



**Soulbury Plus: Conceptual Foundations and  
Institutional Features of a Parliamentary-  
Constitutional State**

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## Introduction

Aside from devolution as a form of power-sharing in Sri Lanka's plural polity, two of the other major themes in the current constitutional reform process are the abolition of executive presidentialism and the strengthening of protections for fundamental human rights. These are to be given effect in a return to the parliamentary form of government and a new bill of rights. The public debate on these reforms is usually conducted on the basis of the practical experience of the problems encountered under presidentialism. However, returning to parliamentary government also demands a positive articulation of the theoretical and institutional basis of the new state to be created by the new constitution. Our intention in this Working Paper is to attempt such an initial visualisation of what we call a 'parliamentary-constitutional state' (drawing also upon the model Kumarasingham has theorised elsewhere as 'Eastminster', see below), with a view to contributing to the process within the Constitutional Assembly and to public discussion more broadly.

The model of state we propose here therefore blends together elements of classical Westminster parliamentarism; recent innovations within this broader Commonwealth tradition, especially in regard to methods of enhanced rights-protection inspired by the values of liberal constitutionalism; and Sri Lanka's present constitutional needs, in the light of our reading of the country's constitutional history and culture. The model is both descriptively 'parliamentary' in terms of the form of democratic government and the institutional balance of power, but also normatively 'constitutional' in terms of being grounded in a written and supreme constitution that entrenches certain matters, which cannot be changed by ordinary legislative procedure. The 'parliamentary-constitutional state' thus is a version of the comparative Commonwealth model represented in such examples as Canada and India, but which also has the antecedent in Sri Lanka of the independence constitution (demotically known as the Soulbury Constitution, which was in force from 1946-8 to 1972). We believe that this constitution provides a good historical precedent for imagining a parliamentary constitution for Sri Lanka in the present, with the significant proviso that we learn appropriate lessons from its failures in regard to rights protection and power-sharing; hence 'Soulbury Plus'.<sup>1</sup>

Our analytical and prescriptive approach is informed by a multidisciplinary method combining constitutional theory, comparative constitutional law and comparative politics, Commonwealth and Sri Lankan constitutional history, and

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<sup>1</sup> Notwithstanding the fact that it was enacted by foreign constitutional authorities in the form of the British monarch and Parliament, and its underlying scheme was prepared by a non-Ceylonese, Sir Ivor Jennings, we reject the simplistic view that the independence constitution was some egregious foreign imposition. Instead, we are mindful that its essential substance was determined by Ceylonese political leaders in the form of D.S. Senanayake, the then Leader of the State of Council and *de facto* head of the independence movement, who was at each stage of its evolution supported by the Board of Ministers and the democratically elected State Council. Indeed, even the drafting of the legal instruments was done by a Ceylonese, B.P. Peiris, then a senior legal draughtsman and later Cabinet Secretary. See H. Kumarasingham (Ed.) (2015) *The Road to Temple Trees: Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: Centre for Policy Alternatives); B.P. Peiris (2008) *Memoirs of a Cabinet Secretary* (Colombo: Sarasavi).

aspects of political sociology. Drawing upon their existing and continuing academic work, Welikala contributes Part I: Conceptual Foundations of the Working Paper,<sup>2</sup> and Kumarasingham Part II: Institutional Features.

## **PART I: CONCEPTUAL FOUNDATIONS**

The 2015 elections were remarkable for any number of reasons but one of the most noteworthy aspects of the campaigns was the prominence of the constitution in general, and the nature and shape of the executive in particular. The political and civil society forces behind the candidacy of Maithripala Sirisena placed the reform of the executive presidency square and centre of the common opposition campaign. Writing in *The Sunday Times* in the run-up to the presidential election, the then Leader of the Opposition and now Prime Minister Ranil Wickremesinghe called for a ‘new constitutional order’ based on popular sovereignty and popular consensus, which would, *inter alia*, abolish the executive presidency and establish a Cabinet responsible to Parliament. The article drew inspiration from both Western comparative examples as well as South Asian history and political theory, including the model of the Lichchavi Republics, the *Vinaya Pitakaya*, the Asokan Rock Edicts, and the policies of the Mughal Emperor Akbar.<sup>3</sup> Sirisena’s victory on this platform, however, was only the latest in a long line of electoral precedents in which the public had endorsed winning candidates promising the abolition, or at least the reform, of the executive presidency since 1994.

While the United National Party (UNP) obtained a majority of votes and a five-sixth majority in Parliament in the 1977 general elections on a promise to introduce a semi-presidential form of government, it can fairly be argued that presidentialism has never sat comfortably in the landscape of Sri Lankan constitutional politics once the electorate experienced its severe democratic cost. At the time of its promulgation, the executive presidency was eloquently critiqued by those such as Dr N.M. Perera and Dr Colvin R. de Silva: two Sri Lankan politicians whose constitutional erudition and foresight have not been surpassed before or since, notwithstanding their involvement in the disastrous first republican constitution.<sup>4</sup> Their contemporaneous prognostications of impending Caesarian authoritarianism were quickly fulfilled when President Jayewardene used his referendum power to evade parliamentary elections in 1982.

The downhill path for democracy and civil liberty since then has been directly linked to presidentialism, and the corresponding formation of a left-liberal

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<sup>2</sup> Another version of this section will appear as an article elsewhere: A. Welikala, ‘*Transitioning from a Presidential to a Parliamentary State: Some Conceptual Questions for Institutional Design*’ (forthcoming 2016) *Law & Society Trust Review*.

<sup>3</sup> R. Wickremesinghe, ‘*The New Republic*’, *The Sunday Times*, 9<sup>th</sup> November 2014 available at: <http://www.sundaytimes.lk/141109/news/the-new-republic-126724.html>

<sup>4</sup> N.M. Perera (2013) *A Critical Analysis of the 1978 Constitution of Sri Lanka* (2<sup>nd</sup> Ed.) (Colombo: Dr N.M. Perera Memorial Trust) and C.R. de Silva, ‘*Foreword*’ in *ibid*.

article of faith in constitutional politics about the need to abolish the institution and return to parliamentary democracy.<sup>5</sup> While the formation of this constitutional consensus was precipitated by presidentialism, it also involved an examination and critique of the pre-presidential history of post-independence parliamentary governance, in particular majoritarian excesses like the Citizenship Acts and the Sinhala Only Act.<sup>6</sup> However, that the argument in favour of a restoration of parliamentary democracy is primarily connected to the experience of presidential authoritarianism has a number of implications for the exact form of the parliamentary state that is in contemplation by the left-liberal reformists who drive or support constitutional reform under the Sirisena-Wickremesinghe national government. As the reform impulse is more about constitutionalism, rights, and democratisation than it is about the preferred form of executive power, the Sri Lankan reformist conception of the parliamentary state is heavily imbued with two other principles – the belief in the expansion of constitutional rights and the protection of constitutionalism through a very strong judicial power – that are not historically part of the Westminster tradition. But these beliefs are so strongly held, because they have been forged and re-forged on the crucible of tiresomely repetitive presidential abuses of the past four decades, that it is now often assumed that there is nothing more to say about them, except to act with alacrity in getting them enacted before the current constitutional moment is over.

It might be added that the expansion of the number and scope of constitutional rights and their protection through a strengthened judiciary are not merely the cherished dream of a left-liberal academic and civil society elite. As was seen in Wickremesinghe's newspaper article, the country's main centre-right political party has embraced it, and there is some indication that many people at large support this. In its analysis of public submissions, the Public Representations Committee on Constitutional Reform (PRC) observed that "On the whole, the submissions on Fundamental Rights (FR) (political, civil, social, cultural and economic rights) and group rights *unanimously* requested for [*sic*] the *strengthening and broadening* of the FR section..."<sup>7</sup> The PRC's report reflects all the main tenets of the left-liberal position. It recommends not only the extension of the scope of existing civil and political rights and the addition of socioeconomic rights, but also strongly judicial forms of enforcement of the future bill of rights.<sup>8</sup> Two normative rationales underpin these recommendations: democratisation and counter-majoritarianism (and the latter's close relation, non-discrimination), both of which, as we shall see, were primary concerns motivating Sri Lankan left-liberalism's turn to 'legal constitutionalism' (I will explain this term more fully below) from the mid-1970s.

<sup>5</sup> See the essays in A. Welikala (Ed.) (2015) *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Colombo: Centre for Policy Alternatives): esp. Chs.1 and 28 available at: <http://srilankanpresidentialism.org/chapters/>

<sup>6</sup> R. Edrisinha, 'Sri Lanka: Constitutions without Constitutionalism – A Tale of Three and a Half Constitutions' in R. Edrisinha & A. Welikala (Eds.) (2008) *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives): Ch. I.

<sup>7</sup> Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform*, Colombo, May 2016: p.101, available at:

[http://www.yourconstitution.lk/PRCRpt/PRC\\_english\\_report-A4.pdf](http://www.yourconstitution.lk/PRCRpt/PRC_english_report-A4.pdf). Emphasis added.

<sup>8</sup> Ibid: pp.136-137.

Just like the older iterations of this approach in the scholarly work of left-liberal constitutionalists, however, there is evidence in the PRC report itself that the popular consensus about (the expansion of) constitutional rights is superficial and conceals a number of deep disagreements. Thus for example, in relation to the Buddhism clause,<sup>9</sup> presumably because there was no consistency or consensus in the public submissions they received, the PRC members were so divided that they have proposed six different options, none of which enjoy the support of a majority of members.<sup>10</sup> It is difficult to see how the clamour for the recognition of more and more human rights, underlying which in this context ought to be a commensurately wide commitment to equality expressed as secularism, sits with what seems to be a continuing commitment to a key majoritarian symbol like the Buddhism clause. This reveals deep social divides on major constitutional questions that have not been adequately addressed by those who think these matters can be mediated and resolved through courts adjudicating on constitutional rights, as if there were in fact constitutional consensus on them.

Thus the focus of Part I of this Working Paper is not a comparative evaluation of presidentialism and parliamentarism, but rather, an interrogation of the assumptions underlying the Sri Lankan reformist conception of the parliamentary state from the perspective of the traditional conceptual foundations of the Westminster (or Commonwealth) model.<sup>11</sup> The aim is to critically shed light on these distinctive reform rationales and institutional proposals, not so much to reject them outright as to ensure that these major constitutional choices are made with proper consideration for all their implications. In particular, the objective is to question the faith in *legal* mechanisms for the protection of rights and constitutionalism, and in so doing to urge the consideration of the *political* mechanisms that are much more the tradition in the parliamentary model of government for achieving these ends.<sup>12</sup>

The issue, however, is not either/or: in applying the Westminster model to the specificities of our political context, we need *both* legal as well as political forms of accountability, in a hybrid model that has recently been theorised as the 'New Commonwealth Model of Constitutionalism',<sup>13</sup> or elsewhere, the 'dialogic model

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<sup>9</sup> Buddhism has been given a 'foremost place' and a duty placed on the state to foster and protect it since 1972: see Section 6 of the 1972 Constitution and Article 9 of the 1978 Constitution.

<sup>10</sup> Ibid: pp.18-19.

<sup>11</sup> H. Kumarasingham (2013) *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I.B. Tauris); S. Gardbaum (2013) *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: CUP).

<sup>12</sup> D. Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament' in A. Horne, G. Drewry & D. Oliver (Eds.) (2013) *Parliament and the Law* (Oxford: Hart): Ch.12.

<sup>13</sup> Gardbaum (2013), although as I have argued elsewhere, the model is really not that new: A. Welikala, 'Specialist in Omniscience'? Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon' in H. Kumarasingham (Ed.) (2016) *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (London: Routledge): Ch.6.

of constitutionalism'.<sup>14</sup> But the current state of the debate is inordinately weighted towards *legal constitutionalism* and exalts its abstract virtues, thereby ignoring the considerable strengths and practical advantages of *political constitutionalism*.<sup>15</sup> The point therefore is, first, to draw attention to legal constitutionalism's costs as well as dangers when seen against its proponents' idealist expectations of constitutional reform, and second, to highlight some of the practical strengths and normative virtues of political constitutionalism that are deserving of serious consideration by Sri Lankan constitution-makers but which are nowadays routinely disregarded when they are not being vilified. A more dialogic and political form of constitutionalism is more congruent with the notion of a parliamentary state, while the constitutionalist aims of rights protection can be secured without framing institutional design, unnecessarily narrowly, as a question of either judicial or legislative supremacy.

### The Parliamentary State as a Normative Model of Democratic Government

We know well the basic institutional difference between presidential and parliamentary states, but often less is said about the values that underpin each of these politico-constitutional models.<sup>16</sup> So let us begin by outlining the idea of the parliamentary state as a normative model.<sup>17</sup> One of the most recognisable features of the parliamentary model of government is its subjection of the executive to political accountability by the legislature. This rule is variously known as the 'responsibility principle', the 'confidence principle', the 'doctrine of responsible government', or the 'convention of ministerial responsibility'. The rule requires that the government is only able to continue so long as it enjoys the support of Parliament (usually defined as a majority of its members), and that the government is required to resign the moment that support is withdrawn.

<sup>14</sup> R. Gargarella, 'We the People' Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances' (2014) *Current Legal Problems* 67(1): pp.1-47.

<sup>15</sup> For a useful recapitulation of the concepts of legal and political constitutionalism, see A. Tomkins (2005) *Our Republican Constitution* (Oxford: Hart): Ch.1. Authoritative expositions of political constitutionalism include J.A.G. Griffith (1997) *The Politics of the Judiciary* (5<sup>th</sup> Ed.) (London: Fontana), J. Waldron (1999) *Law and Disagreement* (Oxford: Clarendon), J. Waldron (1999) *The Dignity of Legislation* (Cambridge: CUP), and R. Bellamy (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: CUP), and for legal constitutionalism, J. Laws (2014) *The Common Law Constitution* (Cambridge: CUP), T.R.S. Allan (1993) *Law, Liberty and Justice: The Legal Foundation of British Constitutionalism* (Oxford: Clarendon), T.R.S. Allan (2001) *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: OUP) and A. Kavanagh (2009) *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP).

<sup>16</sup> For a useful literature review, see P. Ganga, 'Presidents versus Parliaments: The Dynamics of Political Regime Shift in Croatia, Moldova, Mongolia and Turkey', Rumi Forum Research Fellowship Paper (undated), available at: <http://rumiforum.org/presidents-versus-parliaments/>. See also A. Galyan, 'The Nineteenth Amendment in Comparative Context: Classifying the New Regime Type' in A. Welikala (Ed.) (2016) *The Nineteenth Amendment to the Constitution: Content and Context* (Colombo: Centre for Policy Alternatives): Ch.12 available at: <http://constitutionalreforms.org/2016/05/10/chapter-12-the-nineteenth-amendment-in-comparative-context-classifying-the-new-regime-type/>; S. Ratnapala, 'Failure of Quasi-Gaullist Presidentialism in Sri Lanka' in Welikala (2015): Ch.18 available at: <http://srilankanpresidentialism.org/wp-content/uploads/2015/01/26-Ratnapala.pdf>

<sup>17</sup> In what follows I rely heavily on Tomkins (2005): Ch.1.

Developing in the Parliament at Westminster in the seventeenth century, it has become the essential characteristic of parliamentary representative democracies everywhere where the Westminster model has taken root. The core normative value at the heart of this constitutional rule of the parliamentary state is the value of *accountability*, or more specifically, the *political* accountability of government to Parliament. The rule of law, the independence of the judiciary, and other such mechanisms of *legal* accountability are also important and indispensable elements of any modern democratic parliamentary state, but the model's defining feature is the rule and value of *political accountability*.<sup>18</sup>

That rule is so central to the ideal of parliamentary government that it is not only in the exceptional situations of a loss of parliamentary confidence when a government as a whole must resign that its operation is seen in practice. The government has to obtain parliamentary support, on a daily basis, for every one of its legislative and budgetary proposals and of its administration of the country in general, and every minister from the Prime Minister down must enjoy Parliament's support. Without that support, individual ministers have to resign, the government's proposals may be defeated, and if the Prime Minister loses confidence or if the government's annual budget is defeated, then the whole government stands dismissed. Thus, rituals like Prime Minister's Questions are not merely a piece of amusing political theatre, but a striking demonstration of the chief executive's regular political accountability in action, in a way that is nowhere seen in a presidential system. In this way, the parliamentary state has as its central idea the notion that the government must be constantly accountable to the elected representatives of the people. The constitutional rationale of this form of political accountability is deeply democratic. It is the means by which, in between the elections in which the people have their direct say, that the people through their elected representatives ensure that the government not merely carries out the programme for which it was elected, but which ensures that the government acts *constitutionally*, i.e., *accountably*.<sup>19</sup>

In this constitutional arrangement, Parliament is the key institution of democratic representation and accountability. The courts' role is to ensure the rule of law, that is, to ensure that the government acts according to laws of general application, so that legality, reasonableness, and procedural fairness characterises governmental behaviour. Subject to parliamentary confidence and this form of *procedural* judicial oversight, the executive is enabled to carry out its programme until such time that its performance is endorsed or rejected by the people themselves at elections. In the pursuit of peace, order, and good government, this framework assigns a particular role for each of the three organs of state, and while in the orthodox version the Westminster model considers Parliament to be supreme due to certain historical specificities in the UK, there is no reason that should be so in a more generalised conceptualisation of the parliamentary state.<sup>20</sup> What is crucial is not parliamentary supremacy, but the idea of political accountability as outlined above, and accordingly, legal accountability through the courts while important and indispensable, is not the

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<sup>18</sup> See introduction to the Judicial Power Project at: <http://judicialpowerproject.org.uk/about/>

<sup>19</sup> Tomkins (2005): pp.1-10.

<sup>20</sup> Cf. Oliver (2013).

central mechanism by which constitutional democracy is secured. This is why it is argued that the inherent institutional logic of the parliamentary state demands a form of constitutionalism that is more political than legal in nature. It is founded on a realist understanding of governmental behaviour that governments will always try to do whatever they can politically get away with, and as such, the best way of holding them to account is through the political process of parliamentary scrutiny itself, rather than any judicial process through the courts (or at least, a balanced combination of the two).<sup>21</sup>

Because of the association of parliamentarism with the political history of Westminster, it is often assumed that it carries with it a commitment to parliamentary supremacy rather than constitutional supremacy. This is moreover believed to be undesirable, because Parliaments as majoritarian institutions can become captive to authoritarian and illiberal political forces, which would, in turn, endanger liberal values like the rule of law and especially the rights of minorities. In Sri Lanka, the credence that can be attached to this argument from the experience of parliamentary government and discriminatory legislation between 1948 and 1977 is the reason why it is felt by many liberal constitutionalists that legal controls through bills of rights, constitutional supremacy, and the courts are necessary to tame the wilder tendencies of our political culture.<sup>22</sup>

It is important to stress in counterpoint that political constitutionalism is a theory of *constitutional democracy*, and as such, it does not regard Parliament as something that is necessarily a danger to liberal democracy. But neither does it believe that supreme constitutions or courts can satisfactorily address this danger to which any democratic society is exposed. If the polity is influenced by contra-constitutional ideologies like ethnonationalism that aggravate majoritarianism by the ethnicisation of politics, then that is more a question of political culture than about the institutional form of government. Rather than addressing the difficult issue of political culture and its reform or improvement at source, legal constitutionalists believe in domesticating politics through law. This approach of legal constitutionalism is premised on two related claims: first, that we can, and ought to, come to a rational consensus on the substantive (as opposed to the procedural) nature of a democratic society, and that these outcomes are best expressed in terms of human rights which are in turn enshrined in a fundamental constitution that is beyond the ordinary reach of transient political majorities represented in legislatures; and secondly, that the judicial process rather than the political process is the better way of elaborating and enforcing the substantive outcomes articulated in the constitutional bill of rights.<sup>23</sup> As we will see, both these claims are theoretically questionable or at least not as watertight as safeguards as most legal constitutionalists assume they are to deliver the outcomes they desire. But why was it that in Sri Lanka that this model of constitutionalism gained such currency, and what are its main theses?

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<sup>21</sup> Tomkins (2005): pp.2-3.

<sup>22</sup> Edrisinha (2008); R Edrisinha, 'Constitutionalism and Sri Lanka's Gaullist Presidential System' in Welikala (2015): Ch. 28 available at: <http://srilankanpresidentialism.org/wp-content/uploads/2015/01/36-Edrisinha.pdf>

<sup>23</sup> Bellamy (2007): p.3, Chs.1, 2 and 3.

## The Rise of Legal Constitutionalism in Sri Lanka

Even though its present proponents come from a variety of ideological orientations – from classical liberals to social democrats to Trotskyites to liberal conservatives to minoritarian nationalists – the left-liberal consensus on legal constitutionalism reflects a number of distinctive analytical and normative assumptions. In addition to the two mentioned above, these can be summarised as: that the weaknesses of political culture and the failures of elected institutions in respect of human rights protection can, at least to some extent, be remedied through a stronger bill of rights; that fundamental rights must be strongly constitutionalised and placed beyond the reach of transient political majorities; that the courts (ideally an American-style Supreme Court or a Kelsenian Constitutional Court<sup>24</sup>) must have strong powers of constitutional review including to invalidate primary legislation; that universal human rights are indivisible and therefore socioeconomic rights must be afforded the same level of protection and enforcement as civil and political rights; and that group rights also be justiciable.

These perspectives are heavily informed by the dominant discourse of international human rights law and comparative experiences of transformative constitutionalism such as South Africa and India, as much as by specific challenges in Sri Lanka's own less than ideal experience with regard to human rights protection. And it is no coincidence that its leading advocates from the 1970s onwards were educated at American law schools such as Harvard, Yale, Columbia, and Berkeley, then under the shadow of the Warren court and the dominant influence of theorists such as John Rawls, Ronald Dworkin and John Hart Ely.<sup>25</sup> As South Asians, they were also no doubt inspired by the activism of the Indian Supreme Court in holding Indira Gandhi's emergency abuses to account. This was a brave new liberal world in comparison to the tepid instructions of British constitutionalism in relation to the counter-majoritarian requirement and the timidity of the Sri Lankan courts against rampant political institutions. When seen against the spectacular examples of democratic failure such as the Sinhala Only Act (1956), or the 1972 Constitution under parliamentarism, or the 1982 referendum, the 1983 pogrom, or the Eighteenth Amendment to the Constitution (2010) under presidentialism, it is tempting to agree that this set of propositions contain at least a plausible response to our constitutional problems. These examples of mindless majoritarianism have only been exacerbated by the pervasive growth of the cancer of corruption in our political life, both of which our political culture seems powerless to curtail. But we must ask if at a more rigorous theoretical level, whether these claims of legal constitutionalism stand up to scrutiny. The claims as outlined above are many and so are the counterarguments from the perspective of political

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<sup>24</sup> C. Bezemek, 'A Kelsenian Model of Constitutional Adjudication – The Austrian Constitutional Court', SSRN, 3<sup>rd</sup> October 2011, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937575](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937575)

<sup>25</sup> In such works as J. Rawls (1971) *A Theory of Justice* (Cambridge, MA: Belknap Press), R. Dworkin (1977) *Taking Rights Seriously* (London: Duckworth), and J.H. Ely (1980) *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard UP). See also Bellamy (2007): p.10; R. Edrisinha, 'In Defence of Judicial Review and Judicial Activism' in C. Amaratunga (Ed.) (1989) *Ideas for Constitutional Reform* (Colombo: Council for Liberal Democracy): pp.457-80.

constitutionalism. Here we only deal with two of the most fundamental normative claims: the ‘substantive consensus’ on the ideal society and the ‘superiority’ of the judicial process as a forum and method of democratic decision-making.

### ***Substantive Consensus on the Ideal Society***

As noted before, legal constitutionalism is premised on the notion that a rational consensus about the substantive ideal of a democratic society is not only desirable but also possible. That possibility is expressed in the universal values reflected in the discourse of human rights, which ought to form the fundamental basis of the constitutional order. As a leading theorist of political constitutionalism Richard Bellamy concedes, the “desire to articulate a coherent and normatively attractive vision of a just and well-ordered society is undoubtedly a noble endeavour” which has “inspired philosophers and citizens down the ages.”<sup>26</sup> However, the fundamental problem with attempting to articulate the one true ideal for a society is that no one who has tried it from Plato to Rawls has ever succeeded in convincing everyone that their position is universally acceptable. This does not mean that no theory of justice is true, or that a democracy should have no constitutional commitments to rights and justice. What it does mean is “that there are limitations to our ability to identify a true theory of rights and equality and so to convince others of its truth. Such difficulties are likely to be multiplied several fold when it comes to devising policies that will promote our favoured ideal of democratic justice.”<sup>27</sup>

This difficulty – and modesty of expectation with regard to realising ideals in the real world – leads the political constitutionalist to conclude that in a democratic society, we have *legitimate disagreements* about the substantive outcomes that we seek to achieve. Therefore, even where we can agree about the existence of specific rights – and this is by no means a frequent occurrence in a democracy – rights are better achieved through a political process of representative democracy which allows for the full play of these legitimate disagreements and for *reasonable compromises*, rather than through a near-untouchable constitution the interpretation of which is the preserve of an exclusive priesthood of judges and lawyers.<sup>28</sup> This is why Parliament –together with other legislatures if there is devolution – is the incomparable political institution in the parliamentary state.

Let us illustrate this with an example we cited above. It was seen through the PRC process that there is some widespread support for the expansion of constitutional rights, while at the same time the PRC was confronted with views that demanded the continuation of the Buddhism clause. There is a major theoretical inconsistency here to the extent that this seems to support both a majoritarian nativist-nationalist as well as an egalitarian human rights view of

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<sup>26</sup> Bellamy (2007): p.3.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid: Ch.5; Tomkins (2005): Ch.3.

the new constitutional order.<sup>29</sup> If the new constitution constitutionalises both views, and provides a court with the constitutional authority to definitively settle the ensuing dispute, how likely is it that a satisfactory answer would be given from a human rights point of view? If the constitution only constitutionalises the human rights perspective, how likely is it that the constitution itself would be accepted by the majority community? Where does either of these scenarios leave the legal constitutionalist project?

### ***The Desirability and Superiority of the Judicial Process over the Political Process***

The closely related second claim made by legal constitutionalism is as to the general desirability and indeed the superiority of the judicial process as a form of democratic decision-making and as a type of public reason.<sup>30</sup> Law is not only separate from politics, but the latter has potentially alarming consequences that must be tamed and constrained by law. As Roberto Unger put it vividly,

...the ceaseless identification of restraints on majority rule...as the overriding responsibility of jurists...in obtaining from judges...the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room...<sup>31</sup>

The implicit elitism of this approach is the least of our concerns. The more serious problem is that a judicial process can never be as legitimate and as effective as a political process through representative institutions in dealing with, however imperfectly, the deep social divisions that democracy regards as legitimate disagreements. The political constitutionalist view on this is best stated by Bellamy:

It is only when the public themselves reason within a democracy that they can be regarded as equals and their multifarious rights and interests accorded equal concern and respect. A system of 'one person, one vote' provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; and party competition in elections and parliament institutionalises a balance of power that encourages the various sides to hear and harken to each other; promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself.<sup>32</sup>

There are two points worthy of stress here. The first is the procedural vision of democracy that is at the heart of political constitutionalism that is also

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<sup>29</sup> The history of this issue in Sri Lankan constitutional debates is recounted in B. Schonthal & A. Welikala, 'Buddhism and the Regulation of Religion in the New Constitution: Past Debates, Present Challenges, and Future Options', CPA Working Papers on Constitutional Reform No.3, July 2016.

<sup>30</sup> Edrisinha (1989).

<sup>31</sup> R. Unger (1996) *What Should Legal Analysis Become?* (London: Verso): p.72.

<sup>32</sup> Bellamy (2007): pp.4-5.

characterised by modesty of ambition as to outcomes and a certain realism with regard to how both rights and government work in practice. The main purpose of a democratic constitution in this view is to provide the institutions and procedures through which citizens “decide their common affairs and settle their disputes”.<sup>33</sup> Such a constitution therefore seeks a *constitutional balance* between the bill of rights and the courts on the one hand, and on the other, those provisions that set out the structure of government, the relationship between the three organs, and the electoral system.<sup>34</sup>

The second point is a partial concession: Bellamy, Tomkins, and others like them make amply clear that they have in contemplation mature democracies like the UK which have evolved their democratic practices over many centuries. It is easier in these societies to make the political constitutionalist argument, because Parliament much more than the courts has so often been the agent of political progress and constitutional development.<sup>35</sup> Nonetheless, the theoretical criticisms we have just articulated based on their work against an *exclusively* legal constitutionalist approach to constitution-making remains entirely valid. The problem of political culture that legal constitutionalists seek to address through the shortcut of constitutional review is unlikely to succeed in the presence of an unreformed political culture. A political culture that disrespects and violates liberal-constitutional values is unlikely to be chastened by judicial strictures or by written constitutions. It can only be reformed from within, and would take much time.<sup>36</sup>

But what seems, to the legal constitutionalist, the counterintuitive proposal of political constitutionalists to place more responsibility on politicians to behave better (i.e., constitutionally and accountably) is what is more likely to succeed. This is not merely the cynical application of the adage that an old poacher is the best gamekeeper. It represents, in fact, the fundamental empowerment of citizens through placing on them the responsibility for improving the quality of democratic self-government. It is not as if we are without any precedent for democratic change through the political process. Sri Lanka is Asia’s oldest electoral democracy; it was the first in the post-colonial world to manage a change of government through the electoral process in 1956. That election perhaps exemplifies our dilemma with political constitutionalism: from what had been the exclusive activity of a rich elite, that election marked the broadening and deepening of political participation and democracy, but of course it also signalled the deep ethnic division the legacy of which we have yet to resolve today. But at the same time, this is also an electorate that has voted for progressive change, for example, in the elections of 1994 and most recently in 2015 twice. Even at the height of repressive regimes, there have been things that autocratic governments have felt unable to do, and this has been largely determined by a political calculation as to what they can get away with rather than any fear of the judiciary or the law.

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<sup>33</sup> Ibid: p.6.

<sup>34</sup> Ibid: Ch.6.

<sup>35</sup> Ibid: p.2; Tomkins (2005): p.13.

<sup>36</sup> See A. Welikala, ‘*The Idea of Constitutional Incrementalism*’, (forthcoming 2016) *Journal of the Bar Association of Sri Lanka*.

Moreover, our Supreme Court has enjoyed an explicit set of constitutional jurisdictions since 1978 and the record of its exercise of those powers is at best mixed.<sup>37</sup> To give only one of the more infamous examples under the 1978 Constitution, that such a deleterious measure as the Eighteenth Amendment passed constitutional muster in the Supreme Court<sup>38</sup> does not seem to us to inspire the sort of faith and confidence that legal constitutionalists place in the judicial institution, and even they are critical of the diffident and unimaginative manner in which the Supreme Court used its constitutional jurisdiction under the independence constitution.<sup>39</sup>

In a place like Sri Lanka, then, historical experience and current challenges require a more nuanced response that looks to striking an appropriate balance between the best features of legal and political constitutionalism, rather than putting all our eggs in either basket.

### **Ideals Tempered by Reality: The Appropriate Balance between Legal and Political Constitutionalism in Sri Lanka**

The preceding discussion establishes, we hope, the argument that the shift from presidentialism to a parliamentary state brings with it commitments to particular forms of accountability, specifically an emphasis on political forms of accountability albeit without losing sight of important legal controls. It has been our view that the Sri Lankan debate has been dominated by a focus on legal accountability to the exclusion of the political dimension. We have tried to show that the exclusive emphasis on legal constitutionalism can be misplaced, especially where undertaken without adequate attention to its inherent theoretical weaknesses as well as the inadequacy of its empirical assumptions. At the same time, we have accepted that, unlike in the mature Westminster-style democracies, we would in Sri Lanka need a greater measure of legal-constitutional controls on the political process. If this analysis is accepted then it would seem the following propositions must inform constitutional design as we transition to a parliamentary state:

1. The only type of rights that are appropriate for constitutional protection are the negative rights reflected in civil and political liberties. These serve to define the relationship between citizens and the state, and to protect an essential sphere of private autonomy from excessive governmental

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<sup>37</sup> See e.g., R.K.W. Goonesekere (2003) *Fundamental Rights and the Constitution: A Case Book* (Colombo: Law & Society Trust and the Open University).

<sup>38</sup> R. Edrisinha & A. Jayakody, 'Constitutionalism, the 18<sup>th</sup> Amendment and the Abdication of Responsibility' and N. Anketell, 'A Critique of the 18<sup>th</sup> Amendment Bill Special Determination' in R. Edrisinha & A. Jayakody (Eds.) (2011) *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: Centre for Policy Alternatives): Chs. III and IV available at: <http://constitutionalreforms.org/the-eighteenth-amendment-to-the-constitution-substance-and-process/>

<sup>39</sup> Edrisinha (2008); R. Coomaraswamy (1984) *Sri Lanka: The Crisis of the Anglo-American Constitutional Tradition in a Developing Society* (New Delhi: Vikas)  
R. Coomaraswamy (1997) *Ideology and the Constitution: Essays on Constitutional Jurisprudence* (Colombo: International Centre Ethnic Studies).

action.<sup>40</sup> There is widespread consensus about them in society, derived from society's long experience of them from the nineteenth century under British colonial rule. Likewise, confining the courts' constitutional jurisdiction to these rights protects the judiciary's legitimacy, impartiality, and independence by not politicising it through involvement in the controversies of adjudicating on positive rights.

2. The expansion of the constitutional bill of rights to include socioeconomic rights engenders unrealistic expectations, they are often unaffordable in a developing society, they involve policy decisions by unelected judges, and they assume social consensus on deep moral and political choices that is very often non-existent. It is accordingly inappropriate to place them above political negotiation and compromise through representative institutions, by constitutionalising their content and judicialising decisions over them.
3. In relation to the design of the relationship between the three organs of the state, a parliamentary state in Sri Lanka demands a *dialogic* approach that balances the best features of legal and political constitutionalism rather than privilege one over the other. Dialogic constitutionalism brings the three branches into a principled constitutional conversation with each other, so that they are encouraged to work in cooperation to further the agreed political goods and goals enshrined in the constitution, and those other changing public sentiments and demands that are reflected in the legislature through elected representatives. Dialogic constitutionalism gives appropriate weight to the role, function, nature, and normative expectations of each branch; it does not assume that a constitution can or should reflect a permanent social consensus on the good life or that judges are superior to legislators in reasoning through to acceptable compromises on these issues.
4. The dialogic design of institutions avoids the pitfalls of the inherent teleology of legal constitutionalism, straightjacketed by the constitutionalised *telos* of human rights.<sup>41</sup> In both forcing institutions to work together in the realisation of the common good rather than affording one or the other supremacy, and in accepting the reality of legitimate disagreement in a democratic society, it has the capacity to address both the democratic deficit of judicial supremacy as well as the discipline deficit of legislative supremacy. This is the ethos of the emergent, modern, constitutional-parliamentary state throughout the Commonwealth.
5. Institutionally, the constitution of a parliamentary state must provide for pre-enactment political review of legislation (although pre-enactment

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<sup>40</sup> In adopting this limited legal constitutionalist position on civil and political rights, we depart from Bellamy and Tomkins on whom we have relied so far: see Bellamy (2007): Ch.4 and Tomkins (2005): pp.17-25.

<sup>41</sup> M. Loughlin (2000) *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart): p.5.

judicial review is not necessarily excluded), and weak-form constitutional review.<sup>42</sup> Mechanisms in the first category include requiring public bills to be accompanied by ministerial statements of constitutionality, and/or Speaker's and Provincial Council Chairs' certificates of constitutionality, as part of the legislative process; and for the provision of strong human rights and constitutional scrutiny through legislative committee systems.<sup>43</sup> Weak-form constitutionalism means that the courts will be able to judicially review all executive and administrative action, policy, conduct, and subordinate legislation, but they will not be empowered to strike down primary legislation. Instead, they can be empowered with a rule of consistent interpretation (i.e., to attempt reading down legislation to be consistent with rights according to ordinary canons of interpretation) and *in extremis* the power to issue a declaration of incompatibility. The responsibility for remedying such defective legislation shifts back to the executive and to Parliament (and this can be suitably structured through the constitution so that it is done without undue delay). These institutional arrangements reflect the proper separation of powers within the framework of a parliamentary-constitutional state.<sup>44</sup>

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<sup>42</sup> Gardbaum (2013): Ch.2; J. Colon-Rios (2012) *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge). Again, these institutional prescriptions depart from the republican theory of political constitutionalism as enunciated by Bellamy and Tomkins.

<sup>43</sup> The reforms to the parliamentary committee system undertaken in 2015 through the establishment of Oversight Committees are a positive step in the strengthening of political accountability mechanisms in Sri Lanka.

<sup>44</sup> Cf. Gargarella (2014).

## PART II: INSTITUTIONAL FEATURES

“Vous l’avez voulu [You asked for it], George Dandin” mischievously exclaimed the Soulbury Commission’s report 70 years ago implying that their recommendation of the British parliamentary system was at Ceylonese instigation if anything went wrong. The report quoted French playwright Molière’s 1668 comedy *Dandin*, and defended their counsel that Ceylon adopt a Westminster inspired constitution model on the grounds that not only was it best suited for the island, but also on the grounds that “the majority – the politically conscious majority of the people of Ceylon – favour a constitution on British lines. Such a Constitution is their own desire and is not being imposed upon them”. Ceylon stroled towards independence on 4<sup>th</sup> February 1948 with an unabashed fervour for Westminster government. The Soulbury Commission dutifully served an institutional tiffin that satisfied in large measure the specific appetite of Ceylon’s elite. A republic would have been as welcome as an Indian invasion, and instead, a unitary bicameral Realm within the Commonwealth was established that self-consciously saw any other style of government as beneath the dignity of the Ceylonese elect. As such the new constitution was generally deaf to the apprehension from corners in the Colonial Office, old Ceylon Civil Service hands, and the usual local troublemakers. The result was that precious few alterations were made of the Westminster model for the context, complexities, and conventions of Ceylon.

This system was more commonly associated with the British settler countries like Australia, Canada, and New Zealand where ‘kith and kin’ links with Britain seemed to make this appropriate. However, the British and the Asian indigenous elites saw advantages in applying this very British system to the very different context of the East. These Asian countries did not have centuries to interpret and adjust in order to develop their constitution as the British had. Instead within months they needed to formulate and design a constitution and therefore invariably drew upon the system of their imperial master. The local elites with the involvement of external actors like Sir Ivor Jennings determined that Westminster could work in the East. Since the Westminster system is based on convention and ambiguity and not rigid rules and clarity, the same Westminster system could be adopted and manipulated to produce diverse results and reactions that would shape their countries forever. These states therefore became *Eastminsters* that had clear institutional and political resemblances to Britain’s system, but with cultural and constitutional divergences from Westminster.<sup>45</sup> Ceylon’s *Eastminster* distorted the institutions and conventions of the Westminster model and created five key deviations that also had long-term consequences for the island’s democracy. These were:

1. Elite families and personalities dominating the system
2. Heads of State actively involved in politics instead of being impartial figures
3. Manipulation of constitutional conventions

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<sup>45</sup> Kumarasingham (2013).

4. Institutions and political issues governed by non-inclusive considerations and weak accountability mechanisms
5. Executive power driven by the majoritarianism embedded in the system<sup>46</sup>

In this Part II of the Working Paper we instead wish to address the potential abolition of the executive presidency and the return to a parliamentary model. Though the Dominion of Ceylon ended in 1972 and new systems sashayed on the island's constitutional catwalk, Sri Lankans like their forebears retain a legitimate interest in the Westminster model and continue to debate and comprehend their politics using the Westminster lexicon. The opportunity before Sri Lanka is to learn the lessons of the past and create not just a 'Soulbury Plus' constitution, but an *Eastminster* more confident in its past, more wizened of its pitfalls, and more determined to create a just and lasting system rich in the experiences of its Commonwealth cousins and grounded in the conditions and aspirations of Sri Lanka. The same year that the Soulbury Commission was announced saw the end of World War II and the quest in Britain to build a New Jerusalem from the ashes of destruction and despair. Sri Lanka can now craft a New Eastminster seventy years later – a system both familiar and remote. Below are some key considerations to fashion the constitutional tools of any Sri Lankan Hephaestus in their mighty task to build a New Eastminster. The Commonwealth holds many precedents for this task.

## A 'First XI' of Institutional Reforms

### I. *Head of State*

Sri Lanka's longest serving constitution is the present one, which gave the island an executive presidency. Seen by J.R. Jayewardene and many others, including his successors, as a panacea for Sri Lanka's divisive politics and an office that could unite from above, it has instead turned to be more a placebo or worse in dealing with the state's multiple maladies. Ideally a Westminster Head of State is an impartial and dignified figure placed to represent the best of the country and be guardian of its constitution. Critically the Head of State cannot have a party political role and has no constitutional powers to determine any policies, which are the purview of the Prime Minister and Cabinet. Whether a Governor-General or non-Executive President, the Head of State (and the Executive) must have the Bagehotian triptych of rights *vis-à-vis* the Government: (a) The Right to be Consulted; (b) The Right to Encourage, and (c) The Right to Warn. This translates practically in having access to privileged information on the activities of the state such as Cabinet Minutes and diplomatic cables; regular and frank meetings with the Prime Minister – over hoppers perhaps as Soulbury and Senanayake did on Tuesday mornings – and other senior Cabinet Ministers and Public Servants where relevant; and have the ability to confidentially counsel the Government on all

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<sup>46</sup> Kumarasingham has argued elsewhere in greater detail about the consequences of this: see *ibid*.

range of matters – though ultimately it is for the Government to take the final decision. All such meetings must be gazetted. In everyday politics the Head of State can expect to carry out mainly ceremonial duties such as hosting visiting foreign dignitaries, bestowing honours, and delivering speeches across the country. The Head of State must be a unifying and respected figure capable of successfully working with governments of all complexions. In times of crisis a Head of State may be called upon to exercise reserve powers such as withholding assent to controversial bills, ensuring the constitution is followed, dealing with unstable political conditions such as the death or resignation of the prime minister or unclear electoral results. Ultimately, however, an *Eastminster* Head of State, must only intervene in crisis situations, but otherwise leave the governance of the land to the politicians, whether they approve or disprove of their actions unless in contravenes either the law or the spirit of the constitution. Sri Lanka is no longer a Realm and thus a Head of State should be elected rather than selected. Ideally this election is not run on party lines and is conducted indirectly through the Houses of Parliament in combination with the Provinces as is done in India. Another method for the Head of State used in places like Papua New Guinea for the election of the Governor-General is a secret ballot of the parliamentarians. After serving as Head of State the individual should not expect to return or participate in active politics. A crucial role of the Head of State is their selection of the Head of Government, who must always hold the confidence of the popularly elected chamber and if this is not the case then the Head of State must either find another person who can or call new elections.<sup>47</sup>

## **II. Prime Minister**

In Britain and other Westminster Realms, Government is carried out in the Monarch's name – hence the phrase Her Majesty's Government. The Prime Minister derives power from being able to exercise authority as the Sovereign's sole responsible adviser by virtue of commanding a majority in the House of Commons. This in turn means that the Prime Minister can utilise the formal powers vested in the Crown. In the Republics that follow the Westminster model the principle is the same. Prime Ministers ultimately have power by being able to count on a majority of the popularly elected chamber for support and thus ensure that the Government's legislation can be passed. Prime Ministers are therefore beholden to Parliament and parties and not the Head of State for their survival and success. Whereas the Head of State is 'above politics', the Head of Government is the preeminent political leader in the country determining with the support of Cabinet and party or parties the government's policy

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<sup>47</sup> See also M. Mendis & A. Welikala, '*Reshaping the Executive: Choosing the Prime Minister in a Parliamentary System*', CPA Working Papers on Constitutional Reform No.2, June 2016, available at: <http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-2.pdf>

agenda. Almost always a Prime Minister is also the leader of the strongest party in the lower house. Unchecked a Prime Minister can personify what Lord Hailsham described as an 'Elective Dictatorship'. Earlier incarnations of *Eastminster* Prime Ministers across Asia did that and more. A political vacuum was created at the end of colonial rule and more often than not Prime Ministers filled the gap. Too often not only were South Asian Prime Ministers concentrated with awesome power, but the electorate, Ministers and parties expected nothing less. This trait allowed democratic institutions to decay. A New *Eastminster* Prime Minister must not only be empowered to take key political decisions, but also constrained to act within the conventions of office and the requirements of the constitution. The other institutions must assert horizontal accountability on the Executive. For this objective to succeed the other institutions and the citizenry must be aware of their role, strength, and duty. The Prime Minister in the Soulbury Constitution was also adorned with the Defence and External Affairs portfolios. Prime Ministers should not be burdened with other major portfolios since this can only centralise power in one person when instead power and responsibility should be shared more equally across the Cabinet. There are few post-war examples of Prime Ministers having other substantial ministries and even Margaret Thatcher could not be both Chancellor and Prime Minister.

### **III. Cabinet**

The Cabinet is the apex of decision-making in the Westminster system. Theoretically the Prime Minister is only *primus inter pares* and senior Cabinet Ministers such as Finance, Internal, or Foreign Ministers have exerted real power. A look at the Blair years shows that Gordon Brown as Chancellor of the Exchequer exerted massive power and effectively ran vast swathes of domestic and economic policy, which the Prime Minister could only agree to. More generally Cabinet Ministers effectively initiate programmes and hold considerable autonomy within their portfolio. The ministerial responsibility conventions mean that Ministers are accountable for all the activities of their ministries and public servants. At Cabinet all Ministers have the opportunity to discuss, defend and destroy all policies subject to the collective will of the Cabinet, as interpreted by the chair, the Prime Minister. Once decisions are taken the Cabinet is bound by the convention of collective responsibility, meaning that whatever personal view or even opposition, all Ministers must abide by the decision. Historically, *Eastminster* Cabinets have been near pathetic in the observance of such conventions. Cabinet was more likely a den of nepotism or a seraglio of sycophants. Rather than forming a collective decision-making body tasked with governing the whole country, Cabinet was more often a place of conspicuous patronage and unforgivable clientelism. Self-interest and power accumulation were instead the governing conventions. Political parties in Sri Lanka still

revolve around personalities and not policies and at the Cabinet level Ministers either make their ministry into a fiefdom or allow the Prime Minister or President to run their portfolio from their offices. The result from this dereliction of constitutional norms and brazen abuse were threadbare standards of governance. Reforms from other Westminster states including recently the United Kingdom have instituted a strict Cabinet Manual that outlines the procedures and rules of the Cabinet and, though not a binding rule-book, any breach can be used as grounds for dismissal. The Manual also lists instances where a conflict of interest could occur; Ministers' duties; and also the constitutional conventions so Ministers know clearly what is expected of them. Since 1945 there has been a greater frequency across the Commonwealth of coalition governments, resulting from the demise of two-party or single-party systems. India, Australia, Canada, New Zealand and now the United Kingdom have experience of coalition and minority governments as well as single-party ones. On such occasions there is usually an agreement that determines the conditions for supporting the Government's programme, usually revolving around policy concessions or ministerial appointments. It should, however, be clearly stated that such coalition agreements across the Commonwealth do not allow the intolerable practice as seen in Sri Lanka where regardless of which party is in government, certain individuals survive at the Cabinet table since they change their allegiance as easily as their hair colour. This lizard-like ability of the shameless to shed their party skin and possibly back again for pure self-interest can be restricted by appropriate rules in a Cabinet Manual, by Standing Orders of Parliament regulating crossovers, and even by legislation (as in India).

#### **IV. *Senate***

The Soulbury Commission recommendation of an upper house was one of the few 'traditional' Westminster features that the Ceylonese Board of Ministers was not keen on. In some respects their concerns of the upper house never eventuated because the Ceylon Senate never, even lightly, tread on the ambitions of the Executive or House of Representatives, and few mourned its passing in 1972. Upper houses are a natural institutional feature in Westminster states such as the United Kingdom, India, Malaysia, Jamaica, South Africa, or Canada. To be effective Westminster upper houses need to have a purpose, but not challenge the supremacy of the lower house. A conventional purpose for upper houses is to offer a chamber to soberly assess and improve legislation. In Westminster states, which have devolved provinces or other historic or ethnic regions, the upper house is often the chamber that provides a key representative function and thus fulfils a unifying institutional purpose for the regions. Membership of the Senate would provide an avenue to represent groups not normally able or willing to gain a place through the general electorate. Institutional membership can be provided – for certain religious, professional, and minority groups as seen in the United Kingdom and

Ireland. Many upper houses like the House of Lords or the Canadian Senate have a membership that is mainly nominated. The Australian and Indian upper houses are elected by proportional systems in contrast to their lower houses to encourage different groups and opinions to be selected. A combination of proportional election and appointment on the basis of adding value to Parliament provides a worthwhile compromise. In plural societies like Sri Lanka, a Senate ideally provides an invaluable home for various views from across the country – sectional and political – to participate at the centre without festering at being excluded from its politics, and crucially, not breaking the primacy and efficacy of the lower house.

#### **V. *House of Representatives***

The House of Representatives of Ceylon, unlike its early legislative predecessors, rejected communal representation. The principle that all were Ceylonese justified this position. The sentiment may have been real, but it clearly was not realised. Almost all Westminster states' lower houses have first-past-the-post (FPTP) electoral systems, although there are significant exceptions including the Mixed Member Proportional (MMP), Alternative Vote (AV), or Single Transferable Vote (STV) systems used in some countries and sub-state nations. Sri Lanka is currently deliberating on an MMP system, which is an ideal choice given the rationales for electoral reform in the country. It would restore the intimacy of the relationship between the voters and the representative that is afforded by small FPTP constituencies, whilst maintaining the overall proportionality of representation in the legislature, which is crucial to democratic representation in a plural polity. Perhaps most more important is the electoral map of Sri Lanka, which would need to be rethought and redrawn to enable the key groups that inhabit the island the ability to be represented without recourse to communal or list seats. The electoral boundaries would be administered and reviewed by an independent Delimitation Commission. In concert with the Senate it is critical that Sri Lanka's eternal plurality be represented and contribute to the governance of the island collectively, and not evade it due to the redundancy of being marginalised or resort to the ethnic outbidding that has characterised Sri Lankan politics thus far, where parties have little incentive or inclination of engaging with other communities. For the Legislature to function credibly the parties also need to be reformed. Parties need higher transparency, detailed policy forums, and robust debate contained within a structured arena in preference to the kindergarten of shrill kleptomaniacs and superfluous sons following a flawed deity that have been regrettable features of the party system in the recent past. For the House of Representatives to act properly Parliament must regain its centrality to debate and ability to hold the Executive to account. The Executive needs be reminded that governments are ultimately formed and broken on the floor of the House of Representatives. Without a majority of members in support, legislation cannot pass and if this remains the case of key votes such a

Vote of No Confidence the government must resign. Parliamentary rules would need to be strictly studied and administered. Such rules can be set by a Business Committee of all the leaders of the parties headed by the Speaker that can collectively agree to rules, which all parties must abide by, and create a consensus around a workable timetable for parliamentary business. The House must also have great 'set-piece' debates on crucial issues such as the Budget, Foreign Affairs and Constitutional issues, which all the parties have the right to address in addition to the crucial 'Speech from the Throne' – the Government's annual programme. The Speaker on receipt of a deputation of MPs should have the ability to convene Parliament and thus remove the Executive's otherwise exclusive power to determine when the House sits. Most prominently a robust Question Time session every week the House sits is essential for the Opposition and even backbench MPs to place hard questions to the Prime Minister and Cabinet, and supplementary questions without advance notice on current policy. This is a common practice seen in almost all Westminster states and where the Prime Minister should be made to sweat, not swagger. There has been considerable discussion on the worth of referenda. Historically and traditionally referenda have been seen as foreign to the Westminster model since it strikes at the concept that parliament alone can vote on the policies of the state. In recent years this belief has softened, but referenda are still used sparingly and only in limited contexts with specified impact, such as constitutional change. In New Zealand, for example, a referendum can be initiated by both the government and citizens (if able to register a specified proportion of eligible voters), but in both instances, referenda have only indicative value in that the state is not bound by the result. This mechanism holds that citizens can compel their representatives to hear their concerns, but also allow the government to reject or qualify the result since the state has responsibility for all citizens not just a majority of them, which referenda often represent. Referenda are strictly run by the Electoral Commission and are almost always held simultaneously with general elections.

## **VI. *Committee System***

Considerable academic and parliamentary views argue that the Executive is overshadowing Parliament, which is reduced to a mild inconvenience to be humoured as one of the stage props of a democracy. Critical reforms have taken place since the 1980s and have gained significantly in recent years in the United Kingdom, Australia and New Zealand where Parliament has reasserted itself through Select Committees. These Committees unlike those of the Donoughmore era are not mere administrative appendages for Ministers to patronise. Instead they are designed to scrutinise the Executive and investigate issues of public concern. Formed solely of parliamentarians not holding Government office and reflecting the political composition of the Legislature these Select Committees covering all manner of subjects are able to choose their inquiries,

investigate their subjects and harry their targets. To be a Chair of one of these Committees is sometimes more influential and more rewarding than Cabinet office. The best committees contain members of all political persuasions that are expert in their Committee's field and enjoy wide spread support – very often Committee Chairs even come from the Opposition or dissident Government backbenchers. High profile committee hearings are the result of bringing in senior Ministers, bureaucrats, business leaders and others into their sights for a media drenched grilling. Such Committees have the ability, which the whole House does not, of probing in detail critical issues of public interest and compelling either through standing orders or public expectation answers from those who should have them. Such a revival has also generated greater interest from the public who are near invariably welcome to attend all Committee sittings and view their proceedings in print or online. There should also be options of joint committees of both Houses, and of course the Senate, less concerned with whipped party politics, may convene its own committees and produce its own reports. Select Committees are not a place of party populism, but instead an arena for cross-party consensus and meaningful investigation. The recent reforms to the committee system in the Sri Lankan Parliament are a good step in the right direction. However, there is still little incentive or capacity in the current political culture for MPs to treat committee work seriously, as opposed to, say, development work in their electorates. If the reforms are to take any meaningful effect, this political culture has to change, and a new generation of MPs created that would take their crucial scrutiny duties seriously. The media too has a critical role to play in providing necessary exposure to this important aspect of Parliament's work.

## **VII. Judiciary**

Traditionally the Queen-in-Parliament is viewed as completely sovereign in the Westminster model – theoretically able to make or unmake law on any matter – but of course this this can and often is circumscribed by written constitutions in many parliamentary states.<sup>48</sup> As we have argued in Part I of this Working Paper, the more generalizable norm of a modern parliamentary state is accountability rather than parliamentary supremacy. The judiciary have the duty under this system to interpret statutes guided and constrained by the weight of precedent from common law. Judges in the system must be fearless in their application of the law and be oblivious to political or personal bias or pressure. Therefore the judicial branch must have the ability to frustrate the will of the Executive if there are legal grounds to do so. A strong judiciary is jealous of its independence and preserves its integrity. Judges keep strictly separate of the Executive and Legislature and intrepidly uphold the constitution when it is

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<sup>48</sup> See e.g., F. Ventner, 'South Africa: A Diceyan Rechtsstaat?' (2012) *McGill Law Journal* 57 (4): p.722.

under threat whether from president or peon. For such a judiciary to exist, judges must feel confident in their position and duty, which means all temptations to follow or whither from Executive instruction must be removed. Clearly many at the highest levels of the Sri Lankan judiciary have not functioned anywhere near the expectations of the law and have ignored their oath of office. Statutory and constitutional safeguards must be in place to protect the judiciary's role and cordon it administratively by providing ample resources to carry out its demanding task without calling upon the other branches of state for sustenance or favour. It must also work the other way. Judges must be personally and professionally removed from any political or financial avarice and be legally reprimanded and removed if such temptations arise. In many Commonwealth countries judicial expertise is very often shared either at a regional level like the Caribbean Court of Justice or internationally like the Judicial Committee of the Privy Council, which remains the highest appellate court for multiple countries. The shared legal heritage has also enabled countless senior judges to sit on the bench of the other Commonwealth states including the Sri Lankan jurist L. M. D. de Silva who served in the Judicial Committee of the Privy Council in London. In the present context, it may be beneficial to draw upon the Commonwealth in some select key areas, for example in inquiries concerning impeachment of superior court judges.<sup>49</sup> More broadly, the provision of one or more Commonwealth justices on the Sri Lankan bench would increase the scope, impartiality, and knowledge available to the court and embed a necessary aloofness from the Executive. The Asian region itself has a vast reservoir of judicial experience in dealing with issues highly comparable to Sri Lanka's. Malaysia called upon legal experts from Scotland, England, Australia, India and Pakistan for its constitutional and judicial set-up while the Pacific, Africa and the Caribbean have long histories of judicial borrowing.

### ***VIII. Public Service***

A fundamental principle of the Westminster model and of the old Ceylon Civil Service was strict neutrality. Regardless of the party or minister a senior public servant's responsibility was to serve the government of the day and implement their instructions within the bounds of the law after providing frank advice on the merits of the policy at hand and the constitutional context of the decision. The senior members such as the Permanent Secretaries to Ministries were generally those who had trained and worked their whole lives in the public service and mastered the ethos of a service that stays above politics. These principles apply equally to the Diplomatic and Armed Services. Civilian authority is entrenched and actions are carried out after providing free and frank advice and in respect of the law and

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<sup>49</sup> See Written Submissions by the Centre for Policy Alternatives to the Subcommittee of the Constitutional Assembly on the Judiciary, 18<sup>th</sup> July 2016: p.4, available at: <http://www.cpalanka.org/wp-content/uploads/2016/07/CPA-Submission-on-Judiciary-Final.pdf>

constitution. Public servants are not, however, the mouthpiece of any political party and especially during overt political actions and periods, such as election time, must refrain from any action or appearance that can be perceived as politically partisan. A relatively recent innovation in many Westminster states is to have Special Advisers. These are political consultants appointed on the recommendation of individual ministers that provide open party-political advice in the minister's office. Unlike public servants their job is tied to the individual minister and they are not retained in changes of government or minister. They are not given access to all confidential files and they have established boundaries on what they can and cannot do. This innovation has arguably allowed ministers to receive important and necessary political advice and at the same time insulated 'permanent' public servants from taking on political tasks. Another innovation seen in some Commonwealth states is the office of ombudsmen for various sectors such as banking, law, education, freedom of information, etc. Whereas public servants are mostly and necessarily anonymous to citizens the ombudsmen's office is to provide the public with an avenue to lay their grievances or perceived injustices on public services. The ombudsmen have the power to investigate these claims and compel a response from the appropriate ministry. Sri Lanka too has the institution of the Parliamentary Commissioner for Administration as well as a Financial Ombudsman, but these have not, by and large, worked to the best possible potential. Freedom of information is also a relatively new and critical right for all citizens. This makes the publication of specified information mandatory from all Ministries and gives mechanisms for citizens to request information, which if denied, must be justified on legal grounds. This provision has been powerful in promoting transparency and accountability from the Government and Public Service. The passage of the Right to Information Act by the Sri Lankan Parliament in July 2016 is thus a positive measure in step with other Commonwealth countries, but of course, its implementation will be the true test of its efficacy.

### ***IX. Bill of Rights***

For most of the countries that emerged from British rule and followed the Westminster system, including Sri Lanka, a Bill of Rights was viewed as an unnecessary legislative instrument to protect the rights of citizens. Events have proved otherwise, to put it mildly. The Indian assertion of a chapter of fundamental rights in their republican constitution has proved a powerful symbol and tool to judge, defend, and demand rights under the constitution for all types of groups and individuals including cases covering race, language, religion, caste, gender, sexual orientation, education, freedom of expression, and quality of life. Even the traditional Westminster states of Australia, Canada, New Zealand and the United Kingdom have all inserted strong legislative instruments against such discrimination that are routinely held justiciable and respected by all governments. Now such

legislation is taken to be near mandatory, and we have outlined how such constitutional rights might be entrenched within the ethos of the parliamentary-constitutional state in Part I of this Working Paper. Beyond the law, the symbolic inclusion of such Bills of Rights is the fact that it creates a culture of protection and empowerment that keeps a check on Governments by reminding them with the authority of the constitution that individual and group rights matter and will be enforced if threatened. In the historically plural environment of Sri Lanka where rights have been too easily malleable, this is not only desirable, but also essential. An adoption of such a legislative and legal regime, fiercely maintained, would also end credence to the criticism that Sri Lanka does not function under the Rule of Law and would normalise the country's political and diplomatic relations, beyond the rogues gallery of international outlaws that so unfortunately characterised the previous regime.

#### **X. *Council of State***

As will be noticed from previous politics in Sri Lanka personnel are critical for any system to work well, particularly one like an *Eastminster* where convention reigns and thus much is left to the interlocutor to determine. Historically, in England, even before the advent of constitutional monarchy, the Crown was advised and surrounded by a Privy Council. The body was powerful in its own right and even a determined Sovereign had to navigate the sensibilities and duties of the Council to succeed. This counsel extended to those of patronage and appointments. The modern Privy Council (the judicial body is merely a committee of the Council) is drawn of almost all serving and former high ranking Cabinet Ministers, Law Lords, Civil Servants, Prelates and select Commonwealth Prime Ministers, including at one time D.S. Senanayake. The body no longer provides formal political advice to the Sovereign since this is the role of the Prime Minister and Cabinet. However, as mentioned above, within the Crown still reside awesome powers, which the Prime Minister in effect exercises for political benefit. The framers of the Indian constitution were worried about this and wanted instead a Council of State modelled on the Privy Council and Irish Council of State to aid and advise the (non-Executive) President on matters of national importance in decisions on which any party bias has to be avoided. The Council of State was proposed to consist of the Prime Minister, the Deputy Prime Minister, the Chief Justice of the Union, the Speaker of the House of Representatives, the Chairman of the Senate, the Advocate-General, every ex-Prime Minister, every ex-Chief Justice and a limited number of other persons appointed by the President in his absolute discretion. Such a Council was advocated since it was thought useful in India in such matters as the protection of minorities, the supervision, discretion, and control of elections, and the appointment of judges of the Supreme Court and the High Courts. The idea was rejected, but has not been forgotten and similar ideas appear across the Commonwealth. The Canadians have their own Privy Council and

leading scholars have advocated such a scheme for many Commonwealth countries including Australia and New Zealand. The Irish Council of State is composed of the Prime Minister, Deputy Prime Minister, Chief Justice, President of the High Court, Presiding Officers of the two Houses of Parliament, Attorney-General, any former President, Prime Minister or Chief Justice willing to serve, and up to seven presidential nominees. Such a membership with the inclusion of the office of Leader of the Opposition and the Provincial Chief Ministers could be used to scrutinise, debate and formally recommend candidates for major office such as Provincial Governors, appointed Senators, Permanent Secretaries, Armed Forces' Chiefs, High Commissioners and Ambassadors, Commissions of Inquiry, Judicial Officers and other statutory public service positions such as the Delimitation Commission as well State Honours. In addition the Council could help with President's major reserve powers:

- 1 To appoint a Prime Minister
- 2 To dismiss a Prime Minister
- 3 To refuse to dissolve Parliament
- 4 To force a dissolution of Parliament; and
- 5 To refuse assent to legislation

These five powers are all, or at least can be if the situation is not clear, controversial and critical powers, although some of them will recede in significance if the new constitution continues the principle of fixed-term parliaments introduced by the Nineteenth Amendment (2015). It could also be the case that the new constitution provides the President with special reserve powers in exceptional situations including states of emergency, and functions with regard to territorial integrity and national reconciliation. A non-Executive President in such situations where the decision is far from obvious or where he or she is unsure as to the validity of the choice is compelled to make decisions with minimal opportunity for consultation. The Council of State could act as an 'integrity branch' made up of the highest practitioners from the three branches of state and chaired by the President. Such a body may well prevent the predilections for equine selections by Sri Lanka's Caligulas without drastically compromising the principles of a parliamentary state.

## ***XI. State Structure***

Historic Westminster literature held that a true Westminster state should be unitary. These accounts centred on Britain, but applied their mores to the rest of the Commonwealth. The reality is that most of the major Westminster states have varying degrees of formalised devolution or federalism. Canada, Australia, India, South Africa and Malaysia for example all follow this characteristic. Not only these states, but the United Kingdom itself has always had levels of devolution – Scotland, Wales and Northern Ireland all retained

distinct 'national' identities, and institutional and policy features even before the establishment of parliaments in Edinburgh and Cardiff in 1999, while Northern Ireland's parliament can be traced back to 1921. All of the above Commonwealth states have federal features, but also unquestionably have powerful centres and rarely describe themselves as federal. There is nothing contradictory about this. It is, like most Westminster principles, based on pragmatic considerations and justly acknowledges certain degrees of autonomy due to a combination of historical, cultural, religious, linguistic and ethnic reasons while at the same time maintaining cooperation and territorial unity. Secessionism is not an option, but nor is blanket imposition of central policy that affects the rights and identity of a significant portion of the country. Rather than lead to disintegration or civil war, the federal structures of Canada, Australia and India have instead secured unity and also accommodate various groups by giving powers in certain spheres. The *Eastminster* parliamentary state structure therefore provides provinces with meaningful powers and agreed levels of autonomy on certain questions, and a simultaneous acceptance of the Centre's powers and national jurisdiction on all other matters. This structure creates two major levels of government. Firstly, the national level where politicians represent their constituency in the House of Representatives and their Province or group in the Senate that together forms the National Legislature. The second level is at the provincial level and the structure of the Centre is usually replicated in the Province, but in a unicameral legislature where the Government is headed by a Chief Minister and a Governor formally heads the Province as the President's (not the national Government's) representative. Such a framework would mirror the styles and practices of states such as Australia, Canada and India where an agreed list of powers for both Centre and Province are entrenched.

## **Concluding Remarks**

Many readers will note that several of the reforms above have been heard before in Sri Lankan debates. However so much has been warped by the Executive Presidency and any reform suggested from within or around it is still likely to be acculturated by it, which is not a boon for a state seeking to foster consensus and cooperation. The *Eastminster* First XI seeks instead to draw on the hopes of independent Ceylon, which was once seen as the 'Best Bet in Asia' and remove the resilient chaff of 'Great Man' messiah worship inherent to the Executive Presidency, to reveal a more participatory and inclusive structure that the parliamentary system provides. The *Eastminster* First XI also spurns any wistful nostalgia for another era and rejects the need to follow to the letter another country's system. Instead as *Eastminster* implies it implores the country to be aware of its past Westminster heritage and Commonwealth constitutional developments above and select the best to be forged with Sri Lankan needs and beliefs. Clearly this exercise is worthless without people. As Dr B.R. Ambedkar said when introducing the draft Indian Constitution, "if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What

we will have to say is that Man is vile.” The Soulbury Report did not quote the entire sentence of Molière’s reproduced at the beginning of this piece. The sentence ends “vous avez justement ce que vous méritez [you got exactly what you deserve]”. At the very least all Sri Lankans deserve better than what they have had.