

Preliminary Year
Sri Lanka Law College

Constitutional Law



Empowers Independent Learning



Independent Law Student Movement

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Reviews, responses and criticism

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1. NATURE OF CONSTITUTIONAL LAW

Definition

The Constitutional law of a state has been defined as “the law relating to the constitution of a state”. The definition is wide enough to include the study of matters that are of constitutional importance to a country, such as the historical, political and philosophical foundations of the constitution.

The State

‘The State’, according to Harold Laski in a *Grammar of Politics* “is a temporal society divided into government and subject claiming within its allotted physical area, a supremacy over all other institutions. It is in fact the final legal repository of the social will...”

For Constitutional law to exist, a state does not have to be an independent political society recognized international law. A dependent country, such as a colony, can have laws relating to its constitution and this was the case in Sri Lanka as well.

A state can be either Unitary or Federal (Explained in detail in the subsequent lesson).

State and Government

It is necessary to note that there is a distinction between the terms ‘state’ and ‘government’.

A government may be defined as the machinery through which the purposes of the state are sought to be achieved. Our study of constitutional law is subject to the principle of parliamentary democracy. Thus, although the purpose (or purposes) of the state have been variously identified, we may accept the concept that the basic purpose of the state is the enrichment of quality of life of the individual citizen. Generally the term ‘state’ and ‘government’ are synonymously used.

The Constitution

It is sometimes called the supreme law or fundamental law of the land and has been described as the source from which all other laws derive their validity and legality. It thus deals with authority and power.

The word ‘constitution’ may be used in at least two different contexts. Firstly, it is used to describe the whole system of government in a country, i.e. the collection of rules which define and regulate the organs of state. The rules are partly legal. Secondly, it is used in a narrower and concrete sense to refer to the legal and non – legal rules which have been embodied in one document or a group of documents. The constitution of USA is an example of this narrow sense.

In whatever context, the term is used a “near perfect constitution” may be obtained if and only if the concepts which are treated as fundamental to the constitution are utilized to conform to the social will and to achieve the purposes of the state.

Thus, constitutional law may be scientifically defined as the body of rules which in effect governs all other rules and which determines the structure, powers and functions of the principal state organs and which regulate the relations between these principal state organs and the private citizen.

Sources of Constitutional Law

1. Principal source: the constitutional document and the amendments thereto.
2. Supplementary sources:
 - i. Judicial decisions interpreting the provisions of the constitution.
 - ii. Conventional rules regulating the working of the machinery of government.
 - iii. Academic writings.

Constitutional Development in Sri Lanka

1. Donoughmore Constitution

Created by the Donoughmore Commission, served Sri Lanka (Ceylon) from 1931 to 1947. It was a significant development. It was the only constitution in the British Empire enabling general elections with adult universal suffrage. For the first time, a “dependent” non-Caucasian country within the empires of Western Europe was given one-person, one-vote and the power to control domestic affairs.

2. Soulbury Constitution

Sri Lanka's Independence Constitution. It was based on the British system of Government. Traditional British Constitutional principles relating to the Parliamentary and Cabinet systems were adopted. The Soulbury Commission was keen on preventing ethnic tension and encourage national consciousness. In Soulbury Constitution provisions were provided for racial and religious equity. It upheld most fundamental principle of constitutionalism, supremacy of the constitution enabling judicial review of legislation.

In 1947 August first election was held by the newly formed Department of Parliamentary Elections. Prime Minister – Rt.Hon. D.S. Senanayake

In 1952 the second election under the same Department was held.

PM. D.S. Senanayake died in 1952. Then – Prime Minister – Hon. Dudley Senanayake. In 1953 Hon Dudley Senanayake resigned due to ill health. Then Sir Jhon Kothalawala became the PM. For the first time SLFFP contested at the election.

In 1956 elections – Mahajana Eksath Peramuna – Hon. S.W.R.D Bandaranayake became the PM. He was killed on 26th September 1959. Then in 1960 elections – SLFP won. Hon. Mrs. Sirima Bandaranayake became the PM. In 1965 elections- Hon Dudley Senanayake won.

1970 Election- The last election held under the Soulbury Constitution. Hon. Mrs Sirima Bandaranayake became the PM again.

3. 1972 Constitution

The first Republican Constitution of Sri Lanka. It was drafted soon after the General Election in 1970, Pieter Keuneman a prominent minister in the new coalition government, declared that the country needed a constitution. The framers said it should be a people's homegrown (autochthonous) Constitution. The new Constitution was opposed by the Tamil people and main opposition party – UNP. Introduced the British doctrine of Parliamentary Supremacy which had been rejected by the Soulbury Constitution. Supreme power resided in the elected representatives of the people.

The General Election of 1970 was the last held under the Soulbury Constitution. Although the center-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 1970. 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.

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 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.²¹ A challenge to a Bill had to be made within seven days of its presentation to Parliament. 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. The judges of other courts were appointed by the Cabinet from a list of recommended applicants supplied by the Judicial Service Advisory Board (JSAB).

The Cabinet was not bound by the recommendations and was able to appoint a person not so recommended. 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. 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. The executive branch therefore had a high degree of indirect control over the judges of lower courts.

4. 1978 Constitution

The second Republican Constitution. The Constitution introduced by UNP government headed by J.R. Jayawardane who became the first executive President under the 1978 Constitution. Stability for rapid economic development seemed to be the dominant consideration of the framers of the new constitution

The introduction of the Executive Presidency, which is perhaps the most radical change introduced by the 1978 constitution, undermined the notion of parliamentary supremacy by reposing considerable power in one person. President Jayawardane pressed for establishment of political stability by providing for strong leadership, an executive freed from the whims and fancies of Parliament.

With the 1978 Constitution the role of a Member of Parliament was changed. Edmund Burke addressing the electors of Bristol, on 3rd November 1774 said, "you choose a member indeed, but when you have chosen him, he is not a member for Bristol, but he is a Member of Parliament"

2. CLASSIFICATION OF CONSTITUTIONS

Constitutions are classified in to various types according to their features. Among them are:-

- ⇒ Written and Unwritten
- ⇒ Rigid and Flexible
- ⇒ Unitary and Federal
- ⇒ Autochthonous and Granted

Written and Unwritten

A constitution is said to be written where the rules relating to the organs of government are laid down in a formal document containing special legal Sanctity.

Eg: USA, India, Sri Lanka (Soulbury, 1972 & 1978)

Jurists have stated that a written constitution is the final outcome of a constituent assembly.

In an unwritten Constitution, the rules relating to the organs of government are not formally laid down in a specific document, but have evolved through constitutional conventions. Consequently, all laws are not integrated into one place. Rules relating to constitutional matters are included in statutes and case law.

Eg: Britain (Possess an unwritten constitution and hence the rules relevant to the government are found in statutes such as the *Bill of Rights* and *Act of Settlement*).

Rigid and Flexible

A rigid constitution is one under which the fundamental laws cannot be altered in the same manner as ordinary laws or cannot be altered at all.

Rigid constitutions can be further classified as follows:-

- i. Constitutions in which the special amending procedure is within the sole power of the legislature. (Eg: India)
- ii. Constitutions which require a special amending procedure to brought in by an external source. (Eg: Switzerland)

Hood Pilliphs Comments that in this case, “the constitution may be said to be supreme over the legislature”.

The second Republican Constitution of Sri Lanka presents a hybrid of (i) and (ii). While certain provisions can be amended in parliament by adopting the special procedure laid down in the constitution, certain other provisions can be altered only by seeking a vote at a referendum. This has been judicially recognized in *Wickramasinghe V The State*.

- iii. Constitutions which cannot be wholly or partly altered at any given time. (Eg: Basic articles of the constitution of the Republic of Cyprus)

There was a strong academic opinion in regard to Section 29(2) of the Ceylon Order in Council (1946) which asserted that, the said section was unalterable.

A flexible constitution is defined by Dicey as follows:

“One under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body.”

Eg: Constitution of Britain

The operation of a constitution shows that, what really gives it rigidity or flexibility is attributed to political and psychological factors such as the temperament and character of those operating the constitution concerned.

Unitary and Federal

A unitary constitution is one in which the central government of the state exercises the supreme power and authority over the entire country (it does not recognize any other institution with similar power). The supreme power is thus concentrated in a single body.

The essence of a unitary state is that sovereignty is undivided, in other words, the powers of the central government are unrestricted.

Justice Sharvananada, in *Re thirteenth Amendment (1987) 2 Sri L.R. 312* states that:

“In a unitary state, the national government is legally supreme over all other levels. The essence of the unitary state is that sovereignty is undivided-in other words, the power of the central government is unrestricted. The two essential qualities of a unitary state are;

1. The supremacy of the Central parliament
2. The absence of subsidiary sovereign bodies

It does not mean the absence of subsidiary law making bodies, but it does mean that they may exist can be abolished at the discretion of the central authority.”

Eg: Sri Lanka

A Federal state is one where the country is divided territorially into several units and the powers and functions of the state are divided and distributed between a central government and on one hand and the state (Provincial / regional governments) on the other in such a way that each is supreme within its prescribed sphere.

In other words, a federal state can be two or more bodies with one power. Each body has exclusive power in each area within its power. Federal state may be subdivided into –

1. States where the powers allocated to the federal government are specifically stated in the constitution (while the remaining powers are left to the constituent states). Eg: USA, Switzerland and Australia
2. States where the powers of the constituent states or provinces are specified and the residuary power is vested in the Central government. Eg: Canada

In the case of *Re thirteenth Amendment (1987) 2 Sri L.R. 312*:

“The existence of co ordinate authorities independent of each other is the gist of the federal principle. The federal government is the sovereign on some matters and the state governments are sovereign in others. Each within its own sphere exercises its powers without control from the other and neither is subordinate to the other.”

It must be noted that it is the constitution that determines whether a state is unitary or federal. In most countries it is clearly visible, however, in certain countries it is not so.

Eg: India

(India has a basic structure of a federal state, but in respect of the powers possessed by the central government it displays more characteristics of a unitary state. For this reason, India is referred to as a Quasi – Federal State).

Autochthonous and Granted

An autochthonous constitution is one which is rooted entirely or has sprung from its own native soil and is enacted by the mandate of the people of that country. The basis of an autochthonous constitution is that, it does not owe its existence to any foreign country or sovereign agency.

Eg: The British Constitution and the First Republican Constitution of Sri Lanka There

are 3 main features of an autochthonous constitution;

1. Autonomy
2. Self Sufficiency
3. Break in legal continuity

Autonomy

The principle of autonomy is that, an autonomic system of government is in no way subordinate to any other government.

The constitution of such a country would have the force of supreme law within its territory.

In the case of *Ibralebbe V The Queen*, the Court of England stated that, as per the **Ceylon Independence Act of 1947** (Section 10), the British Parliament shall cease to legislate for Ceylon, unless with the consent or at the request of Ceylon. By interpreting the said provisions, court held that the Ceylon parliament was in any sense subordinate legislature, but had the full legislative power of a sovereign independent state.

The most important feature of an autochthonous constitution is its “independence”.

1972 Constitution (Article 1) – “Sri Lanka is a free, sovereign, independent Republic...”

1978 Constitution (Article 1) – “Sri Lanka is a free, sovereign, independent and Democratic socialist Republic...”

The above implies that no foreign body can impose or influence the laws of Sri Lanka.

Self Sufficiency

Prof. K.C. Whear – a well known British Jurist has described ‘Self Sufficiency’ as follows:

“For some members of the common wealth it is not enough to be able to say that they enjoy the system of government which is in no way subordinate to the government of the United Kingdom. They wish to say that their constitution has the force of law.”

This means that an autochthonous constitution is ‘born in its country’ and not granted by any other state.

The first Republican Constitution of Sri Lanka (1972) is an example for a self sufficient constitution.

Break in Legal Continuity

The break referred to here is the break from the existing constitutional system.

This feature is visible in the first Republican constitution of Sri Lanka (1972). With the enactment of this constitution, there was a strong break in the continuity of the governing system which prevailed till then.

A constitution which is granted is one which has its legal origin in the form an enactment or authorization by some other supreme legislative body. Through a granted constitution only a very limited power is vested on the legislature.

Eg: The Soulbury Constitution

RELATED PAST PAPER QUESTIONS:

- (a) Describe the essential requirements for an autochthonous constitution to gain its validity.
(b) Do you think the 1972 constitution of Sri Lanka had satisfied all the necessary requirements needed for a valid autochthonous constitution? Give reasons for your answer. **[Q4; Oct 2016; 16 marks]**
- (a)What is meant by an ‘Autochthonous Constitution’? Explain the rationale behind the validity of a Constitution that is adopted through unconstitutional means. (b)In your opinion, what did validate the process adopted in making the First Republican Constitution? **[Q4; Apr 2016; 16 marks]**
- “The Validity of a Constitution does not flow from law. The validity of a Constitution initially is a political fact and it flows from acceptance by the people. All revolutions are legal when they have succeeded.”
Discuss in light of the validity of the process adopted in making the autochthonous Constitution of Sri Lanka. **[Q4; Oct 2015; 16 marks]**
- The Principle of autonomy emphasizes that the country enjoys a system of government which is not subordinate to any other country’s government.”
Discuss the above statement analyzing the main features of the principle of autonomy in relation to 1972 Constitution. **[Q7; Apr 2015; 16 marks]**
- (i) Explain the difference between a Unitary State System and a Federal State System.
(ii) What system of government should be appropriate to Sri Lanka? Give reasons for your answer. **[Q9; Apr 2014; 16 marks]**
- (a) What is meant by an “Autochthonous Constitution”?
(b)What are the characteristics of such a Constitution?

(c) Explain with reasons whether the 1978 constitution is an “Autochthonous” Constitution? [Q8; Dec 2013; 9 marks]

- Explain the essential features of a unitary state with special reference to the provisions of the constitution and decided cases. [Q9; Dec 2013; 9 marks]
- (a) What is meant by an “Autochthonous Constitution”?
(b) What are the characteristics of such a Constitution?
(c) Explain with reasons whether the 1978 constitution is an “Autochthonous” Constitution? [Q4; Oct 2011; 12 marks]
- What are the characteristics of an Autochthonous Constitution? [Q8; Apr 2011; 9 marks]
- Describe the classification of Constitutions. [Q11; Apr 2011; 9 marks]
- Write a note on the classification of Constitutions. [Q1; Oct 2010; 9 marks]
- Explain the essential features of a unitary state with special reference to the provisions of the constitution and decided cases. [Q7; Apr 2010; 12 ½ marks]
- Write a note on ‘Constitutional Autochthony’ with reference to the Constitutions of Sri Lanka since independence. [Q10; Apr 2010; 12 ½ marks]

3. CONSTITUTIONALISM

- In lay man’s terms, constitutionalism is to be understood as a concept which speaks about the legitimacy of the government.
- Constitutionalism is a way of evaluating the form, substance and legitimacy of the constitution.
- It focuses on ensuring that the government is limited, i.e. that there are limitations on the powers of government.
- The nature of the limitations imposed upon the government depend on what the architects want to safeguard:

- ⇒ They may want to ensure that the system of government cannot be changed arbitrarily and introduce a clause to say that the constitution can be changed only with a certain majority or after a referendum.
- ⇒ They may feel that a certain relationship between the legislature and executive is important.
- ⇒ They may feel that the Judiciary should have a certain guaranteed degree of independence.
- ⇒ They may feel that there are certain rights that citizens have which not be tampered with.
- Thus, it supports fundamental laws. Ideas, attitudes and patterns of behavior that limit and regulate the power of government.

Sovereignty —————→ people's power, on trust, in order to serve the public.

- The constitution is not only the source that derives this power, but also the fundamental source which limits or regulates that power by imposing checks and balances on government institutions belonging to the Judiciary, executive and institutions, its authority, powers, functions and personnel should be kept apart without vesting it all on one person or one institution, which could lead to confusion. However, it is also reckoned that pure separation of power do not assist a government practically in functioning properly and may sometimes lead to a 'constitutional deadlock' if separation of power is strictly practiced.

legislature.



Supported by the doctrine of separation of powers

- Establish impartiality
- Prevent abuse of power

- The constitutional doctrine of separation of powers (SOP) suggests that these

- The doctrine of SOP guarantees that the human rights. Freedoms and liberties of the citizens are best protected through a constitution which divide proper institutional powers, demarcate the legal boundaries of those institutions and their legal jurisdictions.

Therefore concept of Constitutionalism + doctrine of SOP => government derived from and limited to a

law

body of fundamental



Constitution

- However, the Supreme Constitution cannot do anything in isolation without the high regard for the rule of law in a country.

Constitutionalism thus proclaims the desirability of ROL over the arbitrary judgment and fiats of public officials.

- For a constitution (which is considered as supreme law of the country) to be effective and efficient, and the ROL must be given due recognition. For without the ROL, the concept of constitutionalism is no more than a mere concept.
- For the officials on the institutions who practice governmental power, to limit its exercise of power to its jurisdiction, the official as well as the government should be aware of the constitutional limits available to them in order to protect the rights, interests and liberties of the Citizens.

But mere awareness will suffice, if they do not hold the ROL in high regard in its inherent virtue and liberties of the citizens.

- Thus having the constitutional right as the backbone of the country's supreme law undoubtedly protects the rights, freedoms and liberties of citizens.
- Thus, a country's constitution assists the citizens as well as public officials to determine the scope of their rights and powers, whether any official has acted ultra vires (beyond the powers) or intra vires (within the powers). This determination of scope guarantees the protection of human rights of citizens recognized by the supreme law.



Practical application and also the touchstone of the concept of constitutionalism "Limited Government under a Supreme Law".

- The concept of ROL is not only of great antiquity but also one of the predominant concepts of constitutionalism.
- In essence, the concept suggests that society should be governed by law alone and all must be equally subjected to the law.



Similar idea to that of constitutionalism; legitimate government under Supreme law.

- For a government to be conducted under the law it is essential that there are both judicial and parliamentary procedures which ensure that the government only uses those powers that have been conferred on them and the government is accountable to the people through Parliament.

But if the executive have excess power over proceedings of Parliament and also the ability to influence the legislature and Judiciary, such powers derogate from Separation of Powers.

- The Judiciary though separate from legislature constitutionally, is subordinate to the law making Parliament. The functions of judges and Judiciary being to interpret the statutes a

much as possible in line with the intentions of Parliament and the presumption that the intentions of the Parliament was, as always to adhere to the ROL is borne in mind by the Judges in deciding FR cases.

Judges or no judicial office can declare an Act of Parliament invalid. Validity of an Act passed by the legislature is unchallengeable and Parliament at any given time can overturn a judicial decision by enacting a new Act because Parliament has the ultimate power to make laws.

*** Thus we can argue that ROL cannot stand alone without Constitutionalism and vice versa!**

- For the ROL to be adhered to there should be a separation between the law makers and law enforcement.
Thus constitutionalism demands a clearly defined separation of the two concepts, sovereignty and the government.
- How the FRs are protected in the constitution by itself is of utmost importance.
ROL demands interpretation of Acts of parliament bearing in mind the intentions of parliament, but the constitutional restrictions placed on the government power also has to be observed as a part of ROL and to uphold constitutionalism.
- In safeguarding FRs, the idea of constitutionalism has played a major role in SL because FRs are both written and entrenched.
- SL has emerged successfully with the concept of constitutionalism and with its practical plausibility.
 - ⇒ The written constitution adds value in terms of writtenness and entrenchment of FR and entrenchment of FR and extends to other important provisions of the constitution.
 - ⇒ The issue of ROL in its ability to set the restrictions upon the Freedoms and rights of individuals is remedied by the Sri Lankan constitution by clearly enumerating article 15 (Restriction of FRs)
 - ⇒ SL maintains its parliamentary sovereignty by Article 75 and 83 while not compromising on the supremacy of the constitution.

RELATED PAST PAPER QUESTIONS:

- “All salient features of the principle of constitutionalism are nothing but the requirements for ‘Rule of Law’. But these features are expected to appear with attractive labels.”
Do you agree? Explain the salient features of this principle with reference to their relationship with the Rule of Law. Cite authorities at least from two different jurisdictions. [Q1; Oct 2016; 20 marks]
- “There is some merit saying that out of all the post - independence Constitutions of the country, the Soulbury Constitution ensured “Rule of Law” in the country surviving all the challenges to a Constitutional democracy. The spirit of Constitutionalism was to be developed during that period”

Do you agree? Identify the salient features of the Soulbury Constitution and compare them with the other two Republican Constitutions in the light of Constitutionalism. **[Q1; Apr 2016; 20 marks]**

- The Principle of Constitutionalism ensures that 'Rule of Law' prevails over 'Rule by Law'. However, the question remains as to whether in a Constitutional democracy the 'law' could be defined by the legislature."

Do you agree? Identifying the salient features of Constitutionalism discuss to what extent they are to be found in the 1978 Constitution. **[Q1; Oct 2015; 20 marks]**

- "in order to assure 'the sovereignty of the people', it is necessary to create a depoliticized government and it could only be done by 'Rule of Law' found up on the principles of 'Constitutionalism' and not by other means".

Discuss the above statement analyzing the relevant provisions of the 1978 Constitution giving attention to decided cases. **[Q1; APR 2014; 20 marks]**

4. RULE OF LAW

- Rule of Law is that, every man is governed by law and not by the whims and fancies of the rulers. Rule of law treats every person alike. Due to the rule of law arbitrary departure from law and unfair victimization of another is prevented.
- The two main aspects of the concept of the Rule of Law are – I. Minimizing the abuse of power by those in authority
II. Thereby safeguarding the Fundamental Rights of people.
- Rule of Law also means the Supremacy of Law. During the time kings ruled, the power of the king was supreme. It was based on the concept “King can do no wrong”. However it was later found that setting up a legal system to regulate is far better than giving supreme power to an individual person.
- Many Historians and Jurists have explained the Rule of Law –
 - ⇒ **Aristotle**
“The Rule of law is better than that formulated by any individual”
 - ⇒ **Bracton**
“The King himself ought not to be subject to man, but subject to God and the law, because the law makes him king”
 - ⇒ **Dicey** was the first to give the rule of law a clear explanation. He gave 3 meanings to this concept.
The meanings given by Dicey for the Rule of Law contrasted with a system of government based on the exercise of power by person in authority with “wide, arbitrary or discretionary powers of constraint.”
- € No man is punishable or can be made to suffer in body or goods, except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.
 - This meaning stresses the idea that the Law is Supreme. In modern day however, the parliament is recognized as the supreme power.
 - The South African Law (Apartheid law) and the Special Commissions of Inquiry Act are contrasts to this first meaning.
 - When Dicey gave these meanings in 1985, the primary function of the state was ‘preservation of law and order’ and handling of defence and external affairs.
 - However, now the state, in addition to the above focuses on public welfare including education, Communication, health, agriculture etc.
 - Therefore a state is vested with wide discretionary powers in executive.
- € Everyman, whatever his rank or condition, is subject to the ordinary law of the state and amenable to the Jurisdiction of the ordinary tribunals.
 - This gives the idea that every man is equal before the law.
 - However, certain public citizens have received certain privileges of immunity from the legal process. (Ex: President of the Republic, Ambassadors, Judges)
 - There is a need for special tribunals and courts in a modern state provided they are independent.
- € The constitution of England is the result of the ordinary law of the land.
 - The constitution is judge-made law
 - An unwritten constitution doesn’t guarantee Fundamental Rights as much as in a written Constitution.

Brown V Board of Education of Topeka [(1953) 347 US 483]

- The US declared that the state laws that established separate public schools for the black and white students denied the black students equal educational opportunities.

Sriyani Silva V Iddamalgoda and Others [(2003) 1 SLR 14]

- Alleged Violation of Article 11 of the 1978 Constitution
 - All the principles of the British Constitution are not found in Judicial Decisions.
(Ex: Bill of Rights)

⇒ The essence of Rule of law as explained by **Prof. Goodhart** is as follows-

“Public officers should be governed by law which limits their powers.” ⇒ **Jennings** has tried to equate the Rule of law with democracy.

It was found that the above explanations were brought out with a view of avoiding the mistakes that Darcy made.

- The Rule of Law has been used universally in many instances –
 - Use of the concept by judges
 - Reference to international instruments (preamble to the Universal declaration of Human Rights 1948)
 - The European Convention of Human Rights 1950
 - Reference to the rule of law made in the English Constitutional Reforms Act 2005

International Commission of Jurists and the Rule of Law

The International Commission of Jurists has tried to give material content to the concept of Rule of Law and formulate it in a manner that suits the modern world.

The jurists gathered in New Delhi in 1959 and arrived at 4 different conclusions which were embodied in 4 reports as follows –

1. The Legislature and the Rule of Law
2. The Executive and the Rule of Law
3. The Criminal Process and the Rule of Law
4. The Judiciary and the legal process and the Rule of Law

The Legislature and the Rule of law

It is noted here that the legislature in a free society under the Rule of Law is to create and maintain conditions which will uphold the dignity of man as an individual.

This dignity requires not only civil and political rights, but also the establishment of the social, economic, educational and cultural rights which are essential to the development of a personality.

This also states that the powers of the legislature should be forced and determined to enforce fundamental constitutional provisions such as guaranteeing a free election and safeguarding the existence of an independent Judiciary.

The legislature has the responsibility to –

- ⇒ Abstain from enacting retrospective penal legislation.
- ⇒ Not discriminate in its laws between citizens.

- ⇒ Not interfere with the freedom of religious belief. ⇒
- Not impair the exercise of fundamental rights.

The Executive and the Rule of Law

There should be adequate safeguards against the abuse of power by the executive. Further it ensures a reasonable standard of economic security, social welfare and education for a mass of people.

Criminal Process and the Rule of Law

The report states that, if a citizen is charged with a criminal offence, he is entitled to receive the following minimal necessities –

- € Certainty of the Criminal law (Absence of retrospective penal legislation)
- € The presumption of innocence
- € Restriction of powers of arbitrary arrest and detention
- € The opportunity to know the charges for arrest
- € Elimination of evidence obtained by discreditable means
- € A fair trial open to the public
- € Having measures for appeal
- € No excessive punishments

The government has to ensure that all these rights are available for every citizen in the country.

The Judiciary and the Legal profession under the Rule of Law

- The Judiciary should be independent from the interference of the legislature and executive.
- Equal access of law should be available for the Rich and Poor alike.
- It is essential that representation is made available and litigation provided for those who are unable to afford the same.

Declaration on upholding Human Rights and the Rule of Law in combating terrorism In

the suppression of terrorism, states must give full effect to **11 principles**.

1. Duty to protect

- All states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction.
- States must take measures to protect such persons from acts of terrorism.
- Counter-terrorism measures must always be taken with strict regard to the principles of legality (actions taken to combat terrorism must be legal), necessity (there must be a need for it), proportionality (punishment must fit the action) and non discrimination (has to apply to all terrorist groups alike).

2. Independent Judiciary

- In the development and implementation of counter-terrorism measures, states have an obligation to guarantee the independence of the judiciary and its role in reviewing state conduct.
- Government may not interfere with the judicial process or undermine the integrity of the judicial decisions.

3. Principles Of Criminal Law

- States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorists acts are only charged with crimes that are strictly defined by law.
- States must not apply criminal law retrospectively.
- Criminal responsibility of for acts of terrorism must be individual and not collective.
- In combating terrorism, states should apply and where necessary adopt existing criminal laws rather than create new, broadly defined offences or resort to examine administrative measures, especially those involving deprivation of liberty.

4. Derogations (where certain rights can be suspended /restricted for a particular period of time)

- States must not suspend rights which are non - derogable under treaty of customary law.
- States must ensure that any derogation from a right subject to derogation during emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.

5. Peremptory Norms

- States must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman and degrading treatments or punishment.
- Whenever such acts occur, they must be effectively investigated without delay and those responsible must be brought promptly to justice.

6. Deprivation of Liberty

- States may never detain any person secretly or incommunicado and must maintain a register of all detainees.
- States must provide all persons deprived of their liberty, prompt access to lawyers and family members and medical personnel at the place detained.
- States have the duty to ensure all detainees are informed of the reasons for the arrest and any charges and evidence against them and are brought before a court.
- All detainees have a right to habeas corpus or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention.
- Administrative detention must remain an exceptional measure, be strictly time limited and be subject to frequent and regular judicial supervision.

7. Fair Trial

- States must ensure at all times and in all circumstances that alleged offenders are tried only by an independent and impartial tribunal established.
- The alleged offenders must be accorded a full fair trial guarantees, including the presumption of innocence, the right to test evidence, right to defence, right to effective legal counsel and right of appeal.
- States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military courts.

- Evidence obtained by torture or other means which constitute a serious violation of human rights against a defendant or a third party is never admissible and cannot be relied in any proceedings.
 - Judges trying lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.
8. Fundamental Rights and Freedom
- In the implementation of counter- terrorism measures, states must respect and safeguard fundamental rights and freedoms including freedom of expression , religion, conscience or belief association and assembly and the peaceful pursuit of the right to self determination as well as the right to privacy.
 - All restrictions on fundamental rights and freedoms must be necessary and proportionate.
9. Remedy and reparation
- States must ensure that any person adversely affected by counter-terrorism measures of a state or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation.
 - All those who are responsible for serious human rights violations must be held accountable before a court of law.
 - An independent authority should be empowered to monitor counter terrorism measures.
10. Non – Refoulment
- States may not expel, return, transfer or extradite a person suspected or convicted of acts of terrorism to a state where there is a risk that the person would be subjected to a serious violation of human rights including cruel, inhuman or degrading treatment or punishment, enforced disappearance or extrajudicial execution.
11. Complimentarity of Humanitarian Law
- During times of armed conflicts and situations of occupation, states must apply and respect the rules and principles of both international humanitarian law and human rights law.

Sri Lankan Case Law that have used the Rule of Law

1. *Premachandra V Jayawickrema and Other* (1994) 2 SLR 90 @ 102
2. *Bandara and another V Premachandra* (1994) 1 SLR 301 @ 314
3. *Hemasiri Fernando V Samaraweera and Others* (1999) 1 SLR 415 @ 420
4. *In Re 18th Amendment to the Constitution* (2002) 2 SLR 71
5. *Senarath V Kumaratunga and 99 Others* (2001) 1 SLR 59
6. *Ven, Ellawela Medananda Thero V District Secretary, Ampara and Others* (20019) 1 SLR 54 **RELATED PAST PAPER QUESTIONS:**

- “All salient features of the principle of constitutionalism are nothing but the requirements for ‘Rule of Law’. But these features are expected to appear with attractive labels.”

Do you agree? Explain the salient features of this principle with reference to their relationship with the Rule of Law. Cite authorities at least from two different jurisdictions. [Q1; Oct 2016; 20 marks]

- “The concept of Rule of Law embodies several important elements such as every individual is possessed of certain rights and freedoms which should be guaranteed by the state, the need for an independent judiciary and establishment of social, economic and cultural conditions which will permit men to live in dignity.”
Critically examine the above statement. [Q6; Apr 2015; 16 marks]
- “In combating terrorism it is the fundamental duty of the state to protect and uphold the Rule of Law.”
Critically examine the above statement. [Q3; Oct 2014; 16 marks]
- “The Rule of Law implies necessarily the legitimacy of laws and accountability of the state, having as its core, the idea of justice as an underlying moral basis for all laws. Law must protect basic human rights and act as a constraining fetter on legislative, executive and judicial powers.”
Explain the above statement. [Q10; Apr 2013; 9 marks]
- “Our Constitution and system of Government are founded on the Rule of Law and everything must be done according to Law.” Explain the above statement. [Q5; Oct 2012; 9 marks]
- “The Rule of Law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law.” Analyse the above statement critically. [Q5; Apr 2012; 9 marks]
- “The concept of Rule of Law is evolving and needs to be understood and applied based on political, social and economic imperatives. It has no relevance in a society plagued with terrorism.”
Make a critical assessment of this statement with reference to the work of the International Commission of Jurists. [Q3; Oct 2011; 9 marks]
- “The rule of law implies the legitimacy and accountability by state organs and ensures the exclusion of the existence of arbitrariness.” Analyze the above statement critically. [Q6; Apr 2010; 9 marks]
- Write a note with reference to decided cases how our Supreme Court has endeavoured to prevent the erosion of the Rule Of Law, which is considered to be the foundation of the constitution and the system of government. [Q5; Apr 2010; 12 ½ marks]

5. SEPARATION OF POWERS

Traditionally, the powers of a government are divided into legislative, Executive and Judiciary.

Montesquieu formulated the “Doctrine of Separation of Powers” according to which, concentration of powers of government in one body will lead to erosion of political freedom and liberty. Thereafter many academics such as Blackstone, Jay and Hamilton, E. S. Crown, Marshall and L. J. M. Cooray further elaborated the concept. Accordingly, there arose 4 characteristics of the doctrine;

- i. The three branches of government ought to be composed of different powers. ii. There should be functional separation between the organs of government.
- iii. One organ should not control or interfere with the powers and functions of another.
- iv. Modern governments demand coordination of the various functions of government rather than a rigid separation.

RELATED PAST PAPER QUESTIONS:

- “When it comes to the doctrine of separation of powers, since all three post – independence constitutions of Sri Lanka adopted three different approaches to it, a student of Constitutional Law in this country gets rather confused over the application of the doctrine.” Do you agree? Discuss in light of the relevant provisions of the three constitutions. **[Q3; Oct 2016; 16 marks]**
- In your opinion, does the doctrine ‘separation of powers ensure sovereignty of the people’ continue to remain with the people? Identify, if any, the relevant provisions of the Second Republican Constitution providing the operative basis for the doctrine. Why do you think that they are for safeguarding the people’s sovereignty? **[Q3; Apr 2016; 16 marks]**
- “It is not certainly exaggerating to say that out of all the post – independence Constitutions of the country, the Soulbury Constitution upheld the doctrine of separation of powers in its letters and spirit.” Critically examine the above statement in light of the relevant provisions of the Constitutions. Support your answer with case law authorities. **[Q3; Oct 2015; 20 Marks]**
- “There would be an end of everything, were the same man or the same body, whether of the nobles or of the people to exercise those three power, that of enacting laws, that of executing the public resolutions and that of trying causes of individuals.” Critically examine the above statement analyzing the relevant provisions of the 1978 Constitution giving attention to the decided cases. **[Q1; Apr 2015; 20 marks]**
- “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 power of removal of Judges of the Supreme Court and the court of Appeal conferred on the President upon address of Parliament is a check provided by the Constitution to sustain the balance of power between the three organs of the government. The judiciary has no role to play in that removal procedure.” Critically examine the above statement analyzing the relevant provisions of the 1978 Constitution giving attention to decided cases. **[Q1; Oct 2014; 20 marks]**
- “Though there are specific provisions in the Constitution in relation to the checks and balances of one organ, of other organs, in this effect it has not been so. Discuss the above statement with reference to the provisions of the Constitution and decided cases. **[Q6; Apr 2013; 9 marks]**
- (a) Discuss with reference to decided cases the meaning of “Judicial Power”.

- (b) Discuss instances where the courts have struck down legislative acts or executive act as being unconstitutional since they encroached upon "Judicial Power". **[Q2; Dec 2013; 9 marks]**
- Critically analyze the provisions of the Constitution relating to separation of powers and state as to whether the present constitution recognizes such separation. **[Q9; Oct 2012; 9 marks]**
 - Briefly describe the concept of separation of powers analyzing the provisions of the second Republican Constitution. **[Q1; Apr 2012; 9 marks]**
 - (a) Discuss with reference to decided cases the meaning of "Judicial Power".
(c) Discuss instances where the courts have struck down legislative acts or executive act as being unconstitutional since they encroached upon "Judicial Power". **[Q5; Oct 2011; 12 marks]**
 - (a) Discuss what is meant by the doctrine of Separation of Powers and its importance in a democratic society.
(b) Compare the separation of powers under the Soulbury Constitution and the 1978 constitution with reference to decided cases.
[Q9; Oct 2011; 12 marks]
 - Briefly describe the concept of separation of powers analyzing the provisions of the Soulbury Constitution, the First Republican Constitution and the Second Republican Constitution. **[Q2 ; Oct 2010; 9 marks]**
 - Do you consider the doctrine of 'Separation of Powers' as important? Give reasons for your answer with illustrations from the constitutions of Sri Lanka since independence.
[Q10; Apr 2010; 12 ½ marks]

Point		Soulbury Constitution	1972 Constitution	1978 Constitution
Legislative and Executive	Composition	<ul style="list-style-type: none"> Queen was the head of executive and part of the legislature Cabinet of ministers selected from House of Representatives or Senate <p><i>Therefore no Separation</i></p>	<ul style="list-style-type: none"> President was the head of executive and was not a part of the legislature Members of cabinet had to be members of the National State Assembly (selected by the president) <p><i>Therefore no clear cut Separation</i></p>	<ul style="list-style-type: none"> President was the head of executive [Article 30(1)] and cabinet of ministers [Article 43(2)], but not a part of the legislature [Article 91(1)(c)] Members of cabinet elected from members of parliament <p><i>Therefore no clear cut Separation</i></p>
	Control and Interference	<ul style="list-style-type: none"> Act not valid until approved by queen Cabinet of ministers couldn't function without majority of the legislature Statutes enacted by parliament drafted by cabinet of ministers <p><i>Therefore no Separation</i></p>	<ul style="list-style-type: none"> Legislature controls executive by : <ul style="list-style-type: none"> Defending budget Passing no confidence motions Defeating policy statements Executive controls legislature by: <ul style="list-style-type: none"> Preparing and drafting bills Planning and implementing policies <p><i>Have a functional separation which is not too strict</i></p>	<ul style="list-style-type: none"> Legislature controls executive by: <ul style="list-style-type: none"> Parliament can bring about an impeachment motion against the President [Article 38(2)] Parliament shall determine the salary of the President [Articles 36 (1) & (2)] Cabinet will be collectively responsible and answerable to Parliament [Article 42(2)] Defending budget Passing no confidence motions Executive controls legislature by:

				<ul style="list-style-type: none"> - President is entitled to Parliamentary privileges and immunities [Article 32(3)]
				<ul style="list-style-type: none"> - Preparing and drafting bills [Article 85(1) & (2)] - Planning and implementing policies [Article 122(1)(b)] <p><i>Have a functional separation which is not too strict in terms of articles 76(2) & (3) and 155 (2)</i></p>

	Exercise of each other's functions	<ul style="list-style-type: none"> ▪ <i>Weerasinghe V Samarasinghe</i> <ul style="list-style-type: none"> - Governor General had power to make regulations, but parliament retains control over executive. ▪ <i>Associated Newspapers Ceylon LTD(Amendment) Bill</i> <ul style="list-style-type: none"> - Minister can amend an Act relevant to his ministry. <p><i>Exercised each others' powers to a certain extent</i></p>	<ul style="list-style-type: none"> ▪ Legislative power of NSA ensured! [Article 45(1)] <ul style="list-style-type: none"> - Subordinate Legislation [Article 45(3)] ▪ Power to make Emergency regulations delegated to President under the Public Security Ordinance which was enacted by the NSA [Articles 134(1) & 45(4)] ▪ President acts on the advice of the Prime Minister ▪ President is responsible for the NSA [Article 91] <p><i>All powerful NSA! Therefore powers not exercised by the executive</i></p>	<ul style="list-style-type: none"> ▪ Parliament shall not abdicate or delegate its law making power. [Article 76(1)] <ul style="list-style-type: none"> But can do so for subordinate legislation. [Article 76(3)] ▪ Delegation of power to President to make Emergency Regulation [Article 76(2)] as per Public Security Ordinance which was deemed to be enacted by Parliament [Article 155(1)] <ul style="list-style-type: none"> - <i>Yasapala V Minister of Education</i> <p><i>President can exercise legislative power at one instance, but parliament cannot exercise executive power.</i></p>
				<ul style="list-style-type: none"> ▪ Judiciary can issue prerogative writs against executive actions. [Article 140] ▪ Fundamental Right Jurisdiction of the SC [Articles 17 and 126]

Judiciary and Executive	Composition	<p style="text-align: center;">← Judicial Officers cannot be members of the executive and vice versa →</p> <div style="display: flex; justify-content: space-around;"> [Section 13(2)(b)] [Article 70(1)(c)] </div> <p style="text-align: center;"><i>Compositional Separation Present</i></p>		
	Control and Interference	<ul style="list-style-type: none"> ▪ Removal of Senior Judges by Governor General upon address to the House of Lords and Commons. [Sec 52(20)] ▪ Appointment of members to Judicial Service Commission by Governor General [Sec 53] ▪ Judiciary issued prerogative writs against executive. <p><i>Interference by both Organs</i></p>	<ul style="list-style-type: none"> ▪ Judges of SC and CA appointed and removed by President upon address to NSA[Article 122] ▪ Cabinet appoints lower court judges after receiving recommendations from the Judicial Service Advisory Board [Article 124] ▪ Judiciary was able to issue prerogative writs against executive actions. <p><i>Interference by both Organs</i></p>	<ul style="list-style-type: none"> ▪ President appoints CJ, President of CA, Judges of SC and CA upon the approval of the Constitutional Council. [Article 107(1)] ▪ Appointment of members to Judicial Service Commission by president on the approval of the Constitutional Council. [Article 111D(1)] ▪ Judges to the HC appointed by President on recommendation of JSC and consultation with the AG. [Article 112(2)(a)] ▪ Removal of SC and CA Judges by the President upon address of Parliament [Article 107(20)] <ul style="list-style-type: none"> - Shirani Bandaranaike V Chamal Rajapakse and Others ▪ Granting of Pardon by President [Article 34(1)]

	Exercise of each other's functions	<p>← Exercise of Judicial power by executive was invalid, however members sometimes acted quasi judicially <i>Queen V Liyanage</i></p> <ul style="list-style-type: none"> Sometimes members of the executive act quasi Judicially. <p>← Exercise each others' functions to a certain extent →</p>		
Legislature and Judiciary	Composition	<ul style="list-style-type: none"> Queen was the nominal head of both organs Judicial officers cannot be members of the legislature and vice versa <p><i>As Queen was the head of both organs, no strict separation</i></p>	<ul style="list-style-type: none"> Judicial officers cannot be members of the NSA [Article 70(1)(c)] and vice versa. <p><i>Strict Separation in both Organs</i></p>	<ul style="list-style-type: none"> Judicial officers cannot be members of Parliament [Article 91(1)(d)(i)] and vice versa <p><i>Strict Separation in both Organs (Functional Separation)</i></p>

	Control and Interference	<ul style="list-style-type: none"> ▪ Judicial review of legislation present ▪ Both Houses could request Governor General to remove an judge of the Supreme Court ▪ Salaries of Judges determined by Parliament (But cannot be reduced during tenure) ▪ Parliament could constitute Courts (But cannot appoint members) <p><i>Judiciary is seen to interfere with legislature, but not vice versa</i></p>	<ul style="list-style-type: none"> ▪ NO Judicial review of legislation ▪ Salaries of Judges determined by NSA (But cannot be reduced during tenure) ▪ NSA could constitute Courts (But cannot appoint members) <p><i>Generally free from each other's control</i></p>	<ul style="list-style-type: none"> ▪ NO Judicial review of legislation [Article 80(3)] ▪ Determination of SC /CA judges salaries(but cannot be reduces during tenure) ▪ Removal of SC/CA judges by parliament (upon proof through standing orders) ▪ Constitutional Jurisdiction of SC <p><i>Have independence from control of each other</i></p>
	Exercise of each other's functions	<ul style="list-style-type: none"> ▪ Parliament exercises judicial power in hearing matters relating to Parliamentary privileges. ▪ Framing of rules by SC and CA (Judiciary exercising legislative power) <p><i>Exercise each other's Functions</i></p>	<ul style="list-style-type: none"> ▪ NSA exercises judicial power in hearing matters relating to Parliamentary privileges. ▪ Framing of rules by SC and CA (Judiciary exercising legislative power) <p><i>Exercise each other's Functions</i></p>	<ul style="list-style-type: none"> ▪ Parliament exercises judicial power in hearing matters relating to Parliamentary privileges. <ul style="list-style-type: none"> - <i>Premachandra V Montague Jayawickrama & Another</i> ▪ Framing of rules by SC and CA (Judiciary exercising legislative power) [Article 136]

				<ul style="list-style-type: none"> ▪ Judges may interpret Acts and make binding laws [Article 125]
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Summary of SOP in 1978 Constitution

- Have a separation in composition of legislature and Judiciary
- Functional separation between legislature and executive, but not strict.
- Exercise of each other's powers seen in legislature and judiciary.
- Conceptual separation of executive and Judiciary seen, but functions flow into each other.
- Wide control by executive over legislature.
- Executive controlled extensively by Judiciary.
- Judiciary free from executive control.
- Legislature and Judiciary Free from each other's control.

6. SOVEREIGNTY

Sovereignty is the absolute power or authority of the state. In democratic states, sovereignty is vested with the people.

In Sri Lanka, both Republican Constitutions (1972 & 1978) recognize the sovereignty of the people and it is inalienable.

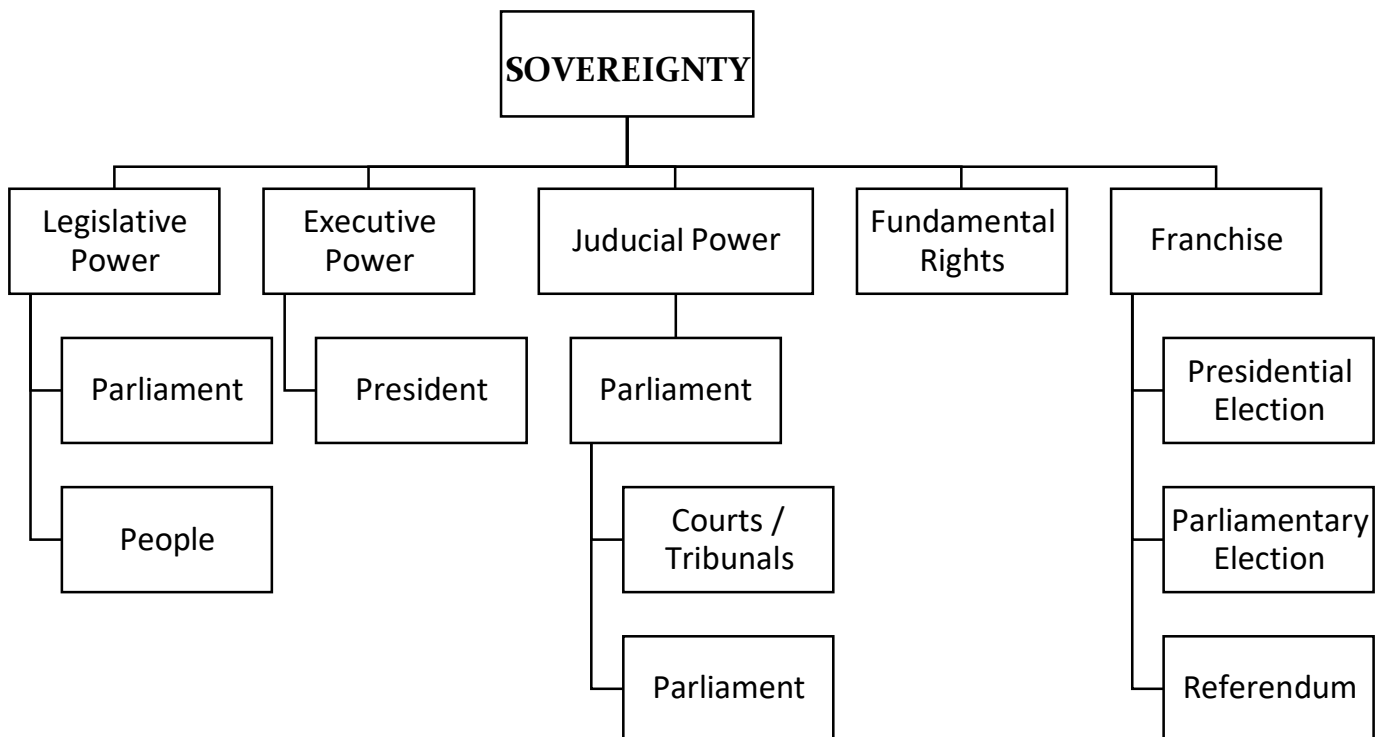
1972 Constitution

- Sovereignty is vested with the people and is exercised by the National State Assembly.
 - *Article 3,*
“In the Republic of Sri Lanka; Sovereignty is in the people and is inalienable”
 - *Article 4,*
“The Sovereignty of the people is exercised through a National State Assembly ...” •
Sovereignty contained only the government powers; Legislative, executive and Judiciary.
- Fundamental Rights were not identified as a part of sovereignty and no mechanism to challenge FR violations.
- No Judicial review of legislation.
 - The constitutional courts can review bills inconsistent with the constitution, but NSA was not bound to enforce the decision. The NSA had sole authority.
- Constitutional provisions including sovereignty were not entrenched. NSA could change any provision with a 2/3rd majority.
- There were no provisions for the requirement of a referendum.

Sovereign power was nominally vested with the people. The concept was justiciable. There was no mechanism for people to exercise their sovereign power except by the NSA.

Thus it can be stated that, under the 1972 constitution sovereignty of the people was nominally recognized but the power was essentially with the NSA.

1978 Constitution



- Sovereignty is in the people and is inalienable.
 - *Article 3*
“In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes powers of the government, Fundamental Rights and Franchise.”
- *Article 4* depicts how the people shall exercise their sovereign power.
 - Legislative Power shall be exercised by parliament and by people at a referendum [4(a)].
 - Executive power shall be exercised by the president [4(b)].
 - Judicial power shall be exercised by parliament through courts and tribunals [4(d)].
 - FR and Franchise shall be exercised by the people directly. Franchise can be used at a presidential election or parliamentary election and referendum [4(e)].
- Supreme Court is vested with the Fundamental Rights Jurisdiction under *Article 126*. Therefore the Supreme Court can protect the rights and freedoms of the people. If there is a violation of FR, people can exercise their Sovereign power by applying to the SC for relief.
- Supreme Court has Constitutional Jurisdiction. The legislature is prevented from enacting laws inconsistent with the constitution. Therefore the parliament cannot alter the powers given to it by the people without the consent of the people.

- *Article 83* states that certain articles [1,2,3,6,7,8,9,10,11,30(2), 62(2), 83] of the constitution are extremely important and cannot be altered without the approval of the people at a referendum. This again, illustrates the sovereignty exercised directly by the people. (source of the legislative power granted to parliament is people. People have the sovereign power. Therefore, when parliament has to alter certain provisions, it has to root to its source of power).
- *Article 85* provides for Referendum. The President shall submit bills to people at a referendum if it is in accordance with article 85(1).
According to *Article 85(2)*, the president shall submit bills to people which is not for amend, repeal, or inconsistent with the constitution, but which is rejected by parliament. This is clear proof that the people have ultimate sovereign authority as they have the power to override the parliament by approving such a bill. Thus absolute power is vested with the people.

Sovereign power of the people under the 1978 Constitution

The 1978 constitution gave a practical meaning to the concept of sovereignty by the following ways –

- a) *Article 3* which recognizes the concept of sovereignty.
- b) *Article 4* which explain in what manner it is to be exercises.
- c) Supreme Court having jurisdiction on Fundamental rights and constitutional matters.

According to *Article 83* which sets out certain requirements in regard to amend certain provisions of the constitution, article 3 is declared as an entrenched provision and therefore a Bill for amendment, repeal or replacement of it needs a 2/3rd majority in parliament and the approval by the people at a referendum for it to be passed as law.

However, *Article 4* is not an entrenched provision and thus needs only a 2/3rd majority of the parliament for amendment according to *Article 82(5)*. Therefore a valid argument arises that, the manner in which sovereignty is exercised can be amended without a referendum. However if article 4 is connected with article 3, then article 4 also becomes an entrenched provision and therefore will need the approval of the people at a referendum. The Supreme Court tried to connect Article 3 and 4 over a period of time (discussed below in detail).

Sovereignty of People and exercise of Legislative Power

1. *Wickramanayake V the State (1978-79-80) 1 SLR 299*

- It was argued for the petitioner that the entrenched article 3 attracts article 4 and therefore all the fundamental rights recognized in the constitution are entrenched.
- The court did not go to consider the situation that would have arisen since it was found that the restrictions imposed upon the fundamental rights which were challenged was in conformity with Article 15(5) and 15 (7).

- Thus there was some indication that the court was willing to consider the argument of the petitioner that the entrenched article 3 attracts article 4 and therefore all FRs recognized in the constitution are entrenched.

2. Development Councils Bills

- Clause 24 of the Bill gave power to the development council to levy taxes/rates determined by the council with the approval of the Minister.
- Article 148 of the constitution allows taxes to be imposed only under the authority of the parliament.
- Court held that the Bill violates Article 1448 which declares that taxes can be imposed only under the authority of parliament and that it contravenes Article 76 and is inconsistent with Article 3.

3. *In Re 13th Amendment to the constitution and the Provincial Councils Bill (1987) 2 SLR 312*

- Majority judgment: "Article 4 is not independently entrenched. To the extent that a principle contained or is a necessary corollary or concomitant of Article 3, a constitutional amendment inconsistent with such principle will require a referendum in terms of Article 83, not because article 4 is entrenched, but because it may impinge on Article 3."
- Minority Judgment: "this court has in fact ruled in a series of cases that Article 4 had to be read along with Article 3. Vide our rulings in SD 5/78, SD 4/80, SD 1/82, SD 2/82, the application of Article 4 however could be raised, still in any particular matter. It is not only Article 4 that we have often linked with Article 3, but by the same token our rulings would cover any article in the constitution which the court considers as being linked with any of the entrenched articles. So as to constitute a basic feature of the constitution."

4. *In Re 18th Amendment to the Constitution (2002) 3 SLR 71*

- Under clause 2 (proposed Article 41FF of the Bill which empowers the council to make rules of procedure and guidelines to be followed by it, the council is required before gazetting the rules (whereupon they would come into effect) to communicate such rules to parliament. No approval of parliament is required in the case of the constitution. Hence, clause 2 alienates the legislative power of the people in violation of Article 4(a); in the circumstances clause 2 requires to be passed by the special majority and approved by the people at a referendum in terms of Article 84(2) by virtue of Article 83.

Sovereignty of People and exercise of Executive Power

1. Land Amendment Bill

- Article 33(d) of the constitution conferred power on the President to make grants/disposition of state land.
- Sections 3 and 5 of the Land Grants (Special Provisions) Act and Section 27 of the Land Development Ordinance empowered the President to make such Grants/ dispositions of state land as constitutionally decreed in Article 33(d).

- This Bill was challenged on the basis that section 4(b) of the Bill, which made the president obliged to make grants upon the recommendation by the Minister was repugnant not only to Article 33(d), but Article 4(b) which attracted Article 3. - The Supreme Court upheld the decision.

2. *In Re 19th Amendment to the Constitution (2002)* 3 SLR 85

- Dissolution of parliament is a component of executive power of the people to be exercised by the president for the people. It cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of Article 70(1) of the constitution.
- The final say even in the situation referred to in Article 70(a) to (c) remains with the President. Therefore, the amendments contained in clause 4 and 5 of the Bill constitute an alienation of executive power inconsistent with Article 3 read with Article 4 of the constitution and require to be passed by the special majority required under Article 84(2) and approved by the people at a referendum by virtue of the provisions of Article 83.

Sovereignty of People and exercise of Judicial Power

1. Prevention of Terrorism (Temporary Provisions) (Amendment) Bill

- Clause 15A(1) of the Bill sought to empower the Minister to make order that a person be kept in custody of any authority which in effect meant that a person could be transferred from Judicial custody to ministerial custody.
- Argued that this violated Article 3 read with Article 4(c) of the constitution.
- The supreme court upholding this decision held that “ this constitutes an interference with a judicial order and is inconsistent with the provisions of Article 4(c) read with Article 3 of the Constitution and must therefore be passed by a 2/3rd Majority and approved by the people at a referendum as provided in Article 83...”

2. National Housing (Amendment) Bill

- Bill sought to confer power on the commissioner of National Housing (CNH) to order payment of compensation for improvement effected by person to whom state land has been given by an instrument of disposition and where such instrument is cancelled.
- Supreme Court held that these provisions appear to confer judicial power on the CNH and the Minister.
- It was held that this was inconsistent with the constitution and may be passed only by a special majority as required by Article 84(2).
- Note:
 - ⇒ Court made no reference to Articles 3 and 4 although in other cases it did draw the connection.
 - ⇒ Parliament passed the law without acceding to the amendment suggested by court to make the Bill consistent with Article 4(c).

Sovereignty of People and exercise of Franchise

1. Athukorala V Attorney General (1996) 1 SLR 238

- It was argued that Article 4(e) is not exhaustive of the manner in which the franchise is exercisable and included pradeshiya sabha elections even though not expressly mentioned in that Article.
- The Supreme Court held that “it would appear from the above provisions that having extended the concept of sovereignty by adding Fundamental Rights and Franchise, parliament in prescribing the manner of exercising the franchise limited it to voting at the occasions referred to in Article 4(e). The wider meaning of Franchise which would include voting at the other elections such as elections of local bodies or provincial Councils had not been adopted.

2. Local Authorities (Special Provisions) Bill

- The Supreme Court stated that the mere fact that in Article 4(e) there is no reference to elections of Local Authorities does not mean that the franchise as contemplated in Article 3 would not extend to elections to local authorities.
- The constitution has to be looked at as an organic whole and in terms cannot be fixed to meanings they may have had at the time of enactment. In terms of the 13th Amendment, the powers vested in the Local Authorities have acquired constitutional recognition.

As seen above it is evident that the Sri Lankan courts have tried to build a bridge between Article 3 and 4.

RELATED PAST PAPER QUESTIONS:

- “The doctrines of ‘Supremacy of Parliament’ and ‘Sovereignty of the people’ are not two mutually exclusive ones. Instead, they should be considered as inherently interrelated and buttressing each other.”
Discuss to what extent these doctrines have been conceptually accommodated in the 1978 constitution of Sri Lanka. **[Q2; Oct 2016; 16 Marks]**
- “In the Republic of Sri Lanka, sovereignty is in the people and is inalienable.”
Discuss with reference to decided cases as to how the Supreme Court has given a practical meaning to the political theory embodied in the above statement. **[Q4; Oct 2014; 16 marks]**
- “In the Republic of Sri Lanka sovereignty is in the people and is alienable. Sovereignty includes the powers of government, fundamental rights and franchise.” (Article 3 of the 1978 Constitution)
Describe as to how the sovereignty of the people referred to in the above statement operates within the Sri Lankan Constitutional structure. **[Q4; Apr 2014; 16 marks]**
- (a) Explain the meaning of “Sovereignty of the people” as stated in Article 3 and 4 of the Constitution.

(b)“The Public Trust Doctrine” reveals that power is conferred on all officers of state as trustees of the people, and that they are obliged to exercise their powers only for the benefit of the people.” Explain the above statement with reference to decided cases. **[Q2; Dec 2013; 13 marks]**

- (a) Explain the meaning of “Sovereignty of the people” a stated in Article 3 and 4 of the Constitution.
(b)“The Public Trust Doctrine” reveals that power is conferred on all officers of state as trustees of the people, and that they are obliged to exercise their powers only for the benefit of the people.” Explain the above statement with reference to decided cases. **[Q1; Apr 2013; 13 marks]**

- “Discretionary powers can never be treated as absolute and unfettered, unless there is compelling language; when reposed in public functionaries. Such powers are held in trust to be used for the benefit of the public and for the purpose for which they have been conferred – not at the whim and fancy of the officials for political advantage or personal gain.” Fernando J. in *Priynganie V Nanayakkara and Others* (1996) 1 SLR at page 399

Explain the above statement with specific reference to Articles 3,4 and 12 of the Constitution and decided cases. **[Q3; Oct 2012; 9 marks]**

- “Where sovereignty continues to be reposed in the People and the organs of the government are only custodians for the time being, that exercise the power for the people. Sovereignty is thus a continuing reality reposed in the people.” (in Re Nineteenth Amendment to the Constitution at page 98)
Explain the above statement with reference to Articles 3, 4, 12 and Article 28 (Fundamental Duties) of the Constitution and decoded cases. **[Q4; Apr 2012; 13 marks]**

- Discuss the ways in which the sovereignty of the people is exercised under the 1978 Constitution. **[Q10; Oct 2011; 12 marks]**

- “The powers exercised by all three organs of the Government should be routed and focused on the sovereignty of the people.”
Explain the above statement with reference to Articles 3 and 4 of the Constitution and decided cases. **[Q7; Apr 2011; 9 marks]**

- “The 1978 Constitution of the Democratic Socialist Republic of Sri Lanka contains many provisions guaranteeing the protection of fundamental rights and the language right. However the violations of such rights continue to be in the increase.”

Discuss the above statement with reference to Articles 3 and 4 (sovereignty of the people) and Article 28 (Fundamental duties) of the Constitution. Give your reasons for such an increase and suggest as to what measures you would recommend to ensure the implementation of the fundamental right and language rights. **[Q5; Oct 2010; 13 marks]**

- “Equality before the law means that among equals, the law should be equal and it should be equally administered, that like should be treated like. (Jennings: Law and the Constitution, 5th Ed. at. Pg 50)”
Discuss the above statement with reference to Article 12 of the 1978 Constitution of

Sri Lanka and the relevant decided cases. [Q1; Apr 2010; 12 ½ marks]

- “In the Republic of Sri Lanka, sovereignty is in the paper and is inalienable.”
Discuss with reference to decided cases as to how the Supreme Court has given a practical meaning to the political theory embodied in the above statement. [Q4; Apr 2010; 12 ½ marks]
- Is the right to information a fundamental right in Sri Lanka? Discuss with reference to decided cases. [Q8; Apr 2010; 12 ½ marks]

7. FUNDAMENTAL RIGHTS

The Nature and Scope

- The Independence Constitution of Ceylon (Soulbury Constitution) did not embody a Bill of Fundamental rights. The nearest it came to one was through Section 29 of the constitution.
- Section 29(2) provided that no law passed by parliament shall, for instance, “prohibit or restrict the free exercise of any religion”, or “make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable.” This section which had been designed to protect the interests of minority communities, failed to protect individuals against discrimination [*Mudanayake v Sivagnanasunderam* (1951) 53 NLR 25 at 30 and 44].
- The first Republican Constitution (1972) enshrined a number of fundamental rights in section 18(1), all of which were to be operative within certain confines or limitations stated in section 18(2) which applied to all those rights equally.
- The present constitution (1978) has a separate chapter on fundamental rights (Chapter VI).
- The Bill of Rights in the present constitution is quite elaborate in the sense that the several rights enumerated therein are not subjected to blanket restrictions. While some rights cannot be subject to any limitation (by way of ordinary/ subordinate legislation or executive/ administrative action), the other rights are subject to restrictions (prescribed by law) of varying degree.
- Such rights cannot be affected by the special majority in Parliament. Any attempt to affect such right will be successful only if people directly confirm such legislative action by way of approval expressed through a referendum.
- The present constitution recognizes the following rights – ✓ Religious Freedom – Article 10 and Article 14(1)(e) ✓ Freedom from Torture – Article 11 ✓ Right to Equality – Article 12(1) ✓ Personal Liberty – Article 13
✓ Freedom of Speech and Related Freedoms – Article 14(1)

(The rights will be discussed in greater detail in the lessons to follow)

- Article 15 sets down a number of far reaching restrictions on fundamental rights, except those which are absolute and cannot be restricted.
 - Articles 10, 11, 13(3) and 13(4) are absolute and cannot be restricted.
 - Articles 12, 13(1), 13(2) and 14 operate subject to the provisions of Article 15(7).

Enforcement of Fundamental Rights

- A breach of Fundamental Rights may be committed by a public authority or a private individual.
- If the breach is committed by a private individual, he is liable as if he violated an ordinary law. Ordinary judicial remedies must then be applicable. Article 12(3) envisages situations where breach of fundamental rights may be traced in a private action.
- Public authorities include the legislature, executive and the judiciary. Whilst the constitution makes provision for the prevention of legislative excess and relief against breaches of fundamental rights attributable for executive and administrative action, it makes no provision for remedies for violation of FR by Judicial action.
- Article 126 is the provision governing the remedy for breach of FR by executive or administrative action.

An outline of the rights recognized by the 1978 constitution

1. Religious Freedom

- There are 2 articles relevant to this freedom; **Article 10** and **Article 14(1) (e)**.
- Article 10 is in one sense a mental state. It is what a person thinks or perceives. None can see or feel it. As such it is absolute and cannot be restricted. However, if it is to be affected, it will require a referendum approval by the people.

Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

- Article 14(1) (e) deals with the external expression (manifestation) of such belief (the physical act of the aforementioned mental state) and is thus subject to limitations incorporated in Article 15(7).

The freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching

Cases where Article 10 was interpreted

- *Premlal v Weerasooriya* (1985) 2 SLR 177
 - In this case, an employee of the Railway Dept. made a petition to the SC under Article 126 that a deduction from his salary as a contribution towards the National Security Fund was a violation of his Freedom of thought, conscience and religion, since there was a possibility that one of the uses of to which the fund money may be put will be destruction of human life, which was repugnant to the tenets of his faith, Buddhism.
 - The SC held that there was no violation of FR since the contributions were not compulsory, but merely voluntary.
- *Christian Sahanaya Doratuwa Prayer Centre (Incorporation) Bill* (4 SC CD 30) - This bill was challenged on the basis that it violated article 10.
 - The bill provides for the setting up of a prayer centre and it also provides financial and economic benefits to its members.

- It was argued that the financial assistance will amount to inducement to follow that faith.
- Thus its main objective may be foreseeable conversion.
- Court held that the bill was unconstitutional and requires a 2/3 majority.
- The constitution guarantees to every person that the basic choice he makes with regard to his belief or would be taken with complete freedom without being exposed to any undue influence, allurements or fraud.
- *Teaching sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of SL (Incorporation) Bill [SC Special Determination No 19/2003]*
 - This bill had been aimed at propagating Catholic religion and to allure persons of other religions to convert.
 - It is by this petition that the Court held that propagation of one's religion is not a right recognized under Article 10.
 - Also under Article 14(1)(e) it has the right to manifest, worship, observance and practice one's religion.

- The constitution does not guarantee a FR to propagate religion.
- Even where propagation is expressly permitted, the entitlement does not extend to the right to convert others.
- *The prohibition of Forcible Conversion of Religion Bill (SC Determination Nos. 2-22 / 2004)*
 - It was sought to prohibit the conversion from one religion to another by using force, allurement or fraudulent means.
 - It also meant that Article 14(1) (e) can be restricted by Article 15(7).
 - Court recognized true evangelism as opposed to improper proselytism as a manifestation of religion.

2. Freedom From Torture

- The article relevant is **Article 11**.

No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

- This too is an absolute right and thus cannot be restricted under the constitution.
- This provision is invoked frequently in respect of ill-treatment by Police or Security forces.
- As declared in the UNDHR, 'Torture' means any act which inflicts severe pain and suffering intentionally, either physically or mentally.
- It further states that this FR cannot be denied/ prohibited even if the applicant is a hardcore criminal who is wanted by law.
- And also one can apply to the SC for remedy only if it is done by an executive or administrative action.
- It is the task of the SC to decide whether an act is a cruel, torturing, inhuman or degrading treatment.
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Cases where Article 11 was interpreted

- *Amal Sudath Silva v Kodithuwaku (1987) 2 SLR 119*
 - The petitioner was detained in police for 5 days and had beaten and tortured inhumanely.
 - The petitioner was an alleged suspect of theft.
 - However, Article 11 guarantees to each and every person irrespective of his/her status for getting recourse to the SC.
 - Further it was held that the petitioner couldn't identify the Police officers who tortured him.
 - The court held that the petitioner does not need to identify the officers who caused him the injury, but the state is responsible for the conditions that are being complained of and in the event the allegations are proved, the state is liable to pay compensation to him.
- *Deshapriya v Weerakoon (2003) 2 SLR 99*
 - The petitioner was a worker in the ship and was arrested on the allegation of theft. He was thereafter retained in the naval ship and tortured in an inhumane manner.

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- The captain (Commander) however denied knowing that such torture took place. He also went on to state that, even if such an act did take place, he was not directly involved.
- Court held that the commander was under a duty to take reasonable steps to ensure that persons under his custody be treated in a humane manner.
In accordance with the law, in the Forces, command is a sacred trust and thus discipline is paramount.
- *Adhikary v Amarasinghe (2003) 1 SLR 270* - The petitioners were a lawyer and his wife.
 - While the lawyer was travelling in his car with wife and child, a minister's vehicle overtook this vehicle, forcefully stopped the lawyer's car, pulled him out and assaulted him in the presence of his wife and child.
 - The psychological trauma suffered by the wife was addressed in the judgment and it was held that the acts committed by the security officers were in violation of Article 11.
- *Sriyani Silva v Iddamalgoda (2003) 1 SLR 14*
 - The petitioner in this case was the wife of the individual who was tortured and subsequently died as a result of those injuries.
 - The petitioner's husband was taken into police custody and tortured severely. He then files a FR case under Article 11. However, before the case was heard, he died due to the injuries suffered during the tortured period.
 - The question then arose whether the next of kin can represent the person whose rights were infringed (after his death).
 - The state took up the objection that Article 11 protects only the person whose rights have been violated and hence the wife cannot take up the matter.
 - This was a dissenting judgment wherein the dissenting judge stated that if the wife cannot take the case forward, there will arise an absurd situation in interpreting the law and thus held that the wife (next of kin) had the right to file the case and seek redress.

3. Right to Equality

- The relevant article is **Article 12(1)**.

All persons are equal before the law and are entitled to the equal protection of the law.

- This is also included in the preamble to the constitution.
- The concept of equality before the law is also recognized in Article 7 of the UNDHR and Article 26 of the International Charter of Civil and Political Rights.
- This right is not absolute and hence can be restricted under the circumstances set out in Articles 15(7) and 15 (8).
- This article contains 2 aspects;
 - ⇒ Equality before the law (negative aspect)
 - Requires that the law of the land be enforced against all persons equally without any distinction made on any ground whatsoever.
 - ⇒ Equal protection of the law (Positive aspect)
 - Demands that all persons are entitled to stand before the law on equal terms, to enjoy the same rights belonging to and to bear the same burdens as are imposed on the other persons in a like situation.
- All persons are not by nature, attainment or circumstance in the same position. Therefore it is wrong to insist that every law must have a universal application or that in the matter

- of administration of justice no distinction must be made between individuals or groups of individuals.
- What the equality provision prohibits is 'discrimination', i.e. treatment of a person in a manner prejudicial to him as compared to another person in similar circumstances. It does not prohibit '**reasonable classification**' (grouping of a person or things based on some real and substantive distinction bearing a just and reasonable relation to the object sought to be attained).

"Before a person can claim to be discriminated against another, he must show that the other person was similarly situated or equally circumstanced; he must, make out that, not only had he been treated differently from others, but that he had been treated from persons similarly placed without any reasonable basis and such differentiated treatment is unjustifiably made"

(Perera v Jayawickrama (1985) 1 SLR 285@297)

- There are 2 criteria used in classification -
 - i. Geographical or Territorial basis
 - *Seneviratne v UGC (1978-79-80) 1 SLR 182*
 - Different parts of the country are different according to the local circumstances.
 - District quota system for university selection post the Advanced Level Examination was challenged on the basis that it violates Article 12(1).
 - Court held that the UGC has tried to act as fairly as possible and tried to distribute on a rational basis.
 - ii. Nature of persons, business etc.
 - *Yasapala v Wickramasinghe [FRD(1) 143]*
 - The Cabinet of ministers laid guidelines for dealing with persons applying for reinstatement in the aftermath of the general strike of 1980.
 - It classified officers who absented themselves from work into categories consisting of officers who (i) involuntarily did not attend office because of some misfortune such as illness or some other similar reason and (ii) voluntarily absented themselves in furtherance of the strike.
 - The SC held that the guidelines exhibit reasonable classification .

Cases where Article 12 (1) was interpreted

- *Palihawadana v Attorney General (1978) 1 SLR 65*
 - The petitioner challenged that the government Job Bank Scheme violates the equality postulated in Article 12(1).
 - Criteria for selection were specified by the cabinet.
 - Under the said criteria, 3000 applicants were eligible. out of which 1000 were selected by the discretionary powers exercised by the Minister in charge of the criteria.
 - This discretion of power was a violation of Article 12(1).



It vests arbitrary power in a MP to select 1000 persons out of a vast number satisfying the eligibility Scheme.

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- It was decided in this case that courts adopted a classification in relation to Article 12(1)
 - - Classification should be **Intelligible Differentia** – which distinguishes persons from another group.
 - The differentia must have a **relation to the object sought to be achieved**.
- *Perera v UGC [FRD (1) 103]*
- At the time the Advanced Level Examination was first introduced (1979), two examinations were held (Old syllabus and new syllabus).

- The UGC adopted a system of allocating available places on a ratio 7.2: 2.8.
 - The question was whether the classification was rationally related to the objective of selecting best students.
 - The SC held that by deciding to have a common basic aggregate in both examinations, those eligible from both sources were integrated into one class and thereby made equals. Thereafter they cannot be discriminated against by reference to the original sources. There was no material to show that one examination was superior.
- *Rampillai v Minister of Public Administration (1991) 1 SLR 11*
 - The question was whether ethnicity can be a deciding factor in granting promotions to Customs officers of equal rank.
 - It was held that, "once the appointees are 'clubbed' together, into a common stream of service, they cannot be treated differently thereafter, for the purpose of promotion, by differentiating them on ethnic grounds."
 - If it was so done, it would have constituted an infringement of Article 12.
 - *Shafeek v Secretary, Public Service Commission [SC (F/R) 249/96, SCM 19.11.1998]*
 - It was held that the principle of ethnic quotas in relation to the recruitment to the public service is an infringement of Article 12.
 - *Perera v Jayawickrama (1985) 1 SLR 285*
 - The petitioner was sent compulsory retirement maliciously and without just cause.
 - Sharvananda CJ stated that, the retirement was 'unreasonable' and 'unjustifiable' and that it lacked 'bona fides'. However, his FR guaranteed by Article 12 had not been violated because he failed to cite instances of another person of under his circumstances having been treated differently.
 - Wimalaratna J, provided a different view stating that, the application of a wrong procedure in taking disciplinary action against the petitioner by itself established discrimination.

4. Personal Liberty

- **Article 13** sets out freedom from arbitrary arrest, guarantees him the protection of not being arrested on mere suspicion, detention, and punishment and prohibits retroactive penal legislation.
- This right is not absolute and hence can be restricted under the circumstances set out in Articles 15 (1), 15(7) and 15 (8).

No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

-Article 13 in its paragraphs (3), (4), (5) and (6), lays down certain valuable safeguards especially relevant to criminal law and procedure.

- Article 13 (3) → guarantees that any person charged with an offence is entitled to be heard either in person or by an attorney at law, at a fair trial by a competent court,

- Article 13 (4) → orders that no person shall be punished with death or imprisonment except by a competent court in accordance with the procedure established by law.
- Article 13 (5) → Presumption of Innocence.
- Article 13 (6) → Prohibits the creation of offences with retrospective effect as well as retrospective enhancement of punishment (however, this does not cover acts or omissions which are criminal according to general principles of International law).
- In the event of an arrest, two fundamental point need to be taken into consideration.
 - (i) No person shall be arrested except according the procedure established by law.
 - (ii) Any Person arrested shall be informed of the reason for his arrest.
- The procedure to be followed during an arrest are explained in the following legislation;
 - ⇒ Section 32 (1) of the Criminal Procedure Act No 15 of 1979
 - ⇒ Section 63 of the Police Ordinance
 - ⇒ Section 6(1) of the Prevention of Terrorism Act No 48 of 1979
- Section 23(1) of the Code of Criminal Procedure Act states on relation to “Arrest” – “In making the arrest, the person making the same shall actually touch or confine the body of the person to be arrested unless there be submission to the custody by word of action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.”

Cases where Article 13 (1) was interpreted

ARREST

- *Namasivayam v Gunawardene (1989) 1 SLR 394*
 - The bus in which the petitioner was travelling was stopped midway by the police.
 - The petitioner was thereafter asked to accompany the officers to the police station.
 - The reason for the arrest was informed as “to investigate into a case of a robbery of a gun”. On the belief that the petitioner was acquainted with such mater, the police was said to behave in this manner.
 - It was held that, the petitioner was prevented by the action of the police officer from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased.
 - Thus this constituted an arrest as the freedom of movement of the petitioner was restricted even though no force or threat was used.
- *Piyasiri v Fernando (2998) 1 SLR 173*
 - The petitioner was a custom officer who along with some fellow officers was travelling to Colombo by Car.
 - The police stopped the vehicle midway, searched the car and told the customs officers to follow the police to the station.
 - It was held that the action constituted an arrest.
“... Lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.”

- *Mahinda Rajapakse v Kudahetti* (1992) 2 SLR 23
 - The petitioner was to travel to Geneva to attend a conference.
 - He was informed by the respondent that his bag will be checked at the Katunayake Airport on the information received that the petitioner was carrying fabricated information.
 - Upon finding such documents, it was confiscated and the petitioner was allowed to proceed with his journey.
 - The petitioner thus filed a case based on the ground of arrest.
 - The court held that his freedom of movement was not restricted and thus Article 13(1) was not violated.
- *Sirisena v Perera* (1991) 2 SLR 97
 - It was held that, whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases.

ACCORDING TO THE PROCEDURE ESTABLISHED BY LAW

- *Premalal De Silva v Inspector Rodrigo* (191) 2 SLR 307
 - Court looked at the law and made the following observations.
 - ⇒ The question for the Court is whether there was material for a reasonable officer to cause the arrest.
 - ⇒ Proof of the commission of the offence is not required. A reasonable suspicion or reasonable complaint of the commission of the offence will suffice. The test is an objective one.
 - ⇒ Police are not required before acting to have anything like a prima facie case for convicting.
 - ⇒ A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officers own knowledge or on the statements made by some other persons in a way which justify him giving them credit.
- *Yapa v Bandaranaike* (1988) 1 SLR 63
 - Court held that a person can be arrested without a warrant in 2 circumstances; ⇒ In an instance where there is reasonable suspicion.
 - ⇒ If the reason for arrest has been informed previously to the person for committing an cognizable offence.
- *Channa Peiris v AG* (1994) 1 SLR 1
 - Sets out the criteria an officer must follow prior to making an arrest.
 - ⇒ The officer making the arrest cannot act on suspicion founded on mere conjecture or vague surmise.
 - ⇒ His information must give rise to reasonable suspicion that the suspect was concerned in the commission of an offence...
 - ⇒ The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence.
- *Vinayagamoorthi Vimalendran v Army General* (1997) 1 SLR 113

- It was held that the question whether the arrest was done following the due process or not is not decided by the offence he was committing at the time of the arrest and not by the offences that are revealed by the investigations carried out after the arrest.

REASONS FOR ARREST

- *Mariyadas Raj v AG (1983) 2 SLR 461*
 - Discussed why there is a requirement to inform a person the reason for arrest.
“... The purpose of this rule is to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresting official and disabuse his mind of the suspicion which actuated the arrest”

PREVENTIVE DETENTION

This concept was brought about at the height of insurgence. Preventive detention does not constitute punishment and Article 13 (4) has no application to preventive detention.

- *Wickramabandu v Herath and Others (1990) 2 SLR 348*
 - “Preventive detention is vital to the law enforcement process. It is an indispensable social necessity and is resorted to in times of war, rebellion, insurrection of even during peacetime. There is nothing inherently unjust in the concept provided that any law for preventive detention should be arbitrary and should provide adequate safeguards against oppression and deprivation of personal liberty.”

5. Freedom of Speech and Related Freedoms

- **Article 14(1)** incorporates the freedom of speech and expression including publication, freedom of peaceful assembly; freedom of association; freedom to form and join a trade union; freedom of movement and of choosing his residence within Sri Lanka and some other related Freedoms.
- This right is not absolute and hence can be restricted under the circumstances set out in Articles 15 (2), 15 (3), 15(4), 15 (5), 15(6) and 15 (8).

(1) Every citizen is entitled to –
(a) The freedom of speech and expression including publication

- The freedom of speech and expression means absence of restraint upon the ability of individuals and groups to communicate their ideas and experiences to others.
- This right is essential for the development of the human personality.
- The freedom of expression goes to the heart of natural rights as it gives one the right to speak or listen.
- The freedom of expression may take a variety of forms including dialogues, publication, distribution of written material, certain symbolic forms etc.
- Article 14 was amended by the 19th Amendment by introducing Article 14A (Right to information as provided by Law). Its main purpose was to make governmental actions transparent to the Public.

Cases where Article 14 (1) was interpreted

- *Joseph Perera v AG (1992) 1 SLR 199*
 - Petitioner and 3 others organized a meeting to discuss “Freedom and the enemy of Free education”.
 - They circulated some leaflets containing issues relating to the meeting.
 - On the day of the meeting the crowd was dispersed by the police.
 - The petitioner charged that their Freedom of expression had been infringed.
 - Court held that article 14(1) was infringed and gave different examples of how freedom of speech and expression can be exercised.

“... By word of mouth, writing, printing, pictures or any other mode. It includes the expression of one’s ideas through banners, posters, signs etc...”
- *Amaratunga v Sirimal (1993) 1 SLR 264*
 - The opposition at the time organized a “Jana Ghosha” (vocal protest) against the then government by using musical instruments and other apparatus.
 - At one particular place, the police interrupted and broke one musical instrument in the process of trying to stop the protest.
 - The petitioner claimed that Article 14(1) was violated.
 - Court held that the said article was violated and further gave examples to article 14(1)(a)
- *Karunathilaka v Dayananda (1999) 1 SLR 157*
 - The government in power at the time used violence to stop people from voting.
 - The question arose whether the right to vote at an election was a part of the right mentioned in Article 14(1) (a).
 - Court held that ,

“The Freedom of ‘speech and expression’ guaranteed by that article should be broadly construed to include the exercise of the right of an elector to vote at the election.

The silent and secret expression of a citizen’s preference between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression than the most eloquent speech from a public platform.”
- *Viswalingham v Liyanage (1984) 2 SLR 123*
 - Court held that freedom of expression includes the freedom of the recipient (to hear).
- *Fernando v The SLBC (1996) 1 SLR 157*
 - SLBC had been airing a particular program on radio for some time.
 - This was suddenly stopped.
 - The petitioner came to Court on the basis that SLBC had violated his freedom of expression and speech as he cannot now listen to what he preferred.
 - Supreme Court took a different approach to that of Viswalingam’s case.
 - It is also noteworthy that Justice Mark Fernando has recognized the right o information by interpreting article 14(1)(a) in a broader sense.
- *Environmental Foundation Ltd. v UDA [SC(FR Application No. 47/04)]*
 - Courts recognized again that there is a freedom of information inbuilt within Article 14(1) (a).

RELATED PAST PAPER QUESTIONS:

- “Religion is an organized belief and such beliefs should not be placed within the reach of any positive laws. A belief for its own survival may depend on particular observations prescribed in the name of religion. Hence, when it comes to constitutional guarantees, there is no need to make a distinction between the two.”
Comment on the above statement in light of Article 10 of the 1978 constitution of Sri Lanka. Support your answer with case law authority. **[Q8; Oct 2016; 16 marks]**
- “The judicial approach to Article 12 of the Constitution has commendably helped to develop jurisprudence in the sphere of equality. However, it is not an exhaustible journey for the judiciary in a plural society.
Discuss. Support your answer with case law authorities. **[Q8; Apr 2016; 16 marks]**
- What do you understand by executive or administrative actions in the context of the Constitutional provisions of Sri Lanka? Discuss with the support of decided cases. **[Q9; Apr 2016; 16 marks]**
- “While article 10 of the 1978 Constitution guarantees an absolute freedom, the actual practice of such freedom is subject to certain limitations. In a plural society such limitations warrant a careful and rational interpretation.”
Discuss. Support your answer with case law authorities. **[Q8; Oct 2015; 16 marks]**
- “In order to prove violation of the equality clause in the 1978 Constitution, one will have to satisfy the court about two things: (a) that s/he has been treated differently from others, (b) that s/he has been differently treated from persons similarly situated without any reasonable basis.”
Critically analyse the above statement in light of the decided cases.
OR
Discuss the development of law in Sri Lanka in relation to sue as set out in Article 126 of the Constitution. **[Q9; Oct 2015; 16 marks]**
- “Article 10 of the 1978 Constitution not only declared the right to which every person is entitled, but also defined that right to include the freedom to have and adopt a religion or belief of a person’s choice.”
Critically examine the above statement analyzing the relevant provisions of the 1978

Constitution giving attention to the decided cases. [Q3; Apr 2015; 16 marks]

- Equality before the law means that among equals the law should be equal and it should be equally administered that like should be treated alike. This article applies both to substantive law as well as procedural law."

Discuss the above statement giving reference to the relevant provisions of the 1978 Constitution and decided cases. [Q4; Apr 2015; 16 marks]

- "Every person is entitled to the freedom to have or adopt a religion or belief of his choice. Every person has the right to manifest his religion or belief in worship, observance, practice and teaching, the right to convert another person to his religion and this right cannot be restricted."

Critically examine the above statement analyzing the relevant provisions of the 1978 Constitution giving attention to decided cases. [Q7; Oct 2014; 16 marks]

- "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. The Supreme Court has in several decisions expanded the scope of this protection."

Discuss the above statement giving reference to the provisions of the 1978 Constitution and decided cases. [Q8; Oct 2014; 16 marks]

- (i) Describe the Constitutional provisions contained in chapter 3 of the 1978 Constitution to assure the fundamental right to the people.
(ii) Describe the mechanism contained in the Constitution against FR violations enforceable by the Supreme Court of Sri Lanka. Give your answer with reference to decided cases. [Q5; Apr 2014; 16 marks]

- Select one of these two statements and discuss the relevant fundamental rights provisions enshrined in the Constitution. Either

(a) "...Article 13(2) requires that an arrested person be brought before the judge of the nearest competent court. How he should be brought before the judge can be laid down by ordinary law, but the requirements that he be brought before a judge, and that it is not any judge but the judge of the nearest competent court, cannot be varied or dispensed with. Those are not matters of discretion, but pre conditions which go to jurisdiction.." Marc Fernando J. *Weerawansa V Attorney General and Others* (2000) 1 SLR page 144

Or

(b) "...Exceptions to Article 14(1) (a) must be narrowly and strictly construed for the reason that the freedom of speech constitutes one of the essential foundations of a democratic society, which as we have seen, the Constitution is no uncertain terms declare Sri Lanka to be..." Amarasinghe J. *Abeysekara V Ariya Rubasinghe, competent Authority and Others* (2000) 1 SLR page 314 [Q8; Apr 2014; 16 marks]

- Discuss with reference to decided cases the approach of the Supreme Court to "reasonable classification" in the context of Article 12 of the Constitution. [Q6; Dec 2013; 9 marks]

- Describe the provisions of the Constitution relating to language rights. [Q10; Dec 2013; 9 marks]
- “Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or investigator thinks its necessary. It must be issues as the law required, and when the Magistrate is satisfied that he should do so on the evidence taken before him on oath...”
Deerartne J. in *Mahanama Tilekaratne V Bandual Wickramasinghe and Others*(1991) 1 SLR page 382
Discuss the above statement with reference to Article 13 of the constitution and decided cases. [Q2; Apr 2013; 13 marks]
- Write a note on the provisions of the Constitution relating to official languages and language rights. [Q7; Apr 2013; 9 marks]
- “The right to personal liberty is a fundamental right which is guaranteed by the Constitution of the Democratic Socialist Republic of Sri Lanka and a person cannot be deprived of this right by the arrest on a mere suspicion.”
Discuss the above statement with reference to the provisions of the Constitution and decided cases. [Q1; Oct 2012; 13 marks]
- “The capacity on the part of one human being to inflict pain or other sufferings o the human being, in the name of the law cannot be accepted at all.”
Discuss the above statement with reference to the provisions of the Constitution and decided cases. [Q2; Oct 2012; 13 marks]
- Write a note on the development of the law in Sri Lanka in relation to the right to sue as set out in Article 126 of the constitution. [Q6; Oct 2012; 9 marks]
- Describe the provisions of the Constitution relating to language rights. [Q7; Oct 2012; 9 marks]
- “Article 13 of the Constitution guarantees the right against arbitrary arrest and the protection of not being arrested on mere suspicion.” Explain the above statement with reference to Article 13(1) and 13(2) of the Constitution and decided cases. [Q3; Apr 2012; 13 marks]
- Discuss with reference to decided cases the approach of the Supreme Court to “reasonable classification” in the context of Article 12 of the Constitution. [Q2; Oct 2011; 12 marks]
- “Every Citizen is entitled to freedom and expression including publication. This freedom can be exercised in different ways. This fundamental right cannot be restricted in any manner.”
Critically examine this statement with reference to decided cases. [Q12; Oct 2011; 12 marks]
- Write a note on the right against torture. [Q1; Apr 2011; 13 marks]

- (a) “Article 13 of the Constitution expressly guarantees the right against unlawful arrest and deprivation of personal liberty. Arresting a person on a mere suspicion would amount to a violation of such right”. Explain the above statement with reference to decided case law.
 - (b) Explain the meaning of the phrase “Procedure established by law” as set out in Article 13 of the Constitution. **[Q2; Apr 2011; 13 marks]**
- “The Judiciary of Sri Lanka has made immense contribution towards the protection of fundamental rights and affording access to justice by adopting liberalized approaches.” Do you agree with this statement? Support your answer with reference to the provisions of the Constitution and decided cases. **[Q4; Apr 2011; 9 marks]**
- Write a note on language rights as guaranteed by Chapter IV of the Constitution. **[Q10; Apr 2011; 9 marks]**
- “Article 13 of the Constitution provides to every person a right against arbitrary arrest and guarantees him the protection of not being arrested on mere suspicion.” Explain the above statement with reference to Article 13(1) and 13(2) of the Constitution and decided cases. **[Q4; Oct 2010; 9 marks]**
- Explain the provisions in the 1978 Constitution of Sri Lanka that guarantee the freedom of ‘thought, conscience and religion’. **[Q2; Apr 2010; 12 ½ marks]**
- “Article 14 of the Constitution deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a free country.” *Joseph Perera V AG (1992) 1 SLR 199*. Comment. **[Q3; Apr 2010; 12 ½ marks]**

8. DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL DUTIES

- Chapter VI (Article 27 to 29) of the deals with Directive Principles of State Policy and Fundamental Duties.
- The Directive Principles of State Policy are meant to “guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society”.
- These principles of state indicate the political ideology acceptable to the constitution makers, namely a mixed economy.
- The Principles enumerated in this chapter ensure that; ⇒
Resources of people are equally shared among all.
⇒ Environment is protected.
- These principles are not justiciable and thus cannot be agitated before a court of law.

However, in a series of cases the SC held that, even if though these principles are not justiciable, they have ensured that the organs of state follow the principles. Cases in which the Directive Principles of State Policy were discussed

- *Seneviratne and another v UGC and another (1978-79-80) 1 SLR 182*
“... It has been said that that the Directive Principles are in the nature of an instrument of instructions which both the Legislature and executive must respect and follow.”
- *In Re thirteenth Amendment to the Constitution and the Provincial Council Bills (1987) 2 SKR 312*
“... The Directive principles require to be implemented by legislation”.
- *Vadivelu v OIC , Sithambarapura Regional Camp Police Post, Vavuniya and Others (2002) 3 SLR 146*
“ ... It is true that the Directive Principles of State Policy do not confer or impose legal rights and obligations and are not enforceable in any Court, but that does not mean that the Judiciary is bound to ignore them.”
- *Mediwake and Others v Dayananda Disanayke, Commissioner of Elections and Others (2001) 1 SLR 177*
“... Article 27(15) requires the state endeavor to foster respect for international law and treaty obligations in dealings among nations”.
- *Weerawansa v The AG (2000) 1 SLR 409*
- Article 27(15) was extensively discussed yet again.

RELATED PAST PAPER QUESTIONS:

- What is the significance of having provisions of ‘Directive Principles of State Policy’ in a Constitution? Have any Constitutional purposes been served by such principles found in the 1978 constitution of Sri Lanka? [Q6; Oct 2016; 16 marks]

- What is the significance of having Directive Principles of state policy in a Constitution? Describe what kind of obligations the state undertakes under these principles towards its citizens. Explain with examples. [Q7; Apr 2016; 16 marks]
- “Non enforceability of Directive Principles of State Policy does not indicate that any of the organs of the Government can ignore them in exercising their respective powers. The simple fact is that the Sri Lankan citizenry deserve the enjoyment of whatever that have been committed by the state towards them.”
Discuss the above statement with reference to the relevant provisions of the 1978 Constitution and case law. [Q6; Oct 2015; 16 marks]
- Explain with reference to decided cases the value of the Directive Principles of state policy. [Q9; Apr 2015; 16 marks]
- “Directive Principles of state policy shall guide Parliament, the president and the cabinet of ministers in the enactment of laws and governance of Sri Lanka for the establishment of a just and free society. However these Directive Principles of state policy are not enforceable in any court or tribunal.”
Critically examine the above statement giving reference to the provisions of the 1978 Constitution and decided cases. [Q2; Oct 2014; 16 marks]
- “It is true that directive principles of State policy do not confer or impose legal rights and obligations and are not enforceable in any Court, but that does not mean the Judiciary is bound to ignore them.” Fernando J. In *Vadivelu V OIC Sithmabaram Regional Camp Police Post, Vavuniya and Others* (2002) 3 SLR at page 152. Explain the above statement. [Q4; Oct 2012; 9 marks]

9. EXECUTIVE PRESIDENT AND IMMUNITY

- The most significant change made by the present constitution as regards distribution of state power is to introduce an executive president, directly elected by the people and whose tenure of office is firmly secured.
“There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces.”
[Article 30(1)]
- The President of the Republic shall be elected by the People and shall hold office for a term of five years. [Article 30 (2)]
- The President so elected shall exercise the executive power of the people.
“The executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People.” [Article 4(b)]
- The Powers and functions of the President are set out as follows-
⇒ [Article 33]

“In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power –

- ensure that the Constitution is respected and upheld;
- promote national reconciliation and integration;
- ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIA; and on the advice of the Election Commission, ensure the creation of proper conditions for the conduct of free and fair elections and referenda.
- to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament;
- to preside at ceremonial sittings of Parliament;
- to summon, prorogue and dissolve Parliament;
- to receive and recognize, and to appoint and accredit, Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents;
- to appoint as President’s Counsel, attorneys-at-law who have reached eminence in the profession and have maintained high standards of conduct and professional rectitude.[Every President’s Counsel appointed under this paragraph shall be entitled to all such privileges as were hitherto enjoyed by Queen’s Counsel];
- to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other judges of the Supreme Court, the President of the Court of Appeal and other judges of the Court of Appeal, and such grants and dispositions of lands and other immovable property vested in the Republic as the President is by law required or empowered to do, and to use the Public Seal for sealing all things whatsoever that shall pass that Seal;
- to declare war and peace; and
- to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do.

⇒ [Article 32(3)]

“The President shall, by virtue of his office, have the right at any time to attend, address and send messages to Parliament. In the exercise of such right the President shall be entitled to all the privileges, immunities and powers, other than the right to vote, of a Member of Parliament and shall not be liable for any breach of the privileges of Parliament, or of its Members.”

⇒ [Article 33A]

“to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do.”

⇒ [Article 34(1)]

“The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka –

(a) grant a pardon, either free or subject to lawful conditions ;”

⇒ [Article 70(1)]

“The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament.”

Immunity of the President

– [Article 35(1)]

Confers on the President immunity from judicial proceedings.

“While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity:

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2)(g)..”

– The SC has decided many cases regarding Article 35(1). ▪

Mallikarachchi v AG (1985) 1 SLR 74

“The rationale of this principle is that persons occupying such high office should not be amenable to the Jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office and that once he has ceased to hold office, he may be held accountable in proceedings in the ordinary court of law.”

▪ *Kumaratunge ve Jayakody and another (1985) 2 SLR 124*

“ Article 35 gives blanket immunity to the president from proceedings of any kind whatsoever instituted or continued against him in any court of law...”

– [Article 35(3)]

Immunity does not apply in the capacity of a Minister (Respondent would then be the AG)

▪ *Visuwalingham and Others v Liayanage and Otehrs (183) 1 SLR 203*

- SC tried to dilute the immunity enjoyed by the president. (Immunity for the “office” POF president and not the “doer” of the Act).

“ Actions of the executive are not above the law and certainly can be questioned by a Court of Law. Article 35 provides only for the personal immunity of the president during the tenure of his office from proceedings in any court.

▪ *Karunatileke v Dissanayake (1999) 1 SLR 157*

- Further clarified that which was discussed in the previous case.

“... It imposes no bar whatsoever on proceedings (a) against him when he is no longer in office... Immunity is a shield for the doer, not for the Act.”

▪ *Senarath v Chandraratne, Commissioner of Excise and Others (1995) 1 SLR 209* - President’s acts were relied on by the commissioner of Excise to justify his acts. “in the instant case the petitioner has not filed proceedings in a court seeking relief against the

President. The Respondents to the application are all officials. Relief has been sought against the officials only.”

- *Senarath and others v Kumaratunga and Others* [SC FR 503/2005].
 - The only case where a person instituted action against a president after she left office.

RELATED PAST PAPER QUESTIONS:

- The suitability or otherwise of an executive presidential system of governance for a country depends on various factors including the political past of the country. It cannot be introduced just for experimental purposes. Some scholars are of the view that Sri Lankan political history had not warranted such a system.
State to what extent you agree with the above statement. Your answer should include discussion on the pros and cons of the executive presidential system introduced to Sri Lanka. Support your answer with relevant authorities. **[Q5; Apr 2016; 16 marks]**
- “If not for the 19th Amendment to the Constitution, the Executive President of Sri Lanka would have remained as the most powerful individual in the world in wielding political powers in a democracy.”
Comment on the above statement citing relevant Constitutional provisions relating to the powers of the Executive President in Sri Lanka. Support your answers with case law. **[Q5; Oct 2015; 16 marks]**
- “it is important to specifically understand that no single position or office created by the Constitution itself circumscribes the scope and ambit of even the power vested with any President who sits as the head of this country. Power must only be used strictly for the larger benefit of the people, the long term sustainable development of the country and in accordance with the rule of law.” *Shiranee Tilakawardene J. Sugathapala Mendis and Others V Ms. Chandrika Bandaranaike Kumaratunge and Others S.C.F.R. No 352/2007* (Waters Edge case)
Explain the above statement and set out the responsibilities of the President with reference too the provisions of the Constitution and decided cases. **[Q9; Oct 2010; 9 marks]**
- “Article 35 of the Constitution only prohibits the institution (or continuation) of legal proceedings against the president while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act.”
Critically examine the above statement with reference to decided cases. **[Q9; Oct 2014; 16 marks]**
- Analyse the provisions of the Constitution relating to the immunity of President from suit and explain the instances in which acts of President can be challenged, giving illustrations.
[Q1; Dec 2013; 13 marks]

- “Article 35(1) only prohibits the institution of legal proceedings against the President while in office. But it does not purport to prohibit the institution of proceedings against any other person, where it is permissible under the Law.” Fernando J. in *Karunatilake V Commissioner of Elections* (1999) 1 SLR 157 at page 176
Explain the above statement with reference to decided cases. [Q4; Apr 2013; 9 marks]
- “The effect of the immunity conferred on the President under Article 35 of the Constitution is only the prevention of legal proceedings against the President while holding office.”
Do you agree with the above statement? Give your reasons. [Q8; Oct 2012; 9 marks]
- Analyse the provisions of the Constitution relating to the immunity of President from suit and explain the instances in which acts of President can be challenged, giving illustrations.
[Q2; Apr 2012; 9 marks]
- (a) Discuss with reference to decided cases the approach taken by the Supreme Court in interpreting Article 35 of the Constitution.
(b) Do you think that there are compelling reasons for the post of President of Sri Lanka to be given the immunity set out in Article 35 of the Constitution? Explain your answer with reasons. [Q6; Oct 2011; 12 marks]
- (a) Explain the provisions of Article 35 of the Constitution which relates to the immunity of the President.
(b) Can actions and omissions of the President be subject to judicial review?
(c) What are the responsibilities attached to the exercise of the executive powers of the President?
Support your answer with reference to provisions of the Constitution and decided cases. [Q5; Apr 2011; 9 marks]
- (a) What is the rationale behind the immunities conferred on the Executive President by the 1978 Constitution of Sri Lanka? [Q6; Apr 2010; 6 ¼ marks]
(b) Explain the approach of the Supreme Court in interpreting the President’s immunities. [Q6; Apr 2010; 6 ¼ marks]

10. INDEPENDENCE OF THE JUDICIARY

Introduction

- Independence of the judiciary has been described as follows – ⇒ Blackstone

- “The main preservation of public liberty in England consists in the distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at the pleasure of the crown.”
- ⇒ Wade and Phillips
- “It is essential that they (judges) be free from any fear of dismissal by the persons whom they must be prepared to control.
- An independent Judiciary is the surest protection against excess of power by the administration
- ... the British understanding of the separation of powers demands that the judiciary should be independent of the executive. ”
- ⇒ S. A. De Smith
- “Judicial independence in a liberal democracy demands that it should be unconstitutional for the legislature to invade the domain of the judiciary by pronouncing judgment (as in a bill of attainder) or reversing a judicial decision with retroactive effect or enabling the executive to designate which judges shall sit to hear a particular case or abolishing a judicial office while it has a substantive holder, or reducing judicial salaries.
- It is clearly of great importance that justice be dispensed even-handedly in the courts and that the general public feel confidence in the integrity and impartiality of the judiciary ”
- ⇒ Sharvananda C.J.
- “Independence of the Judges that constitute the Judiciary”
- On taking into account all descriptions given above, the concept of **Independence of Judiciary** can be defined as; “A constitutional or legal environment which enables judges to discharge their functions and duties without fear or favour”
- Independence of the judiciary can be viewed as a logical consequence of the doctrine of separation of powers.
- It can be regarded as a concomitant of the Rule of Law.
- Since the Act of settlement of the British Parliament was passed in 1701, judges held office during good behaviour; their salaries could not be reduced during their term of office and only upon address of both Houses of parliament could the judges have been lawfully removed from their office. Consequently the Act may be regarded as the original source of the concept of independence of the judiciary as that concept is understood in modern constitutional parlance. This was related to later in the House of Lords decision in *Toronto Corporation v New York Corporation* (1938) A.C. 415.
- In the case of *Senadhira v The Bribery Commissioner* (1961) 63 NLR 313, Sansoni C.J. referred to the three principal pillars in the Temple of Justice as stated by Lord Atkin in the *York Corporation* case. The principals were as follows –
 - a) The appointment of judges of the superior courts by the Governor- General.
 - b) Judges of the Superior courts hold office during good behaviour subject to removal by the Governor- General on an address by the Senate and the House of Representatives.
 - c) The salaries of the judges are fixed and cannot be reduced during their term of office.

The framers of our constitution added a fourth pillar –

- d) The power of appointment, transfer, dismissal and disciplinary control of judicial officers was vested in the Judicial Service Commission.

Constitutional provisions in Sri Lanka directed at preserving the Independence of the Judiciary

1. Soulbury

Constitution

Higher Court Judges

- Section 52(1)

“The Chief Justice, Puisne Judges of the Supreme Court and the Commissioners of Assize shall be appointed by the Governor -General”

- Section 55(1)

“The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the judicial Service Commission.”

2. 1972 Constitution

- Section 122

Judges of the Superior Courts; ⇒ Appointed by the President on the advice of the Prime Minister or an authorized Minister.

⇒ They shall hold office during Good behaviour ⇒ Removed by the President after an address of the National State Assembly. ⇒

Salaries of Judges charged on the Consolidated Fund.

Judges of other courts are established under the Courts Ordinance, Presidents appointed under the Rural Courts Ordinance and Judges of Courts which may be created and established by the National State Assembly.

- Section 124

Appointment, transfer, dismissal and disciplinary control of judges and other state officers' administering Justice.

3. 1978 Constitution - Preamble

“... assuring to all people Freedom, Equality, Justice, Fundamental Human rights and the Independence of the Judiciary as the tangible heritage that guarantees the dignity and well-being of succeeding generations of people of Sri Lanka...”

- Articles 107 – 111C ⇒ Appointment and Removal of the Judges of the SC/CA ⇒ Salaries of the Judges of the SC and CA on the consolidated fund. ⇒ Performance and Discharge of other duties and functions by judges ⇒ Appointment, removal and disciplinary control of Judges of the High Court. ⇒ Interference with the Judiciary considered an offence.

- Independence of the Judiciary was discussed extensively in the following cases-

- Visuwalingham and Others v Liyanage and Others* (1983) 1 SLR 203
- SC No.3/2012 C.A. (Writ) No 358/2012
- Attorney General v Bandaranayake and Others* (SC Appeal 67/2013)
- Nixon v Unites States* 506 U.S. 224 (1993) at page 234

- Independence of the Judiciary does not depend on the constitutional provision, but the Judge Himself.
 - Dr. Neelan Thiruchelvam
“The future of the judiciary as the custodian of the public conscience in strife ridden Sri Lanka does not rest in abstract constitutional principles or arrangements. It depends on the quality of those who assume the judicial mantle and their capacity to be morally outraged by injustice and discriminatory practices and to draw on the armoury of their legal power to redress their grievances.”
 - Jonathan Soeharno
“The aim of selection should be to find judges who are of professional character. This means judges who are mindful of the right legal knowledge who are aware of developments in society, who are attentive, who are constant in character, who can transcend to institutional values, who are able to mediate knowledge with the specific demands of the case, who know how to enact institutional values appropriately and who have shown proper behaviour overtime.”

RELATED PAST PAPER QUESTIONS:

- “Independence of the Judiciary means the degree of credibility enjoyed by this institution in the eyes of the public. This independence is the popular yardstick by which a country’s democracy deficit could be easily identified.”
Discuss the above statement in the context of independence of the judiciary under the 1978 Constitution of Sri Lanka. **[Q9; Oct 2016; 16 marks]**
- “When the judges themselves show indecision and do not show evidence of any consistent attitude, the judiciary becomes vulnerable to either open attacks or insidious pressures that erode judicial independence.”
Critically examine on the above statement in light of recent happenings which have raised serious questions over the independence of judiciary in Sri Lanka. **[Q7; Oct 2015; 16 marks]**
- Discuss the provisions of the 1978 Constitution in relation to the Independence of the Judiciary with reference to decided cases. **[Q5; Apr 2015; 16 marks]**
- Compare and contrast the provisions of the Soulbury Constitution and the 1972 Constitution in relation to the independence of the Judiciary. **[Q6; Oct 2014; 16 marks]**
- “Constitutional provisions are fundamental to protect the ‘independence of the judiciary’ and it is the prime duty and obligation of the legislature and the executive to honour and enforce such provisions; which is an essential factor for ‘good governance’.”
Discuss the above statement giving reference to the provisions of the 1978 Constitution and decided cases. **[Q2; Apr 2014; 16 marks]**
- Critically examine the provisions of the Constitution relating to the Independence of the Judiciary with specific reference to the removal of Judges and state your views to

whether the safeguards provided in the Constitution are adequate to guarantee Independence of the Judiciary. [Q5; Apr 2013; 9 marks]

- “The method of appointment of members to the judiciary has undergone several changes from the Soulbury Constitution to the 1978 Constitution. These changes are a step in the right direction and enhance the independence of the judiciary.”
Make a critical evaluation of this statement by considering the different methods of appointment of judges from the Soulbury Constitution to the 1978 Constitution. [Q7; Oct 2011; 12 marks]
- “The Judiciary is an important organ of state which performs the task of protecting the rights of individuals and ensuring that all organs of the government do not exceed their powers.’ Explain the above statement with reference to decided cases. [Q7; Apr 2010; 9 marks]
- Comment on the adequacy of the provisions in the 1972 and 1978 Constitutions of Sri Lanka to ensure the ‘independence of the judiciary’. [Q12; Apr 2010; 12 ½ marks]

11. SUPREMACY OF PARLIAMENT

- In Britain, the transformation of legislative power from an all powerful Monarch to the British Parliament took place over a period of time.

Growth of the powers of the British Parliament took place through a series of events including

- Magna Carta (1215)
- Case of Proclamation (1610)
- Bill of Rights (1689)

- The doctrine of Supremacy of parliament has been commented on by certain Jurists as follows –

Dicey

The concept of “Supremacy of parliament” embodies 3 basic propositions:

- ⇒ Parliament can make or unmake any law
- ⇒ No person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament.
- ⇒ The right or power of parliament extends to every part of the king’s dominion.

De Lolme

“It is the fundamental principle with English lawyers that parliament can do anything but make a woman a man and a man a woman.”

- A parliament can be considered Supreme upon the establishment of the following facts:
 1. Parliament has the power to make or unmake any law whatsoever.
 2. Parliament is not bound by its predecessors
 3. Parliament recognizes no rival legislative authority
 4. Parliament Acts are not subject to Judicial review
 5. Parliament is not bound by International law
 6. Parliament is not bound by Morality
 7. There are no substantive limitations to the powers to the parliament
 8. There are no procedural limitations to the powers of parliament

Supremacy of Parliament in Sri Lanka – Soulbury Constitution

Parliament has the supreme power to pass any law on any topic affecting any person. Parliament further can unmake or amend any law. However it is also noted that the constitution itself has imposed certain restrictions or limitations on parliament when exercising the legislative power.

According to the Soulbury constitution, the parliament of Ceylon was created by the Ceylon (Constitution) Order in Council in 1946. The limitations imposed on the parliament are stated in the constitution.

- Section 4
 - The Governor General shall be appointed by the queen of England.
 - He may receive the power, authority and function which the queen of England would assign to him
- Section 7
 - The Queen of England was the head of parliament.
 - The sovereignty of Britain is shared by the Sri Lankan Parliament.
- Section 29(2)
 - Parliament cannot pass a law to prohibit or restrict the free exercise of religion.
 - To privilege or advantage on a person of a specific religion or community - To impose any disability on a person of a specific religion or a community
 - To alter the constitution of any religious body

In *Bribery Commissioner V Ranasinghe* it was said that, entrenched religious or racial matters shall not be the subject of the legislation.

- Section 29(4)
 - Parliament may amend or repeal any provision of this order under the power of the queen of England.
 - Such a bill should have a 2/3 majority of votes and it should be certified by the speaker (procedural limitation)

Restrictions on the Legislative power

- The Parliament of YUK could legislate for Ceylon.
- The Parliament could not legislate extra territorially.
- The King-in-Council could amend the order in council 1946.
- The King-in-Council could legislate on defence and external affairs.
- The governor could reserve certain classes of Bills.
- Certain types of legislation could be disallowed under section 39 of the order in council.

Some of these restrictions were removed by;

- The Ceylon (Independence) Act
- Ceylon (Independence) Order in Council
- Ceylon Constitution (Amendment) orders in council 1947

However certain restrictions were imposed;

- Power of Judicial review'
- Section 29(4) - Section 39
- Section 29(2)
- No Judicial power

Supremacy of Parliament in Sri Lanka – 1972 Constitution

- Article 5
 - NSA exercises the legislative power of the people
 - Section 44
 - “the legislative power of the NSA is supreme and includes the power,
 - a) To repeal or amend the constitution as a whole or in any part, and
 - b) To enact a new constitution to replace the constitution ...
 - Section 51(5)
 - Repeal, replacement or amendment of the constitution with the vote of two thirds of the whole number of members of the Assembly (including those not present) ▪
- Section 48(1)
- Retrospective operation of any or all of the provisions of law
- Section 52(1)
 - Enact any law which is inconsistent with any provision in the constitution with a vote of two thirds of the whole number of members of the Assembly (including those not present).
 - No provision similar to section 29(2) of the Soulbury constitution. ▪ Proviso to section 44
 - “Provided that such power shall not include the power,
 - i. To suspend the operation of the constitution or any part thereof; and
 - ii. To repeal the constitution as a whole without enacting a new constitution to replace it.”

Supremacy of Parliament in Sri Lanka – 1978 Constitution

- Unlike the parliaments during the Soulbury and 1972 constitutions, the Parliament during the 1978 constitution was an all powerful supreme body. The reason being that –
 - ⇒ Presence of certain practical limitations on the supremacy of parliament;
 - i. International Law
 - ii. Doctrine of Mandate (Parliament cannot do an act contrary to what was promised by a mandate)
 - iii. Public Opinion (opposition was faced in passing certain laws such as the VAT Bill, as public opinion was taken into great consideration)
 - ⇒ Referendum (reduces the legislative power of parliament greatly)
 - ⇒ Article 83 (imposed substantive limitations on the law making power of parliament)
 - ⇒ Parliament is bound by certain considerations of International law
 - ⇒ The people have become a rival legislative authority to parliament (in relation to the entrenched provisions of the constitution)

RELATED PAST PAPER QUESTIONS:

- “The doctrines of ‘Supremacy of Parliament’ and ‘Sovereignty of the people’ are not two mutually exclusive ones. Instead, they should be considered as inherently interrelated and buttressing each other.”
Discuss to what extent these doctrines have been conceptually accommodated in the 1978 constitution of Sri Lanka. [Q2; Oct 2016; 16 Marks]
- “Supremacy of Parliament, despite its theoretical underpinnings, is reduced to a matter of merely an academic debate in today’s context. There are many factors that contribute to the gradual erosion of its significance in practitioners eyes.”
Do you agree? Give reasons for your answer with the support of case law authorities. [Q2; Apr 2016; 16 marks]
- “Supremacy of Parliament doesn’t mean that it can pass any law without following any method prescribed by the supreme law of the land. Otherwise, the concept of ‘sovereignty of the people’ would become meaningless”. Do you agree? Give reasons for your answer with the support of case law authorities. [Q2; Oct 2015; 16 marks]
- “The 1978 Constitution recognizes the legislative Supremacy of Parliament. The 13th Amendment did not in any way compromise this supremacy.”
Critically examine the above statement with reference to decided cases. [Q8; Apr 2015; 16 marks]
- “The 1978 Constitution does not recognize the Supremacy of Parliament. The legislative power of Parliament is limited. It was further limited by the 13th Amendment to the Constitution.”
Critically examine the above statement analyzing the relevant provisions of the 1978 Constitution giving attention to decided cases. [Q5; Oct 2014; 16 marks]

- “The restrictions imposed on the legislative power of Parliament suggest that Parliament does not enjoy the supremacy any longer.”
Critically examine the above statement with reference to the provisions of the Constitution and decided cases. [Q8; Apr 2012; 9 marks]

8 Questions	Soulbury Constitution	1972 Constitution	1978 Constitution
Can Parliament make or unmake any law?	<p>YES</p> <ul style="list-style-type: none"> - <i>The Queen V Liyanage</i> 65 NLR 73 (Accepted that the Ceylon parliament could pass any legislation, prospective as well as retrospective and legislation contrary to principles of natural justice or fundamental principles of English law. It could have passed even Criminal legislation which was <i>ad hominem</i>) - <i>Kodikkan Pillai V Mudanayake</i> 54 NLR 433 	<p>YES</p> <ul style="list-style-type: none"> - There were no restrictions on the law making power of the National State Assembly (NSA) 	<p>NO</p> <ul style="list-style-type: none"> - The Parliament could not pass certain laws without going for a <u>referendum</u> of the people - “The legislative power of the people shall be exercised by parliament...and by the people at a referendum” [Article 4(a)] - “The parliament shall have the power to make any law, including laws having retrospective effect...” [Article 75] EXCEPTION to ^ [Article 13(6) and Proviso to Article 75] - The Parliament can make laws inconsistent with the constitution only upon [Article 84(1)] - ⇒ 2/3rd majority + Referendum (If it is an Entrenched Provision) ⇒ 2/3rd majority (If it is a general provision) - <i>Ratnasiri Wickremanyake V The State</i> (“Unlike the 1972 constitution, the 1978 constitution has placed some limits on the exercise of legislative power”)

			- 13 th Amendment was seen to place more limitations on the legislative power of parliament.

Are Acts of parliament subject to judicial review?	YES <ul style="list-style-type: none"> - The following limitations were brought about by Judicial review; <ul style="list-style-type: none"> ⇒ Parliament cannot pass laws adversely affecting any provisions relating to government stock (Stock invested by the British in Ceylon) ⇒ Parliament could not pass laws which conferred judicial power on the executive/legislature. ⇒ Parliament could not pass laws which were ultra Vires to the provisions of the constitution. ⇒ Parliament could not pass laws which deprived any person's right to access the courts. 	NO (However, Bills could be reviewed) <ul style="list-style-type: none"> - Judicial review excluded "No institution administering justice and likewise no other institution, person or authority shall have the power or Jurisdiction to inquire into pronounce upon or in any manner call in question the validity of any law of the NSA" [S. 48(2)] 	NO (However, Bills could be reviewed) <ul style="list-style-type: none"> - "No Court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of an Act on any ground whatsoever [Article 80(3)]
Are there any substantive limitations to the law making power of parliament?	DIFFERENT VIEWS <ul style="list-style-type: none"> - Dr. C.F. Amarasinghe "Section 29(2) could not be repealed even by a 2/3rd majority. - <i>Bribery Commissioner V Ranasinghe</i> 66 NLR 73 (Dicta by Lord Pearce supported this view) - Professor Jennings 	YES <ul style="list-style-type: none"> - Proviso to Section 44 (only substantive limitation) - No provision similar to section 29(2) of the Soulbury constitution. 	YES <ul style="list-style-type: none"> - "2/3rd majority AND approval by people at a referendum required for <ul style="list-style-type: none"> ⇒ Bill amending /repealing/replacing/inconsistent with Articles 1,,3,6,7,8,9,10,11 & 83 (Entrenched Articles) ⇒ Amendment/repeal/replacement inconsistent with Articles 30(2) or 62(2) which would extend the term

	“Section 29(2) could be amended by the procedure set out in Section 29(4).		of office of president/duration of parliament to over 6 years
			[Article 83] - Proviso to Article 75

<p>Are the law making powers of parliament bound by considerations of international Law?</p>	<p>NO</p> <ul style="list-style-type: none"> - <i>Leelawaithie V Minister of Defence and External Affairs</i> 68 NLR 73 (The Universal Declaration of Human Rights <u>had no binding force</u> as it formed no part of the Municipal law) 	<p>No</p> <ul style="list-style-type: none"> - “Sri Lanka is a free, sovereign and independent republic...” [Article 1] - <i>Leelawaithie V Minister of Defence and External Affairs</i> 68 NLR 73 - (The Universal Declaration of Human Rights <u>had no binding force</u> as it formed no part of the Municipal law) 	<p>YES (practical limitation to the supremacy of parliament)</p> <ul style="list-style-type: none"> - Parliament cannot pass a bill which restricts the International treaties and conventions for economic development and the National economic development [Article 157] However a contrasting situation was seen in- - <i>Nallaratnam Singharasa V The Attorney General</i> - “Sri Lanka is a free, sovereign, Independent and Democratic Socialist Republic” [Article 1] ^in this context however, parliament is not bound by International law
<p>Is parliament bound by its predecessors?</p>	<p>***</p>	<p>NO (Not bound unless it wanted to)</p> <ul style="list-style-type: none"> - “Unless the NSA otherwise provides, all laws, written or unwritten, in force immediately before the commencement of the constitution... shall mutatis mutandis and except otherwise expressly provided in the constitution, continue in force...” [Article 12(1)] 	<p>NO</p> <ul style="list-style-type: none"> - Article 168(1) to (5) supports the position that parliament is not bound by its predecessors. “Unless Parliament otherwise provides...” [Article 168(1)]

<p>Are there any procedural limitations to the law making powers of parliament?</p>	<p>YES</p> <ul style="list-style-type: none"> - <i>Bribery Commissioner V Ranasinghe</i> 66 NLR 73 (No law shall be passed Ultra Vires to the Constitution) - Parliament may amend and repeal any provision of this order under the power of the Queen of England [S. 29(4)] (^ such a bill should have a 2/3rd majority of votes and should be certified by the speaker) 	<p>YES</p> <ul style="list-style-type: none"> - Procedure for enacting laws in general [Articles 46 & 47] - Special procedure that should be followed in amending the constitution and laws inconsistent with the constitution [Articles 51 & 52] - Contemplation of certain procedural steps in regard to passage of urgent bills [Articles 55(3) ,(4)] - Requirement of a 2/3rd majority for the passing of any Bill [Sections 51(5), 52(1) & 55(4)] - <i>Bribery Commissioner V Ranasinghe</i> 66 NLR 73 (No law shall be passed Ultra Vires to the Constitution) 	<p>YES</p> <ul style="list-style-type: none"> - Article 78 - 80(Procedure for enacting laws in general) - Article 80-82 (Special Procedure for laws amending the Constitution and laws inconsistent with the constitution)
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<p>Does parliament recognize any legislative rival?</p>	<p>NO</p> <ul style="list-style-type: none"> - British Parliament could not have passed a law affecting Ceylon, unless Ceylon requested. “An Act of UK Parliament shall not extend or be deemed to extend to a Dominion... unless it is expressly stated in the Act concerned that the Dominion has requested and consented to its enactment” [S. 4- Statute of Westminster] 	<p>NO</p> <ul style="list-style-type: none"> - “The NSA may not abdicate, delegate or in any manner alienate its legislative power, nor may setup an authority with any legislative power other than the power to make subordinate laws” [Section 45(1)] - “The NSA may by law confer the power of making 	<p>NO</p> <ul style="list-style-type: none"> - “Parliament shall not abdicate or in any manner alienate its power, and shall not set up any authority with any legislative power” [Article 76(1)] - “It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in
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		<p>subordinate legislation for prescribed purposes on any person or body" [Section 45(3)(a)]</p> <ul style="list-style-type: none"> - <i>C.W.C. v Supt. Beragala Estate</i> 76 NLR 1 (... "the unlimited right given in a statute cannot be taken away without express power by a regulation") - <i>Weerasinghe V Samarasinghe</i> 68 NLR 361 @ 363 ("...there is nothing in the Public Security Ordinance to indicate that parliament has abdicated its legislative authority...") <p>However, there may be one instance where such limitation to its legislative power can be cited;</p> <ul style="list-style-type: none"> - "Delegation of power to the President to make Emergency Regulations in accordance with the law for the time being, relating to Public Security" [Section 45(1)] 	<ul style="list-style-type: none"> - accordance with such law" [Article 76(2)] <i>Weerasinghe V Samarasinghe</i> 68 NLR 361 ("...there is nothing in the Public Security Ordinance to indicate that parliament has abdicated its legislative authority...") <i>Yasapala V Minister Of Education</i> F.R.D. (1) 143 ("The president's power of making emergency regulations is thus coextensive with that of parliament.... the constitution however enables parliament to exercise a control check by requiring the proclamation made by the president to be approved by a resolution of parliament...") "It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes..." [Article 76(3) ^Thereby, laws made by Provincial Councils (established under the 13th Amendment) cannot override laws passes by parliament.
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Is parliament bound by Morality?	***	***	***
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12. THE 13TH AMENDMENT

- The 13th amendment was a result of an Indo-Lanka agreement which was an attempted to distribute policy making powers among the 9 provinces.
- The provincial councils were established through this amendment with the intention of solving the many ethnic problems that arose in the Northern and Eastern provinces at the time.
- In order to understand that judgment in relation to the 13th amendment [*In Re Thirteenth Amendment to the Constitution and Provincial Councils Bill (1987) 2 SLR 312*], one must first understand the following terms;

- **DEVOLUTION**

Conferment of powers of the central government to a designated body in a region **without relinquishment of the Central governments supremacy**

Hence



Does **not result in the permanent alienation** of any part of the sovereign power of the State or its supremacy in all matters over the whole state



Not permanent because

The power **to recall and resume the devolved powers exists in the sovereign authority** in the state.

- **DECENTRALISATION**

Powers of decision making of the Central government are **exercised by officials who are a part of the Central Government.**

- **DELEGATION**

Grant power to do an act which is vested in the **grantor to an agent** usually **subject to conditions as to its exercise and can be revoked at any time.**

- Does the 13th Amendment impose a restriction on the legislative supremacy of the Parliament?

⇒ Article 75

“Parliament shall have the power to make laws, including laws having retrospective effect...”

⇒ The 13th Amendment introduced 3 lists;

- Reserved List [Article 154G (7)]

A provincial Council has no power to make statutes on any matter set out in List II of the Ninth Schedule (~~Reserved~~ List) Exclusively for Central Parliament

- Provincial Council List [Article 154G (1)]

Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which is established, with respect to any matter set out in List I of the Ninth Schedule (Provincial Council List)



Only regarding matters pertaining to their area (within its geographical boundary) [Article 154G (3)]

This article sets out the special procedure to be followed by Parliament when making laws in respect of the Provincial Council list.

[Article 154G (4)]

Parliament can make law on any matter set out in the Provincial Council List where one or more provincial Councils request Parliament by resolution.

- Concurrent List

[Article 154G (5)]

Both the Parliament and the Provincial council can legislate after consultations (with each other).

[Article 154G (6)]

In the case of any conflict between Provincial Statute and an Act of Parliament, the Act prevails and the Provincial statute shall be void to the extent of inconsistency.

[Article 154G (9)]

If the Law existed prior to the 13th Amendment, this Law remains suspended and inoperative within the province so long as the statute is in force unless the Parliament decides contrary by resolution. After which the Act is valid

⇒ It is therefore noted that some amount of legislative power is granted to the Provincial Councils by the 13th Amendment.

⇒ The 13th Amendment Bill was thus challenged on the following grounds;

1. It will change the nature of a Unitary state
2. It will violate the Supremacy of Parliament

In this case Sharananda CJ stated that, "the essence of a unitary state is that the sovereignty is undivided (In other words that the powers of the central government are unrestricted.). He also mentioned the essential features of a Unitary State -

1. The Supremacy of the Central Parliament
2. The absence of a subsidiary sovereign body

He further stated that, although the Provincial Councils stand as subsidiary law making bodies, they can be abolished by the parliament at any time.

With regard to legislative power that is granted to the Provincial Councils, Sharvananda CJ said, the legislative powers of Provincial Councils are not exclusive as -

- That power is subject to constitutional restrictions
- The bylaws made by the Provincial Councils are applicable only to those provinces
- The Parliament can amend or repeal this chapter regarding legislative power at any time.

Hence, one can see that Provincial Councils are always subject to the Parliament and therefore Sri Lanka continues to be unitary state and Parliament still enjoys legislative Supremacy.

*Kindly refer both the Majority and dissenting judgments of *In Re Thirteenth Amendment to the Constitution and Provincial Councils Bill (1987)* 2 SLR 312 in order to get a better understanding on this unit.

RELATED PAST PAPER QUESTIONS:

- “The provincial Councils system introduced in Sri Lanka should be considered as an experimental one in the sphere of devolution of power of governance. However, it has been entrapped into a dogmatic quagmire within a short period of time and is prevented from moving away towards meaningful devolution of power in its letter and spirit.”
Briefly comment on the Provincial Councils system in Sri Lanka introduced by the 13th Amendment to the Constitution. [Q7; Oct 2016; 16 marks]
- “Some critics are of the view that the 13th Amendment to the Constitution devolved neither the legislative power nor the executive power to the provincial councils.”
Comment on the above statement in light of the concept of devolution of power and state how it has been effected in Sri Lanka through the 13th Amendment to the Constitution. [Q6; Apr 2016; 16 marks]
- The Thirteenth Amendment to the Constitution introduced devolution of power.”
How effective have been the said provisions in Sri Lanka? [Q5; Oct 2015; 16 marks]
- Write a note on the devolution of power to the provincial councils and analyze as to how effective it has been in its interpretation. Give illustrations for your answer. [Q11; Dec 2013; 9 marks]
- The Thirteenth Amendment to the Constitution introduced devolution of power. How effective have been the said provisions in Sri Lanka. [Q11; Oct 2012; 9 marks]
- Discuss the impact of the 13th Amendment to the Constitution on the Supremacy of Parliament under the 1978 Constitution. You must discuss both the majority and the minority judgments of the Supreme Court in the 13th Amendment to the Constitution determination.
- Write a note on the devolution of power to the Provincial Councils under the Thirteenth Amendment to the Constitution and analyse as to whether the purpose for which the said provisions have been fulfilled. [Q6; Apr 2011; 9 marks]
- Write a note on the devolution of power to the Provincial Councils and analyze as to how effective it has been in its implementation.
Give illustrations and reasons for your answer. [Q10; Oct 2010; 9 marks]

13. SOME MAIN FEATURES OF THE RECENT AMENDMENTS TO THE CONSTITUTION (17TH, 18TH AND 19TH)

17 th Amendment	18 th Amendment	19 th Amendment
<ul style="list-style-type: none"> ▪ Passed in 2002 ▪ Reduced the power of the Executive President. ▪ Established a – <ul style="list-style-type: none"> ⇒ Constitutional Council ⇒ Independent Public Service Commission ⇒ Election Commission ⇒ National police Commission (^ were made independent to ensure that the influence of the President in some of the main areas of the country were reduced) ▪ President was required to obtain the <i>recommendation</i> of the Constitutional council in making appointments to certain commissions (Elections commission, Public Service Commission etc) and the <i>approval</i> of the CC when making certain appointments (Chief Justice, Attorney General etc). 	<ul style="list-style-type: none"> ▪ Passed in 2010 ▪ Gave back to the President some of the powers taken away by the 17th Amendment (Primary aim of the Amendment). ▪ Replaced the Constitutional Council with a Parliamentary Council. ▪ Removed the prohibition on a person twice elected to office from contesting again as President. ▪ President only had to obtain observations of the Parliamentary Council to make certain appointments (Elections commission, Public Service Commission, Chief Justice, Attorney General etc) 	<ul style="list-style-type: none"> ▪ Passed in 2015 ▪ Right to information recognized as an Fundamental Right (Article 14A) ▪ Reduced the term of office of President from 6 to 5 years. ▪ Re introduced a two limit on a person holding office as President, ▪ Changed the immunity of the President (prior to the 19th amendment, Article 35(3) gave immunity to the president in both his ▪ Private and official capacities) ▪ Constitutional council re established (Similar to the 17th Amendment) ▪ Prime Minister is vested with additional powers. (eg: President has to consult with the PM prior to making ministerial appointments) ▪ Takes away the power of the President to dissolve parliament on his whim (unless in an extremely needed situation)

RELATED PAST PAPER QUESTIONS:

- “It is opined in some quarters that the 19th Amendment to the Constitution has not effected any substantial changes to the executive powers of the office of President of Sri Lanka. However, it has helped to restore certain precepts of democracy in the governance.”
Do you agree? Discuss with support of case law authority. **[Q5: Oct 2016; 16 Marks]**
- Discuss the salient features of the 19th Amendment to the Constitution and its intended effects on governance. Give examples. **[Q6; Apr 2016; 16 marks]**
- Compare and contrast the provisions of 17th and 18th Amendments to the 1978 Constitution of Democratic Socialist Republic of Sri Lanka.
- Critically analyze the provisions of the Eighteenth Amendment to the Constitution. **[Q7; Dec 2013; 9 marks]**
- Critically analyze the provisions of the Eighteenth Amendment to the Constitution. **[Q8; Apr 2013; 9 marks]**

