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Abstract
On 31 March 2011, the United Nations Secretary-General's panel of experts handed down a report on 'Accountability in Sri Lanka'. Among other things, the report observed that the Attorney-General's Department in Sri Lanka suffers from a lack of independence from the President. Further, the Department plays a dual role both advising the government and functioning as the public prosecutorial agency. The Sri Lankan Solicitor-General is part of this Department, and is therefore either paralysed by, or a product of, these institutional dichotomies.

This article will seek to explain the role of the Solicitor-General in Sri Lanka, and the controversial relationship between the Attorney-General's Department and the President. It will briefly explore the historical context, identify the appointment process, and describe the current functions of the Sri Lankan Solicitor-General. It will argue that the Solicitor-General cannot be both public prosecutor and government advisor, and perform either role with integrity. Therefore, the Solicitor-General in Sri Lanka should be established as an independent statutory office, and the prosecutorial function should be transferred to a separate government agency, rather than under the President.

Keywords
Solicitor-General, Sri Lanka, Attorney-General's department, Sri Lankan Solicitor-General

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INSTITUTIONAL DICHOTOMIES: THE SOLICITOR-GENERAL IN SRI LANKA

DANIELLE IRELAND-PIPER*

On 31 March 2011, the United Nations Secretary-General's panel of experts handed down a report on 'Accountability in Sri Lanka'.[1] Among other things, the report observed that the Attorney-General's Department in Sri Lanka suffers from a lack of independence from the President.[2] Further, the Department plays a dual role both advising the government and functioning as the public prosecutorial agency.[3] The Sri Lankan Solicitor-General is part of this Department, and is therefore either paralysed by, or a product of, these institutional dichotomies.

This article will seek to explain the role of the Solicitor-General in Sri Lanka, and the controversial relationship between the Attorney-General's Department and the President. It will briefly explore the historical context, identify the appointment process, and describe the current functions of the Sri Lankan Solicitor-General. It will argue that the Solicitor-General cannot be both public prosecutor and government advisor, and perform either role with integrity. Therefore, the Solicitor-General in Sri Lanka should be established as an independent statutory office, and the prosecutorial function should be transferred to a separate government agency, rather than under the President.

I Historical context

Sri Lanka in a 'multi-ethnic and multi-religion'[4] island nation, near the south coast of India. Sri Lanka - meaning 'Resplendent Isle'[5] is not the name by which the island was always known. At various stages in history, it was called Taprobane by the Greeks, Serendib by the Arabs, Zeilan or Seilan by the early Europeans and Ceylon

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1 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011) <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf>.

2 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011) http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, v and 98.

3 Ministry of Justice Sri Lanka, *Attorney-General's Department* <http://www.justiceministry.gov.lk/dept/attorney.htm>.

4 Aquinas V Tambimuttu, *Sri Lanka: Legal Research and Legal System* (January 2009) New York University <http://www.nyulawglobal.com/index.htm>.

5 Vijaya Samaraweera, *Sri Lanka*, World Biographical Series (Clio Press, 1987) vol 20, xiii.

by the British.[6] The country was renamed 'Sri Lanka' in 1972,[7] and for ease of reference, this name will be used throughout this article regardless of the point in history referred to. Sri Lanka is a unitary state, divided into administrative districts.[8] It was settled by various waves of migration from India beginning in around 400 BC.[9] Indo-Aryas from the north of India established Singhalese Buddhist kingdoms, and Tamil Hindus, now known as 'Sri Lankan Tamils' from southern India established a kingdom in the northern coastal areas.[10] Muslim traders also established a presence in early Sri Lankan history.[11] As mentioned below, there has been tension between these two different ethnic groups ever since.

The 16th century onwards: European occupation

Before centuries of foreign occupation, Sri Lanka had an elaborate judicial system where judicial powers were exercised by a hierarchy of officials, and overseen by the King.[12] However, from the 16th century onward, Sri Lanka was colonised by the Portuguese (1597 – 1658), the Dutch (1658 - 1796), and the English (1796 – 1948), all of whom made their mark on the legal system.[13] European rule also led to the establishment of a Christian community – Catholics under the Portuguese, and Anglicans under the English.[14] The Dutch and the Portuguese interest in the island was largely due to its high quality cinnamon, described as the 'finest and purest'[15] by a Dutch missionary in 1672.[16] Both the Dutch and Portuguese exploited ethnic tensions to their 'political advantage',[17] with separate laws for separate groups.[18]

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6 Ibid.
7 Ibid.
8 Robert Oberst, 'Administrative Conflict and Decentralisation: the Case of Sri Lanka' (1986) 6 *Public Administration and Development* 163, 163.
9 K Alan Kronstadt, *Sri Lanka: Background and U.S. Relations* (Congressional Research Service, 22 January 2008) 4.
10 Ibid.
11 Samaraweera, above n 5, xviii.
12 Attorney-General's Department of Sri Lanka, *Evolution of the Office of Attorney General* <http://www.ewisl.net/attorney1/testing/History.htm>.
13 Samaraweera, above n 5, xviii.
14 Samaraweera, above n 5, xvii, xix.
15 Ibid xvi.
16 Ibid.
17 Ibid.
18 Ibid xviii.

Notably for the purposes of this article, under Dutch rule, a role roughly equivalent to a Solicitor-General was developed and referred to as the 'Advocate Fiscal'.[19]

British rule

Like most of the Indian subcontinent, Sri Lanka was under British rule from 1796 until attaining independence in 1948.[20] Like other Europeans, the British were interested in Sri Lanka's cinnamon. However, due to their 'imperial contest with the French'[21] they were more interested in the strategic advantages of access to Sri Lankan harbours.[22] Tamil labourers from India, now known as 'Indian Tamils', were brought by the British to Sri Lanka to work in tea and rubber plantations.[23] In this way, British colonial rule during the 19th and 20th centuries brought varying ethnic communities – including the Singhalese, the Indian Tamil and the Sri Lankan Tamil - under one rule. They imposed a single administration which operated according to the Westminster system of government.[24] During this time, it was typically Tamils that benefited from education and employment opportunities in government.[25] This created resentment towards Tamils that still exists today. As Kronstadt observes:

> The Sinhalese, who had deeply resented British favouritism toward to Tamils, saw themselves not as the majority, however, but as a minority in a large Tamil Sea that includes 60 million Tamils just across the Palk Strait in India's southern state of Tamil Nadu.[26]

Samaweera also writes on this issue, noting that an English education – the key to social mobility, status, wealth and services – was not distributed equally between ethnic groups.[27] He concludes that this led to the creation of a new, predominantly Tamil, English-educated elite.[28] In 1833, the British established a Legislative Council drawn largely from this European and Tamil elite, although it later included

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19 Attorney-General's Department of Sri Lanka, *Evolution of the office of Attorney General*, above n 12.

20 Encyclopedia of the Nations, *Sri Lanka- Politics, Government and Taxation* (2011) <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Sri-Lanka-POLITICS-GOVERNMENT-AND-TAXATION.html>.

21 Samaraweera, above n 5, xviii.

22 Ibid.

23 Kronstadt, above n 9, 4.

24 S J Tambiah, *Sri Lanka – Ethnic Fratricide and the Dismantling of Democracy* (University of Chicago Press, 1986) 65.

25 Ibid.

26 Kronstadt, above n 9, 5.

27 Samaraweera, above n 5, xxi.

28 Ibid xxii.

Singhalese and Muslim representatives.[29] It was not until the 1920s that this system of ethnic representation was replaced with territorial representation.[30] At this point, it became apparent that the numerical superiority of the Singhalese would eventually dominate an independent Sri Lanka.

In 1834, the British renamed the position of Advocate Fiscal as King's Advocate and subsequently, Queen's Advocate (during the reign of Queen Victoria).[31] In 1884, the position was split into two, and became known as the Attorney-General and Solicitor-General.[32] Available records show that as far back as 1884, the Attorney-General was assisted by the Solicitor-General.[33] For many years, the Attorney-General was a member of the Legislative Council, and played a political role. However, in 1931, the office of the Attorney-General – assisted by the Solicitor-General – became a public servant and no longer a member of the Legislative Council.[34] This is still the case today.

Independence

Independence 'dawned in 1948 with a great deal of optimism'[35] that an ethnically and religiously divided community would unite as an independent nation.[36] However, although safeguards against Singhalese domination were enshrined in the 1948 *Constitution*, they proved ineffective, and by 1949 the government had denied the majority of Indian Tamils citizenship and franchise rights.[37] Although an agreement in 1964 enabled a significant number of Indian Tamils to receive citizenship, this 'did not erase the image of Indian Tamils as the unassimilated minority'[38] with separatist tendencies.[39]

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29 Ibid xxv.
30 Ibid.
31 Attorney-General's Department of Sri Lanka, *Evolution of the Office of Attorney General*, above n 12.
32 Ibid.
33 Ibid.
34 Attorney-General's Department of Sri Lanka, *Evolution of the Office of Attorney General*, above n 12.
35 Samaraweera, above n 5, xxviii.
36 Ibid.
37 Ibid xxix.
38 Ibid xxxiv.
39 Ibid xxviii.

A republican *Constitution*

In 1972, Sri Lanka became a republic and adopted a new *Constitution*.[40] This *Constitution* was soon replaced in 1978, and Sri Lanka made a shift to the executive president system which was a fusion of the French system of government and the Westminster model.[41] The position of the Solicitor-General survived throughout this period of change. However, amendments to the *Constitution* as part of the reform in 1978 – particularly as relates to the judiciary in Sri Lanka – have been controversial, as have reforms in 2010 that brought the Attorney-General's Department, and therefore the Solicitor-General, under the direct control of the President. This will be discussed in more detail below.

Civil war & ethnic conflict

Before moving on to discuss the appointment and functions of the Solicitor-General in Sri Lanka, a moment should be taken to reflect on the two enormous civil conflicts Sri Lanka has faced in the 20th and 21st centuries. It would be remiss to purport to provide an overview – however brief – of the history of Sri Lanka without mentioning these conflicts. Firstly, armed insurrections in the south of Sri Lanka in 1971 and again in the late eighties were 'brutally put down'.[42] Secondly, a secessionist conflict with the Liberation Tigers of Tamil Eelan ('LTTE') took place between 1983 and 2009.[43] The conflict began in earnest after race riots in July 1983 were triggered by an assault on a routine army patrol by a rebel Tamil group, and the retaliatory attacks that ensued.[44] There are accusations that the government itself was involved in organised attacks on Tamils.[45] By the year 2000, the conflict had already resulted in over 60 000 deaths, and the displacement of one and a half million people.[46]

While these ethnic conflicts may not seem relevant to a discussion of the role of the Solicitor-General, the reality is that all public servants in Sri Lanka have been operating in the midst of a civil war, and simmering ethnic tensions. Ironically, as much as the existence of a Solicitor-General in Sri Lanka is an inheritance from the

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40 Attorney-General's Department of Sri Lanka, *Evolution of the Office of Attorney General*, above n 12.

41 Sashini Walpola, Interview with Mr W P G Dep, Former Solicitor-General of Sri Lanka (Bond University, 25 March 2011).

42 Jonathon Goodhand, David Hulme and Nick Lewer, 'Social Capital and the Political Economy of Violence: A Case Study of Sri Lanka' (2000) 24 *Disasters* 390, 393.

43 Ibid, and *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011) http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, v.

44 Samaraweera, above n 5, xxxv.

45 Ibid.

46 Goodhand, Hulme and Lewer, above n 42, 393.

British, so too in part are these ethnic tensions the result of a colonial administration that used disunity to their advantage. As Tambimuttu observes, 'the ethnic and religious diversity of the nation, and also its colonial history, have a direct bearing on aspects of the legal system of Sri Lanka.'[47] As at 2008, the ethnic composition of the population in Sri Lanka was made up as follows: five per cent Indian Tamil; twelve per cent Sri Lankan Tamil; eight per cent Moorish and Malay Muslims; and around 0.7 per cent other groups, with the remaining majority being ethnic Singhalese. To further complicate matters, religious divisions further divide ethnic groups who although 'united at one level by commonly perceived ethnic identity, are differentiated at another level on the basis of religious groups.'[48] As Samaraweera observes, this results in a highly complex social structure.[49] No doubt this has prompted speculation as to the possibility of 'separation into two sovereign states'.[50]

Sri Lanka today

Despite ongoing political violence, the Democratic Socialist Republic of Sri Lanka is an 'operating multi-party democracy'[51] which operates under a unicameral parliament of over 200 members.[52] Sri Lanka has drawn from the French-style presidential system, where the President is popularly elected, and may dissolve Parliament, call elections, and appoint the Prime Minister and Cabinet. There is also a Secretariat for coordinating the peace process with the LTTE, who in turn, operate their own Secretariat.[53]

II Appointment and functions

The Sri Lankan Solicitor-General is now appointed and dismissed by the President, on advice from the Public Service Commission, and once approved by Parliament.[54] Reportedly, almost all Solicitors-General in Sri Lanka have been appointed to the position after working for the Attorney-General's Department and then subsequently

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47 Tambimuttu, above n 4.
48 Samaraweera, above n 5, xiv.
49 Ibid.
50 A Jeyaratnam Wilson, *The Break-Up of Sri Lanka* (C Hurst & Co, 1988) 208.
51 Kronstadt, above n 9, 4.
52 Ibid 5.
53 Ibid.
54 Walpola, above n 41.

being appointed as one of the Additional Solicitors-General. [55] As in Australia, the Sri Lankan Solicitor-General is not a member of the Parliament.[56]

In addition to court appearances and the provision of legal advice, the Sri Lankan Solicitor-General also examines parliamentary bills, and oversees allegations of misconduct by members of the legal profession.[57] Solicitors-General may play a part in law reform in Sri Lanka. For example, a former Solicitor-General headed a committee appointed by the Ministry of Justice, Law Reform and National Integration to recommend amendments to practice and procedure in police investigations and judicial hearings.[58] In addition, persons appointed in the role appear to also play a part in facilitating regional cooperation, as evidenced by the Sri Lankan Solicitor-General's appointment as Vice-President of the Asian-African Legal Consultative Organization.[59] This body has 30 members and exists to increase 'Asian-African influence in the progressive development and codification of international law.'[60]

Deputy Solicitors-General and Additional Solicitors-General

Like India, Sri Lanka incorporates an additional tier of law officers, known as 'Additional Solicitors-General'. In addition, Sri Lanka also appoints Deputy Solicitors-General. At the time of writing, the Sri Lankan Attorney-General's Department functions with 199 professionals including the Attorney-General, the Solicitor-General, five Additional Solicitors-General and 20 Deputy Solicitors-General.[61] Anecdotal evidence suggests that all but one of Sri Lanka's Solicitors-General first served as an Additional Solicitor-General prior to appointment.[62] This indicates a perception that the subordinate roles are necessary precursors to appointment, which could in turn affect the way in which Additional Solicitors-General and Deputy Solicitors-General conduct their duties.

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55 Walpola, above n 41.

56 Attorney-General's Department of Sri Lanka, *Evolution of the Office of Attorney General, Departmental Website*, above n 12.

57 Walpola, above n 41.

58 Basil Fernando, *The Kafkan Metamorphosis of Sri Lanka's Attorney-General* (31 March 2008) Asian Human Rights Commission & Asian Legal Resource Centre Hong Kong <http://www.article2.org/mainfile.php/0701/308/?print=yes>.

59 Asian-African Legal Consultative Organisation, 'Special Meeting on Environment and Sustainable Development: 49th Annual Session' (2010) 40 *Environmental Policy and Law*, 226.

60 Ibid.

61 Ministry of Justice Sri Lanka, *Attorney-General's Department,* above n 3.

62 Walpola, above n 41.

A dual role: advisor and prosecutor

The position of Solicitor-General in Sri Lanka is part of the Attorney-General's Department (the Department). The Department plays a dual role both advising the government and functioning as the public prosecutorial agency.[63] As part of the Department, this is also the dual role of the Solicitor-General. Many commentators argue that this has 'often led to clear conflicts of interest'.[64] In its 2009 'Asia Report', the International Crisis Group claims that the 'attorney general's department has, with few exceptions, failed to investigate and prosecute effectively massacres and disappearance cases'.[65] In a similar vein, Fernando refers to the 'failure to prosecute those accused of thousands of disappearances in the south alone'[66] and asserts 'instead of prosecuting, the AG's department [sic] has been assigned to attend meetings of United Nations agencies ... [to] defend the government against allegations of human rights abuses'.[67]

In this context, it is disturbing to note that the conviction rate of criminal prosecutions in Sri Lanka is reportedly less than ten percent, and in some cases, claimed to be more like four percent.[68] The available open source material citing this statistic does not make it clear whether this accounts for summary criminal offences and guilty pleas. Nonetheless, it is still very low. One Sri Lankan lawyer cited by Lewis Davis argues this is in part a result of the *Prevention of Terrorism Act* and Emergency Regulations.[69] He says that although Article 11 of the *Constitution* prohibits torture, Article 16 of the *Prevention of Terrorism Act* provides that a confession—whether verbal or written, whether taken while in custody or not, or whether in the course of an investigation or not—is not irrelevant when made to a police officer above the rank of Assistant Superintendent.[70] The burden of proving

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63 Ministry of Justice Sri Lanka, *Attorney-General's Department,* above n 3.

64 International Crisis Group, 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights' (2009) 172 *Asia Report* 5.

65 Ibid.

66 Fernando, above n 58.

67 Fernando, above n 58.

68 The conviction rate has been put at 4% in: Human Rights School, *The Role and Characteristics of the Prosecution as Envisaged under International Law* <http://www.hrschool.org/doc/mainfile.php/lesson42/165/>; at 3-4% in: Lewis Davis, 'Sri Lanka's Judicial Medical Officers, their Concerns and the Torture Shortcut' *Asian Human Rights Commission* <http://www.humanrights.asia/resources/journals-magazines/eia/eiav4n2/sri-lankas-judicial-medical-officers-their-concerns-and-the-torture-shortcut; and 4% in: Dr A.C. Visvalingam, 'Unpublished Reports Of Commissions Of Inquiry', *Citizens Movement for Good Governance*, <http://cimogg-srilanka.org/2009/04/unpublished-reports-of-commissions-of-inquiry/>.

69 Davis, above n 68.

70 Ibid.

that such a confession is irrelevant is on the person claiming it to be irrelevant—for example, a torture victim. Further, under the state of emergency legislation, acts carried out under the *Prevention of Terrorism Act* are immune from judicial review if carried out in 'good faith'.[71] In interviews in 2009, Fernando remarked on what it described as 'the irony of police using the torture shortcut and why the conviction rate in Sri Lanka is only 3-4 percent',[72]

> [some] confessions here are not admissible in court *but the information obtained can be used to gather further evidence that can be used in court or to find people.* So the police can maintain the case but they cannot win the case which is why the conviction rate is so low.[73]

The effect of this on the inability of the Attorney-General and Solicitor-General to perform their dual functions is illustrated in an example provided by the Asian Human Rights Commission. The Commission reported on a Sri Lankan citizen complaining that police officers had tortured him.[74] The Commission claims that at the initiating stages of proceedings, the Supreme Court was informed that the Attorney-General would appear for the alleged perpetrators.[75] Noting that this 'has given rise to the speculation that the Attorney-General's Department seems to be changing its policy of not taking the side of alleged perpetrators of human rights abuses',[76] the Commission points out the inherent conflict of interest this presents: the Attorney-General, assisted by the Solicitor-General, is also the chief prosecutor of all crimes, including the crime of torture. Further, the Commission expressed concern that the Attorney-General (or Solicitor-General) acting for the alleged perpetrators will deter an effective police investigation of the matter.[77]

The role of the Attorney-General's Department in the 'Presidential Commission of Inquiry to Investigate and Inquiry into Alleged Serious Violations of Human Rights' (the Presidential Commission) has also attracted criticism. The International Independent Group of Eminent Persons (IIGEP) expressed reservations as to the

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71 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, above n 1, 97.

72 Davis, above n 68.

73 Ibid, citing Fernando, above n 58.

74 Asian Human Rights Commission, *Attorney General's Department and Torture – AHRC* (15 September 2011) Sri Lanka Watch <http://srilankawatch.com/index.php?option=com_content&task=view&id=42&Itemid=1>.

75 Ibid.

76 Ibid.

77 Ibid.

propriety of the Department acting as legal counsel to the Presidential Commission.[78] Noting that 'members of the Attorney General's Department have been involved in the original investigations into those cases subject to further investigation by the Commission itself',[79] the IIGEP concluded that members of the Department 'may find that they are investigating themselves'[80] and being called as material witnesses before the Presidential Commission.[81] The IIGEP considered these possibilities to be '... serious conflicts of interest, which lack transparency and compromise national and international standards of independence and impartiality that are central to the credibility and public confidence of the Commission.'[82]

This alleged conflict of interest is a barrier to the Solicitor-General being able to properly prosecute violations of fundamental rights by the police, or other parts of the executive arm of government. This is all the more concerning given that many of these constitutional rights can be amended by Parliament, without a referendum being put to the people. Article 82(5) of the *Constitution* of Sri Lanka ('the *Constitution*') provides:

> A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker ...

However, this provision is subject to Article 83 of the *Constitution*. Article 83 protects some provisions of the *Constitution* from alteration, replacement or repeal under Article 82(5), unless 'approved by the People at a Referendum'.[83] Provisions that

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78 Asian Human Rights Commission, *Sri Lanka: The Attorney General Being part of the Presidential Entourage Needs to be Questioned by Legislators* (14 June 2007) Relief Web <http://reliefweb.int/node/235148>.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

83 *The Constitution of Sri Lanka*, art 83 reads as follows:
Notwithstanding anything to the contrary in the provisions of Article 82—
(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and
(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not

cannot be amended by Article 82(5) without a referendum include Article 83 itself, and:

- Article 1, which establishes Sri Lanka as the 'Democratic Socialist Republic of Sri Lanka';
- Article 2, which provides that the Republic of Sri Lanka is a Unitary State;
- Article 3, which identifies sovereignty, as being 'in the people and ... inalienable.'
- Articles 6, 7, and 8 which establish the national flag, the national anthem, and the national day;
- Article 9, which gives Buddhism 'the foremost place', while assuring to all religions the rights granted by Articles 10, the freedom of thought, conscience and religion, and 14(1)(e), the freedom to worship, observe, practice or teach religion;[84]
- Article 10, which as noted above requires that every person is entitled to freedom of thought, conscience and religion; and
- Article 11, which prohibits any person from being subject to torture or cruel, inhuman or degrading treatment or punishment.

However, there are significant constitutional rights that are not protected by Article 83 from repeal or amendment under Article 82(5). Although, Article 3 is protected and it defines sovereignty as including 'fundamental rights', the specific inclusion of some of the fundamental rights in Chapter III of the *Constitution*, but not others, would indicate the exclusion of those other rights is intended. For example, the following Articles in Chapter III, entitled 'Fundamental Rights', are not identified in Article 83 as requiring an amendment in order for Parliament to amend or repeal :

- Article 12, which provides that all persons are equal before the law, and that no citizen is to be discriminated against on grounds such as race, religion, language, caste, sex, or political opinion;
- Article 13, which provides for the freedom from arbitrary arrest, detention and punishment, the presumption of innocence, and the prohibition of retroactive penal legislation;

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present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

[84] The *Constitution of Sri Lanka*, art 14(1)(e) reads as follows: '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 or teaching.'

- Article 14, which provides for freedom of speech, assembly, association and movement; and
- Article 17, which entitles every person to apply to the Supreme Court, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right.

Therefore, some fundamental rights are not entrenched in the *Constitution*. This means that not only is it difficult for the Solicitor-General to be both an advisor to the government on one hand, and prosecute violations of human rights by the executive arm of government on the other; but even an attempt by the Solicitor-General to commence a prosecution of a violation of the freedom from arbitrary arrest and punishment (for example), could be thwarted by an amendment under s 82. This makes it difficult for the Solicitor-General to adequately perform either of his/her dichotomous roles.

State of emergency

Despite a new *Constitution* and model of government, a key feature of the Sri Lankan legal system is underpinned by what the United Nations Secretary-General's panel of experts describes as Sri Lanka's 'comprehensive regime of emergency provisions.'[85] This emergency regime first emerged under the colonial era *Public Security Ordinance No. 25 of 1947*, and in its amended form, was used in 2005 to declare a state of emergency, which continued through to 2011 by virtue of monthly ratification by Parliament.[86] This state of emergency has facilitated the enactment of emergency regulations conferring broad powers relating to, among others, arrest, detention, search and seizure.[87] The relevance of the emergency regime to the role of Solicitor-General in Sri Lanka, is that it is difficult to function as both prosecutor and advisor with any true independence under such conditions.

III Presidential control

In 2010, the Sri Lankan Attorney-General's Department, and therefore the Solicitor-General, was transferred from the Ministry of Justice to the direct control of the President.[88] This occurred after the 2010 elections[89], and by virtue of Article 44(2) of the *Constitution*, which provides that the 'President may assign to himself any subject or function and shall remain in charge of any subject or function ... and may for that

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85 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, above n 1, 96.
86 Ibid.
87 Ibid 97.
88 Ibid 98 [354].
89 Ibid 97.

purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the *Constitution* or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President'.[90]

This means the Department lacks sufficient autonomy from the President. The International Crisis Group asserts that an increasing number of appointees from the higher courts have been from the Attorney-General's Department and that the ensuing 'result is benches stacked to favour the government.'[91] It is argued that the independence of the prosecutorial function of the Department is now further compromised. For example, the Asian Human Rights Commission asserts that:

> … if the department is under the president it will have to take orders from his office on matters of prosecutions. This will be particularly so in terms of political opponents of the government and orders of the higher office will have to be obeyed ... **actions relating to corruption … may be withdrawn if the accused is a government politician or a person in whom the government has some interest**. Similarly in cases of political violence and other instances the prosecutions may be withdrawn for political expediency. [92]

Another commentator was equally scathing and claimed:

> Since 1978 the institution of the Attorney General's Department has been subjected to serious undermining. This has been documented by observers and human rights organisations in considerable detail. However, despite of this undermining the institution has remained an independent entity and to a greater degree the officers of the institution have tried to maintain the old traditions which go back to about 125 years. The previous attempts to undermine the institution have seriously damaged its credibility and particularly the office of the Attorney General himself has lost public confidence. **However, this new move will damage the institution substantially and above all it will damage the image of the institution as it will be seen as one directly controlled by the executive president**. [93]

In addition, Fernando claims that members of the legal profession, such as lawyers and judges, are subjected to intimidation and violence if choosing to act for politically

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[90] *The Constitution of Sri Lanka*, article 44(2).

[91] International Crisis Group, above n 64, i.

[92] Asian Human Rights Commission, *Sri Lanka: President to take over Attorney General's Department will Further Damage The Rule Of Law* (5 May 2010) <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-070-2010> (emphasis added).

[93] David Kumar, *Sri Lanka: Attorney General Under the President* (23 May 2010) Journalists for Democracy in Sri Lanka <http://www.jdslanka.org/2010/05/sri-lanka-attorney-general-under.html> (emphasis added).

unpopular or detained persons.[94] In this climate, it is hard to imagine how the Solicitor-General could act both as prosecutor and advisor without fear of reprisal. In this way, the Solicitor-General will either be a product of, or paralysed by, institutional dichotomies.

The findings in the 'Report of the Secretary-General's panel of experts on accountability in Sri Lanka' support this concern. For example, the report found:

> In particular, the independence of the Attorney-General has been weakened in recent years, as power has been more concentrated in the Presidency. Moreover, the continuing imposition of Emergency Regulations, combined with the Prevention of Terrorism Act in its current form, present a significant obstacle for the judicial system to be able to address official wrongdoing while upholding human rights guarantees.[95]

Other features of the Sri Lankan justice system which are problematic include an immunity of the President for any act or omission, whether personal or official.[96] However, in response to accusations such as those above, the Attorney-General's Department claims that it has made considerable contributions to the 'promotion and protection of human rights...'[97] and that it 'no longer defends Police Officers and Security Forces personnel alleged to have been involved in the perpetration of torture.'[98] Notwithstanding this, controversy surrounding Law Officers in Sri Lanka also extends internationally. For example, in March 2010, an Australian news source published an article claiming the Sri Lankan Government sought to influence an investigation and prosecution in Australia of Australian citizens charged with terrorism offences for their alleged support of the Tamil Tigers.[99] The Australian prosecutorial authorities were required to establish that the Tamil Tigers are (or were) a terrorist group, and therefore, sought witness statements from Sri Lankan

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[94] Basil Fernando, *Lawyers in Sri Lanka Threatened* (2 January 2009) UPI Asia <http://www.upiasia.com/Human_Rights/2008/12/31/lawyers_in_sri_lanka_threatened/6165/>.

[95] *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011 <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf> v.

[96] The *Constitution of Sri Lanka*, article 35(1) provides: 'While any person holds office as President, no proceedings shall he instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity'.

[97] Attorney General's Department Sri Lanka, *Promotion and Protection of Human Rights* <http://www.ewisl.net/attorney1/Special%20Units/specialmissing.htm>.

[98] Ibid.

[99] Nick McKenzie and Richard Baker, 'Sri Lanka stymied investigation', *Sydney Morning Herald*, 31 March 2010.

police and military personnel.[100] Reportedly, a Sri Lankan Deputy Solicitor-General told Australian officials 'he would tell the witnesses not to testify unless he was able to advise them, and asked to review Sri Lankan witness statements before they were finalised'.[101] This news article concludes by asserting that the Sri Lankan government viewed the case as a means to overcome Australia's refusal to list the Tamil Tigers as a terrorist group.[102] Either way, the central role played by a Deputy Solicitor-General in a matter of international crime cooperation is indicative of the political dimensions to the roles played by Law Officers in Sri Lanka. This is further illustrated by the Sri Lankan Solicitor-General leading a delegation in the negotiation of a 'Treaty on Mutual Legal Assistance in Criminal Matters' between Sri Lanka and the Russian Federation in July 2011.[103]

In light of the above, it is clear the Sri Lankan Solicitor-General operates in a highly politicised and contentious environment, and it is widely perceived that the 'Attorney General's Department suffers from having to play contradictory roles.'[104]

IV The way forward

In Sri Lanka, the Solicitor-General is part of a department with conflicting roles. The Solicitor-General of Sri Lanka is expected to function both as an advisor to a government accused of war crimes, [105] and at the same time, a public prosecutor. This gives rise to an intractable conflict of interest. Therefore, Sri Lanka must engage in meaningful institutional reform, and separate out the prosecutorial function from the office of the Solicitor-General, which in turn, should be established as a separate statutory authority. Clearly, Sri Lanka is emerging from an enduring civil conflict, and has many other issues to deal with. However, institutional reform is an investment in future stability, and would help to dissolve institutional dichotomies and preserve the integrity of the office of the Solicitor-General and other public servants.

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100 Ibid.

101 Ibid.

102 Ibid.

103 'Sri Lanka, Russia Sign Treaty to Combat Crime, Terrorism, Drug Trafficking' (26 July 2011) *BBC Monitoring International Reports*.

104 Asian Human Rights Commission, above n 78.

105 See generally *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, above n 1; and Bharatha Mallawarachi, *Sri Lankan President Receives Report on War Crimes Allegations* (20 November 2011) <http://www.theglobeandmail.com/news/world/sri-lankan-president-receives-report-on-war-crimes-allegations/article2242709/?utm_medium=Feeds%3A%20RSS%2FAtom&utm_source=Home&utm_content=2242709>.