition but also allowed the UNP to adopt a constitution which created an executive presidency with enormous powers. The Constitution drew its inspiration from the French Constitution but granted to the President even greater powers including the power to dissolve a parliament when politically convenient.<sup>45</sup> The executive Presidency weakened the balance of power among the three branches of the government. The legislature’s power to check the executive (moderate at best in parliamentary systems) diminished further under the presidential system while presidential power to control the legislature increased. The President can threaten Parliament with dissolution. The President can also win over opposition members by offers of ministerial positions or other perks. The defection of 18 opposition UNP members to the government in January 2007 is a graphic illustration of the power of presidential patronage and manipulation. The intimidatory effect of this overwhelming

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<sup>44</sup> Sri Lanka Department of Elections, <http://www.slelections.gov.lk/> at 15 October 2008.

<sup>45</sup> For a comparison between the French Constitution and the 1978 Sri Lankan Constitution, see S Ratnapala, ‘Sri Lanka at constitutional cross-roads: Gaullist presidentialism, Westminster democracy or tripartite separation of powers?’ (2003-2004) *LAWASIA Journal*, 33-56

executive power coupled with emergency powers on the public service and the judiciary is not hard to imagine.

The UNP government commenced a program of economic liberalisation in 1978, reversing the two decades of socialist economic policy. The economy began to improve and there was an upsurge in domestic and foreign investment. Despite this deregulation, the government retained enormous powers of patronage. Large-scale projects needed government approval, firms needed all sorts of permissions and authorisations to do business and a range of services were still provided by government including security. The returns from investment in Sri Lanka increased exponentially but so did the opportunities for corruption owing to the remaining government controls on trade and investment. The governing party was able to use these powers to benefit party supporters and to buy electoral support. This practice of highly politicised liberalisation led to higher levels of corruption on an unprecedented scale. Political patronage created a brand of extreme political partisanship within government and society. Even though there were several changes of government in the period 1978-2006, the problem of extreme political loyalty grew worse with each administration. This spread not only among private citizens but also in every aspect of social life and government departments and the judiciary were no exception. This wave of political loyalty adversely affected the strength and competence of government institutions, especially those that helped to protect judicial independence.

The Bar Association (comprising all admitted legal practitioners) has a vital role in strengthening the judiciary. Yet it has become a political playground. The Bar is split between members supporting the government and those supporting the opposition UNP. Its members divide on party lines and take up partisan positions on major issues affecting the country where people rightly expect them to adopt an independent standpoint.<sup>46</sup>

There were more far reaching consequences of this political patronage. Because of the corruption and the money associated with political power and the disastrous state of

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<sup>46</sup> International Bar Association, above n 1, 32.

policing (a major consequence of the civil war) most of the politicians and wealthy business people began to rely on private security which in many cases involved criminal elements with continuing links to the organized underworld. The criminal organisations in return gained political protection which allowed them to operate in defiance of the law. The problem came to a head when gangs started attacking prison buses and some courthouses in revenge killings. Even the lives of judges became perilous. On November 19, 2004, a High Court Judge, Honourable Sarath Ambepitiya and his bodyguard were shot and killed by four assailants outside the judge's Colombo residence. Ambepitiya had presided over several high-profile narcotics cases and was scheduled to hear another narcotics case the following week.<sup>47</sup>

### **State sponsored or condoned lawlessness**

Perhaps the most damaging factor in the decline of the legal institutions of the country was state sponsored or condoned lawlessness. Here we have to be careful not to place the blame entirely on the state. The state confronted three major challenges to law and order. They were the JVP insurrections of 1971 and 1989 and the Tamil Tiger separatist movement that commenced in 1975 and continues to this day. The JVP led insurrections were inspired by an ideology that combined Marxist communism and Sinhala nationalism. This ideological cocktail had great appeal to Sinhala youth whose aspirations were frustrated by the lack of jobs and opportunities. The UF government in 1971 and the UNP government in 1989 suppressed these insurrections with the aid of extraordinary emergency powers backed by brute military force. The threat posed to democracy and the rule of law by the JVP insurrections was real and serious. In 1971 the JVP made an unsuccessful attempt to overthrow the lawfully elected government by an armed rebellion. In the aftermath an estimated 15,000 youths lost their lives. In the late 1980s armed JVP youth imposed unofficial curfews and carried out killings of politicians, public servants and prominent identities in various parts of the country. The government responded in a like manner to crush the rebellion. The President, Mr. Ranasingha Premadasa organized unofficial militia directed by government Ministers and

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<sup>47</sup> US Department of State, *Sri Lanka: Country Reports on Human Rights Practices 2004*, (2005) <http://www.state.gov/g/drl/rls/hrrpt/2004/41744.htm> at 15 October 2007.

members of Parliament. Some of the people recruited were underworld gangsters aligned with local politicians. These gangs carried out thousands of killings all around the country. Three regional commissions of inquiry established in 1994 and a fourth established in 1998, reported a total of 21,215 disappearances between 1988 and 1994, most of which occurred during the 1988-89 period of the JVP uprising. Unofficial estimates put the figure much higher. The commissions found that many people disappeared after having been removed involuntarily from their homes, in most cases by the security forces. As soon as the President was assassinated on May 1, 1993 by suspected Liberation Tigers of Tamil Eelam (LTTE) operatives, these killings stopped. No charges have been laid against any person concerning these killings and a proper investigation into the killings was never carried out. The effect of these events on public confidence in the legal system and the courts is hard to overestimate.

#### **Unresolved questions about misconduct at the highest judicial level**

The position of Chief Justice is particularly important to public confidence in the functioning of the judiciary. The Chief Justice represents the entire judiciary and the office is symbolic of the independence, impartiality, integrity and the dignity of the judiciary as a whole. In the constitutional scheme of things, the office is critical to the working of the judicial system. As the Chairman of the Judicial Service Commission the Chief Justice presides over disciplinary matters of the lower court judges and matters of transfer. The Chief Justice is responsible for assembling the Benches that hear particular cases and for listing of cases. The office carries great informal authority. Hence whoever holds the position must be of the highest standing and unimpeachable reputation.

The present Chief Justice Honourable Sarath Silva is known as a lawyer of great ability and learning. However, he was appointed to the highest judicial position amidst investigations into professional misconduct by him when he was serving as Attorney-General.<sup>48</sup> Unfortunately, these allegations were not resolved before the appointment and the Chief Justice took office in a charged atmosphere. Since then, he has faced several allegations of misconduct. It has been alleged by groups such as the Free Media

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<sup>48</sup> International Bar Association, above n 1, 26-27.

Movement, that the Chief Justice has narrowed the scope of human rights litigation and has consistently defended the government in legal actions relating to political disputes. The Judicial Service Commission has been accused of unfairly dismissing a number of judges without holding inquiries or undertaking disciplinary hearings, and it has been alleged that some of these dismissals have been politically motivated.<sup>49</sup> In June 2001, the main opposition party brought an impeachment motion against the Chief Justice but it was never debated because of the prorogation of Parliament.<sup>50</sup>

The political impasse over the Chief Justice's conduct raises larger questions about the extent of the politicization of the judiciary and the will of the government to resolve the issue meaningfully. The issue is not whether the Chief Justice is guilty of misconduct or not but why the system failed to resolve the allegations. In Sri Lanka, due to decades of adversarial politics and institutional decay, public debates tend to be heavily coloured by political motivation and bias and it is difficult to find independent and impartial commentary on public institutions. Public criticism of the judiciary must be undertaken in a responsible manner within the bounds of the law of contempt. Public scrutiny is essential for the well being of the judiciary. While the courts must be protected against contempt the political system must be able to deal with serious allegations against judges if the rule of law is to prevail. The Constitution provides means of dealing with judicial misconduct through impeachment but for that process to work fairly, legislators must act in a non-partisan and responsible manner. This has been sadly lacking in the current state of the country's political culture.

The timing and the nature of the impeachment motion introduced by the opposition UNP in 2001 raised the question whether it was a genuine effort to investigate allegations or whether it was a politically motivated action just to take advantage over the minority government. In any event, the issue of the Chief Justice's conduct degenerated into a political struggle with the resulting impasse leaving the matter unresolved. It is evident that the efforts of non-political groups such as the Free Media Movement and other civil

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<sup>49</sup> Ibid 23-24.

<sup>50</sup> Ibid 28.

society organisations have been insufficient to galvanise public opinion about the potential threat to the administration of justice and the rule of law. It is difficult for non-political concerned groups to overcome the debilitating effects of decades of political partisanship. The end result is that the serious allegations against the holder of the highest judicial office have remained uninvestigated and unresolved leaving a large dent in public confidence in the judiciary as a whole. The long-term damage to the judicial edifice is incalculable.

### **CONCLUDING REMARKS**

This research project commenced as an investigation into the constitutional defects affecting the independence of the judiciary. Some of these defects, particularly those concerning the appointments process were observed and discussed in the preceding pages. It became evident, however, that the problems of the judiciary cannot be isolated from the general causes affecting constitutional government in Sri Lanka.

Ratnapala observes that the prevalence of constitutional government is dependent on four conditions: (1) prevalence of the classical conception of constitutional government (system of limited powers) as a dominant ideology; (2) an official constitution in written or customary form that adopts this conception of constitutional government; (3) an institutional matrix that sustains the official constitution and translates it into the experience of the people; and (4) a healthy economy that supports the institutional foundation of constitutional government.<sup>51</sup> The third and fourth conditions are interdependent, each being a cause of the other. In the first decade after independence, all these conditions were fulfilled in Sri Lanka. It may be argued that the that ‘cultural revolution’ commenced in 1956 despite its clear success in bringing into the political and economic mainstream, the Sinhala rural folk, ushered in changes to the political culture that was in friction with the classical notion of a government with limited powers. The idea of rule by majority replaced the notion of government under law and the constitution as the dominant ideology. At the same time, the country commenced its journey down the

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<sup>51</sup> S Ratnapala, above n 17, 6.

socialist economic path leading to decades of economic contraction, growth of the public sector and dependence of people on government for jobs and welfare. The third and fourth conditions identified by Professor Ratnapala were thereby gradually undermined. The economic decline applied severe pressures on the country's institutional matrix and the conversely the institutional decay led to further economic decline.

In theory, when the economy prospers, the institutions should also become stronger. This is what we witness in the Asian Tiger Economies where economic prosperity lead to the growth of democratic political structures and the strengthening of the rule of law. Since the economy was liberalized in 1978, the country has recorded impressive GDP growth rates. However it has not been accompanied by an institutional revival. There are many possible explanations. The most obvious is that while institutions are easy to destroy they are much harder to rebuild. It cannot be done overnight. But there are other reasons. The country and the people generally have been deprived of the full benefits of market reforms for several reasons. These include continuing endemic corruption and patronage, politicization of all sectors of public life and the terrible cost of the continuing ethnic conflict and the cost of the 1989 southern uprising.

The re-establishment of judicial independence in Sri Lanka requires a general constitutional revival. Such a revival requires a major effort on the part of political actors, the legal profession, the judges themselves and the civic minded public. It must follow a general increase in respect for the rule of law by all parties. The greatest factor currently hindering such a revival is the continuing emergency created by the ongoing separatist war. Without a political settlement, normalcy cannot be restored to society and the legal system. If a lasting and just settlement is achieved, the country can look forward to a period of peaceful economic growth and a revival of civil society that can create the pressures necessary to discipline the politicians who continue to corrupt the country's institutions. With greater prosperity and an expanding well-educated middle class, the country can expect to see a strengthening of its legal structures and an improvement in its legal and political culture. The independence and reputation of the judiciary can be restored only through such a national resurgence.

