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Failure of Quasi-Gaullist Presidentialism in Sri Lanka

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Constitutional Choices

Sri Lanka's Constitution combines a presidential system selectively borrowed from the Gaullist Constitution of France with a system of proportional representation in Parliament. The scheme of proportional representation replaced the 'first past the post' elections of the independence constitution and of the first republican constitution of 1972. It is strongly favoured by minority parties and several minor parties that owe their very existence to proportional representation. The elective executive presidency, at least initially, enjoyed substantial minority support as the president is directly elected by a national electorate, making it hard for a candidate to win without minority support. (Sri Lanka's ethnic minorities constitute about 25 per cent of the population.) However, there is a growing national consensus that the quasi-Gaullist experiment has failed. All major political parties have called for its replacement while in opposition although in government, they are invariably seduced to silence by the fruits of office.

Assuming that there is political will and ability to change the system, what alternative model should the nation embrace? Constitutions of nations in the modern era tend fall into four categories.

1. Various forms of authoritarian government. These include absolute monarchies (emirates and sultanates of the Islamic world), personal dictatorships, oligarchies, theocracies (Iran) and single party rule (remaining real or nominal communist states).

2. Parliamentary government based on the Westminster system with a largely ceremonial constitutional monarch or president. Most Western European countries, India, Japan, Israel and many former British colonies have this model with local variations.

3. French or Gaullist presidential model which combines an elected presidency with substantial executive power and political influence with parliamentary government. The

executive power is shared between the president and the ministry headed by a prime minister or premier. The system works well only in a political culture that allows cohabitation between opposing political parties controlling the different power centres such as when the presidency is won by one party and the parliamentary majority by the other party. It has also worked in a perverse sense where one political party dominates all the branches of government as in Russia. The system has led to political crises in the Ukraine (2006-2010), in Romania (2012) and the Palestinian Authority (2006-2007) and in Sri Lanka.

4. The system of tri-partite separation of powers as in the United States. It is now the constitutional model in most Latin American democracies and in Indonesia.

Sri Lanka has only two choices, given its experience: a return to parliamentary democracy or moving to a US style separation of powers which makes the life of the legislature independent of presidential control. I take the view in this essay that the tripartite system offers the better choice for Sri Lanka because the parliamentary system will perpetuate the greatest defect of the current constitution which is the overwhelming power of the executive over parliament. The model I propose is that represented by the theory of the tripartite separation of powers developed in the work of John Locke, Baron de Montesquieu and James Madison and substantially realised in the Constitution of the United States. I do not propose the exact replication of the American Constitution but the adoption of a similar constitutional structure with some important modifications. I am of the view that such a constitution will best meet the demands of governmental stability, democratic accountability and the protection of minority interests in this multi-ethnic and multi-religious nation.

However, it is also the message of this essay that any democratic system is only as good as its underlying institutional bulwark. A constitution's success depends as much on culture as on the legal devices set in place. The nation must find ways

to address its cultural malaise if it to have hope of achieving a lasing state of constitutional government.

Role of Underlying Institutions in Securing Constitutional Government

It is easy to have a constitution but hard to achieve constitutional government. The best designed constitutions often fail for want of conditions that sustain constitutional government. I mean by a constitution, the formal documents that describe a nation's system of government. I mean by constitutional government the state of affairs in which public authorities are subject to the governance of fundamental rules of justice. The failure of constitutions is often assigned to defects in their formal provisions. In many cases, this is true. There is no doubt that the two fatal defects in the Weimar Constitution allowing emergency legislation by decree (Art 48) and constitutional amendment by two-thirds majority (Art 76) provided Adolf Hitler the legal pathway to supreme power and thereby to the destruction of the constitution. There many other examples of constitutional self-destruction caused by weak initial settings. Defects in the two republican constitutions of Sri Lanka are rightly blamed for the authoritarian trajectory in the politics of the nation. In fact the second republican constitution of 1978 that installed the current presidential system was enacted under the two-thirds rule of the first republican constitution of 1972.

No constitution is perfect. Yet some countries maintain reasonable standards of civil government notwithstanding serious deficiencies in their formal constitutional arrangements. The United Kingdom has for over two hundred years enjoyed an enviable degree democracy and civil liberty relative to other nations, without the aid of a written constitution or an enforceable bill of rights. New Zealand's *Constitution Act* is susceptible to momentary change by ordinary legislation but that nation ranks high in any estimation of democracy. Australia does not have a constitutional bill of rights but has a deserved reputation for respecting fundamental rights and freedoms of its citizens. The great

lesson of constitutional history is that a government of laws and of the people needs more than a well-crafted constitution. The written words of constitution can provide powerful constraints on power and channel the energies of government towards the public interest. Their force however, is derived not from magical properties of the constitutional text but from human behaviour. The pious incantations of the constitution are of little avail where the principal actors in the political arena lack reverence for the letter and spirit of the law. I include among these actors, not only elected officials but also the public service, the judiciary, the media, and leaders of civil society. The history of the Sri Lankan republic provides a graphic illustration of the corruption of a constitution which, despite its defects, is a workable democratic model.

Human actions may be motivated by high ideals but for the most part, they are governed by incentives and disincentives that life presents. This is the reason why the Scottish philosopher David Hume thought that 'in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest'.[1] The trouble is that the most rigorous constitutional checks prove ineffective without a supporting matrix of more informal constraints. These constraints are called institutions in economic literature and they include not only the formal legal rules but also the cultural and economic. Constitutional government is ultimately sustained by a substratum of supporting institutions and a culture of constitutional behaviour on the part of officials and citizens. Yet a nation can enhance its prospects for securing a high degree of constitutional government by choosing wisely the structural features of its formal constitution.

Even if a constitution is free from serious defects, there are no guarantees of its effectiveness or longevity. The crucial point to grasp is that a constitution has no intrinsic capacity to maintain itself. A paper constitution may command respect

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1 D. Hume, '*The Independency of Parliament*' in E.F. Miller (Ed.) (1987) ***Essays Moral, Political and Literary*** (Indianapolis: Liberty Fund): p.42.

through its symbolism and psychological effect on citizens and officials. But it is mainly sustained by forces that lie outside it in the form of the complex web of formal and informal constraints that make up a people's political culture. The characteristics of a constitution, particularly the way it disperses power, the checks and balances it installs and the degree of difficulty that is involved in formally amending the constitution are crucial determinants of its stability. However, like all other constitutional provisions, these features are maintained not by the magical quality of the language of the constitution but by the behaviour of the elements which comprise the political community. This behaviour is shaped by a whole range of formal and informal constraints, of which the formal constitution is but one. Other constraints include habits, customs, moral codes, attitudes, ideologies and economic conditions. In economics literature, these constraints, together with the higher order rules such as constitutional provisions are known as institutions. Institutions provide the framework of rules within which the game of social life is played out.

The concept of an institution has been likened to the constraints that make up the rules of the game, as opposed to the players who engage in the game.[2] Institutions are distinct from organisations that belong with the players. The term *institutions* is elastic enough to include constraints of all kinds that influence human behaviour, including legal and moral rules, etiquette, cultural constraints (such as those concerning reputation), superstition, other more-personal and less understood values that guide action (such as parental and filial affection and compassion toward fellow beings). Institutions ultimately are found in the norms of behaviour. A norm has no independent existence. It can exist only as a part of an extended matrix of norms. The ancient legal norm *pacta sunt servanda* (contracts should be observed) is supported by many other norms, such as those concerning respect for person and property, truthfulness, the impartiality of third-party arbiters (in case of breach), and the integrity of law enforcement

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2 D.C. North (1990) *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press): p.3.

officials. The cardinal constitutional norm of independence and impartiality of the judiciary, so essential to the rule of law, depends critically not only on the norms of judicial ethics and responsibility but also on the acceptance of judicial decisions by officials and citizens adversely affected by them. Such acceptance is the outcome of numerous other norms that create the overall culture of 'playing by the rules'.

Economic Conditions and Constitutional Government

However we look at constitutional government, it is apparent that economic conditions form a major factor in its success. The emergence of the market economy converts society from one in which the benefits of the law are extended only to members of one's tribe or group to one in which everyone has the protection of abstract and impersonal rules. The recognition of the benefits of trade, hence of the right to hold and dispose of several property, caused the emergence of the system of abstract rules that secure freedom and order.[3] Markets based on the observance of such shared rules created a new form of trust among strangers. This is not trust of the individual stranger but trust of the rule system—a reliance on institutions more than reliance on individuals. Repeated transactions based on abstract rules strengthen such rules. Where markets shrink, for whatever reason, the strength and reach of abstract law will weaken as exchange among strangers lessens, trust diminishes and people become more dependent on protection and patronage.

Poverty by itself does not destroy the rule of law, but it limits the strength and reach of such rule. History shows that impoverished communities often have very stable general laws. In these communities, the gain from observing the law and the harm from violating the law are palpable. The rule of law breaks down when the real or perceived costs of compliance are greater than the costs of noncompliance. In a society in

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3 F.A. Hayek (2013) ***Law, Legislation and Liberty*** (London: Routledge): pp.43-44.

which one's general wellbeing or survival in catastrophic circumstances depends on the good will of others, powerful incentives exist for observing the rules of the game. The problem for the rule of law in this economic context occurs when the state takes over as provider, displacing markets with regulations and entitlements.

We need go no further than Sri Lanka to demonstrate the causative relation of economic conditions and constitutional government. In 1948, Ceylon, as it was then known, gained independence as a constitutional monarchy under a Westminster-type parliamentary democracy guaranteeing universal adult franchise, independence of the judiciary and of the public service and equal protection of the law to all communities. In its first decade, the country was held up as a model of constitutional government, the living proof of the cross-cultural validity of the rule-of-law ideal. Its constitutional decline began in 1956 with the election of its first socialist government. This government introduced racially discriminatory laws and administrative practices to fulfil pledges to its electoral support base among the Sinhala peasantry and petit bourgeoisie. The 1972 Constitution, authored by a leading Marxist lawyer, dismantled many of the existing checks and balances in the name of the sovereignty of the people. The return to power of the market-friendly UNP in 1977 raised some hopes but the rot had well and truly set in, and the situation for the rule of law in some respects worsened during the UNP's sixteen years in office.

Although tampering with the Constitution was a factor in the decline of constitutional government, it was not the major cause. Even the 1972 Constitution had more safeguards than citizens in the United Kingdom, New Zealand, and many other functioning democracies enjoy. In Sri Lanka, however, the institutional matrix of constitutional government was destroyed by a catastrophic economic decline resulting from the conversion of the country's semi-market economy to a socialist-type command economy. Nationalisation of all key sectors of the economy—including the public transport system, the banks, the insurance industry, wholesale trade, and, most damaging of all, the plantation industry, which was the

backbone of the economy—converted the people into a population of public servants. Controls on prices, rents, house ownership, imports, and currency exchange drove foreign investors out and choked off local enterprise. As the universities and schools produced more and more unemployable general arts and science graduates, the government created more jobs to keep them off the streets. Armies of youth did little more than open doors, bring cups of tea for senior officials, and move documents from one office cubicle to the next. Real incomes declined as a shrinking economic pie was divided into ever-smaller slices. Essential goods became scarcer and dearer, and queues stretched longer. The Tamil youth suffered most. Not only did private-sector jobs dry up, but the young Tamils were also squeezed out of public-service employment through language policy. It is not difficult to imagine the impact on constitutional government of the efforts of a nation of public servants seeking to make a decent living off the government.

It is easy to destroy institutions, but much more difficult to rebuild them, as Sri Lanka has learned painfully.

The 1978 Constitution: Gaullist Presidentialism Gone Wrong

1978 Constitution opted for an adaptation of the *Constitution of the Fifth Republic of France* engineered by the President Charles de Gaulle and his Prime Minister Michel Debré. It was meant to overcome the instability of the parliament-dominated Fourth Republic by creating a strong presidency. The President in the Fifth Republic is not a figurehead but has executive power relating to defence and foreign relations and the power to protect the Republic in crises. Even in normal times, the President has the power of arbitration by which the direction of policy can be influenced. This power flows from the President's constitutional capacity to require Parliament to reconsider bills, to refer them to the *Conseil constitutionnel* (the highest constitutional authority) and to dissolve Parliament in the event of serious disagreement. The 1978 Constitution drew its inspiration from the Fifth Republic but, as discussed below,

created a Presidency that is even more powerful than that of France.

The Sri Lankan President has power under the Eighteenth Amendment to appoint superior court judges, the members of the Judicial Service Commission, the Public Service Commission, the Elections Commission and other leading officers of state including the Attorney-General, the Auditor-General and the Secretary-General of Parliament. The power is subject only to a duty to consult a Parliamentary Council whose advice the President is not binding on the President. In contrast, appointments to the most important constitutional positions in France including judicial offices are stringently regulated. The appointing and disciplinary authority for judges, the *Conseil Superieur Magistrature* is appointed by the President but according to terms determined by organic act. The French judges also have to be career judges who are graduates of judicial training schools. The National Assembly and the Senate elect the High Court of Justice. The *Conseil constitutionnel*, that *inter alia* controls elections and determines constitutionality of laws, consists of nine members of whom only three are appointed by the President, the others being appointed by the Presidents of the National Assembly and the Senate. Civil and military positions are filled by the President but according to regulations made by the Prime Minister (Art 21). Members of the *Conseil d'Etat* responsible for administrative regularity and legality are appointed by the Council of Ministers.

The Seventeenth Amendment to the Sri Lankan Constitution brought the President's power over key constitutional positions much closer to the French model raising the hope that it would restore the integrity of institutions undermined by decades of executive manipulation. These hopes were dashed by systematic executive sabotage of its provisions and its eventual repeal and replacement by the Eighteenth Amendment. The rule of law that is central to constitutional government is impossible to achieve if the officials charged with the due administration of the law are themselves susceptible to corruption or control.

The deeper contradiction in the 1978 Constitution is the capacity of the President to manipulate Parliament without being responsible to it in the conventional sense and the consequent weakness of Parliament as a check on the presidency. The advantage of the parliamentary system in the classical sense lies in the responsibility of the executive to parliament through the confidence principle. A government that loses the confidence of parliament has a duty to resign and may be removed if it fails to do so. Parliament alone determines the ministry and its longevity. The advantage of the presidential system in the classical sense is the capacity of the legislature to be independent of the president and hence serve as an effective check and balance to the executive branch. The French president cannot be removed by the legislature during the president's term except by impeachment and the French legislature cannot be unilaterally dissolved by the president except in extraordinary circumstances. The 1978 Sri Lankan Constitution sacrificed both these checks. The President is nominally responsible to Parliament (Art 42) but cannot be removed for loss of parliamentary confidence. Yet the parliamentary component of the executive, the cabinet, may be dismissed by the President even when it enjoys the confidence of Parliament by the exercise of the power to dissolve Parliament after one year of its existence (Art 70(1)(a)).

In both France and Sri Lanka, the executive power is shared between the President and an executive responsible to Parliament comprising the Prime Minister and the Council of Ministers in the case of France and the cabinet in the case of Sri Lanka. The French President's share of the executive power is limited to the defence of the Constitution and the territory, the observance of treaty obligations (Art 5) and the ultimate command of the armed forces. Ministers are formally appointed by the French President but they are chosen and their portfolios are determined by the Prime Minister (Art 8). Although the French President exerts much power informally, the role was described by the principal author of the Constitution of the Fifth Republic and its first Prime Minister

Michel Debré as that of a 'republican monarch'.[4] De Gaulle himself conceded that his 'influence did not extend to day-to-day policy.[5] In contrast, the Sri Lankan President determines the number of ministers and the extent of the executive power to be given to the ministers (Arts 44 and 45). The French President presides over the Council of Ministers, but the Prime Minister is the head of government both in law and in fact (Art 21).

The most potent weapon in the presidential armoury is the power to dissolve Parliament without reason after the first year of its term. The dissolution of Parliament also terminates the parliamentary component of the executive, leaving the President in total executive control until a new Parliament is elected. Although it is possible to argue that the President is bound to observe Westminster convention that a government with confidence of Parliament is entitled to remain in office, there is no assurance that the principle will be upheld in practice or be enforced by the Supreme Court. The French President has similar power but must consult the Prime Minister and the presidents of the assemblies before dissolving parliament. The Sri Lankan President also has another significant power not enjoyed by her French counterpart – the power to change the electoral cycle by calling for an early Presidential election after the expiry of four years of the term (Art 31(3A) (a)(i)). This power was conferred by the Third Amendment to the Constitution that the Supreme Court held did not require the approval of the people at a referendum. I am convinced with the wisdom of hindsight that the decision was wrong. (I must take a fair share of blame for promoting the error as junior counsel to the Attorney-General who opposed the challenge to the Bill.) I believe that the Amendment was contrary to the spirit of Art 3. There is also a plausible argument that it was contrary to Art 3 in the technical sense. Art 31(3A)(d)(i) introduced by the Third Amendment had the effect of making the term of an incumbent President re-elected at an early election commence

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4 J. Bell (1992) ***French Constitutional Law*** (Oxford: Clarendon Press): p.16.

5 Ibid: p.15.

on the 'date in the year in which the election is held (being a date after such election) or in the succeeding year, as corresponds to the date on which his first term of office commenced, whichever is earlier'. This means that in certain circumstances more than six years would lapse between Presidential elections, a condition that impairs the right of franchise guaranteed in Art 4. Franchise according to Art 4 includes the right to vote at Presidential elections. Art 4 contemplated six yearly presidential elections. It is not referendum protected but Art 3 that makes the franchise inalienable is referendum protected. Hence under the terms of Art 83 the Third Amendment should have been approved at a referendum owing to inconsistency with Art 3. The passage of the Third Amendment is history. The President's power to go to an early poll combined with the power prematurely to dissolve Parliament gives the President unprecedented control over the electoral cycle, thus introducing arbitrariness at the heart of the Constitution.

The basic problem with of the 1978 Constitution concerns the weakened position of Parliament. When the President and the parliamentary majority belong to the same political party the Parliament has no capacity for independent deliberation and action and no means of checking the executive. In periods when the President and the parliamentary majority belong to different parties, Parliament may act against the presidential will but at its own peril. Thus, the Constitution combines the failings of the Westminster system (discussed below) with the dangers of a powerful presidency. The 1978 Constitution is an unsatisfactory imitation of the French constitutional model. A more faithful replication of the French model will improve the present Constitution in that it will significantly curtail the President's executive power and restore to executive pre-eminence the government comprising the Prime Minister and ministers having the confidence of Parliament. However, the President's power over Parliament, though diminished under the French system, remains excessive because of the ever-present threat of dissolution. Serious problems also arise when the President and the parliamentary executive belong to opposing parties or coalitions. The French response to the problem is called *cohabitation* under which the President and the

Council of Ministers respect the constitutional division of powers and each side avoids undermining the constitutional role of the other. *Cohabitation* has so far worked reasonably though uneasily in France but this has much to do with the prevailing political culture. The fact that the powers of the two arms of the executive are defined with reasonable clarity also helps *cohabitation.* Even if the Sri Lankan Constitution is similarly reformed, current experience of the divided executive indicates that cohabitation is bound to be much more problematic within the country's highly adversarial political culture. Such a system would be worth having despite its uncertainties if it enhances constitutional government to a degree not possible under alternative systems of representative democracy, namely the classical presidential and the Westminster models. So far there has been no evidence of such payoff. My view is that while the Westminster model represents a modest improvement on the Gaullist model, the separation of powers along the lines of the US Constitution offers the best prospects for constitutional government in Sri Lanka.

Five Failings of Westminster Democracy

Westminster democracy, also known as parliamentary democracy and responsible government, is the product of the constitutional history of England and of the United Kingdom after the Act of Union with Scotland. In this system, the electorate does not directly elect the executive but elects the legislature that acts as an electoral college to elect the Prime Minister, the head of the government. The ministers are nominated by the Prime Minister and appointed by a constitutional head of state (the constitutional monarch or a titular president). The Prime Minister and the ministers (or a selected group amongst them) form the cabinet that collectively makes the major policy decisions of the government. The Prime Minister, unlike the US President, cannot override the cabinet. The cabinet is collectively responsible to Parliament, or in the case of bicameral legislatures, to the lower house thereof. In practical terms it means that the Prime Minister tenders the resignation of all

the ministers when a motion expressing lack of confidence is passed by Parliament or if Parliament denies the government funds for its ordinary annual expenditures. In such circumstances an alternative government is commissioned if that is feasible, or more likely Parliament is dissolved and re-elected at a general election. Ministers are also individually responsible to Parliament, which in practical terms means that they must answer questions of members and must resign if they are censured by Parliament. The maximum term of Parliament is fixed but it may be dissolved sooner in the circumstances just mentioned. A government's term ends with the loss of confidence, usually after an election or as a result of defections during the term. The government is responsible in theory to the electorate through the mediacy of Parliament.

The Westminster system of parliamentary government, despite its theoretical elegance, is seriously flawed in five respects.

1. The system often fails to produce an executive that reflects the choice of the electorate.
2. The system makes Parliament subservient to the executive except in the uncommon situation where the government does not command a majority in Parliament (or in the lower house if it is a bicameral legislature).
3. The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures.
4. The system tolerates greater arbitrariness in government owing to the fusion of legislative and executive powers.
5. The system reduces the chances of the most able persons being chosen to perform executive functions.

1. The system does not ensure popular government

Popular government is not synonymous with constitutional government in the sense of government under law. Crudely majoritarian systems (by which I mean systems that rely solely on elections to produce good government) often produce

arbitrary rules that seriously harm minorities. All governments, popular or otherwise, need to be restrained by rules for constitutional government to prevail. If so one may ask how the subjects of the United Kingdom enjoy such a high level of constitutional government under a crudely majoritarian system? The answer is that the powers of the UK government and Parliament, though unconstrained by a written constitution, are in fact constrained by a political morality that is deeply ingrained in British society. The unwritten UK Constitution is a product of history and tradition. It exists not in books but in the practices of the nation. Other countries that adopt liberal constitutions cannot rely on such political traditions, hence must institutionalise auxiliary precautions through constitutional design. Given the right checks and balances these countries can build a supporting culture of constitutional behaviour through constant vigilance, hard work and reasonable luck. Although democratic choice does not automatically produce constitutional government, it is in combination with other devices, an important promoter and protector of constitutional government. In countries such as Sri Lanka, where the supporting institutional structures of constitutional government are weak, enhancing democratic choice attains greater importance. The Westminster system leaves much to be desired in this regard.

As mentioned, in the Westminster system, the executive government is formed by the leader of the party that has the confidence of Parliament or of its lower House. After a parliamentary election, the leader of the party which is likely to command the support of a majority of members in the Lower House is appointed as the Prime Minister and the Prime Minister chooses the ministry from within his own party ranks or from the ranks of coalition parties. Hence, the government is chosen or determined at parliamentary elections according to the number of seats won, not according to the number of votes gained. It does not take an Einstein to work out that under the 'first past the post' single member constituency system (whether preferential voting is permitted or not); a party could receive a minority of the popular votes and gain a majority of the seats in Parliament. What this

means is that a party that is not the choice of a majority of voters may be entitled to form the government.

It is also clear that a switch to proportional representation does not solve this problem. Indeed, it has the potential to make the executive government even less representative of the popular choice. While proportional representation makes a lot of sense with respect to the election of the members of the legislature, under the Westminster system of responsible government, it does not lead, necessarily, to majority government. In many European democracies that combine forms of responsible government with proportional representation, hardly ever has there been a government elected by a majority of the people. Tasmania, the only Australian State that has proportional representation in the Lower House, routinely elects governments that received much less than fifty per cent of the popular vote. The Sri Lankan electoral history is no different. Clearly, the problem is not with the electoral system but with the Westminster system of responsible government which entrusts executive power to the party which enjoys, for the time being, the express or tacit support of a majority of members of Parliament. The distortion of the popular wish concerning who should exercise executive power is aggravated in Australia by the requirement of compulsory voting and the requirement of indicating preferences at federal elections. The compulsion to indicate preferences is particularly insidious. It forces many voters to grant preferences to parties they have no wish to support in order to validate their primary vote.

In contrast, a system that enables the public directly to elect an executive president by a preferential system of voting ensures that the candidate who is most preferred by the electorate or, at any rate, the candidate who is least objectionable to the electorate is chosen as the head of government. It is true that the American system of presidential elections is capable of distorting the public choice owing to the absence of preferential voting and the intermediacy of the Electoral College. In the absence of preferential voting an election can produce a winner who may not be the most preferred or the least objectionable candidate. However, a system where the

executive is directly elected on a preferential voting system or by the French 'run off ballot' system tends to produce the government that is least objectionable to the electorate if not the one preferred by a majority of the electorate.

2. The Westminster system makes Parliament subservient to the executive

The great virtue of the Westminster system is said to be its capacity to make the executive responsible to the elected house of Parliament. This responsibility is enforced by the convention that requires the Prime Minister, whose party is defeated on a confidence motion or on an appropriation bill, to tender the resignation of his government or to advise that Parliament be dissolved and new elections be held. The responsibility to Parliament is thought to be reinforced by the ministers' duty to answer questions in Parliament relating to the conduct of their departments and their duty (observed mainly in the breach) of resigning when they are individually censured by Parliament.

Though this view of Westminster democracy was perhaps true of the English constitution during its classical era, it is no longer the case in England or anywhere else where the system is practised. Today, Parliament is subservient to the executive will, except in the unusual instances when the government party does not have a majority in the lower house. The reality now is that Parliament (or where applicable the lower house through which ministerial responsibility is supposed to be enforced) is confined to two functions. Firstly, after an election, it acts as an electoral college to pick the ministry and shadow ministry. Secondly, it provides two loyal and vociferous cheer squads for the government and opposition to liven the proceedings of the house. The great virtue of Westminster democracy has become its fatal contradiction. How did this transformation occur?

Before the Reform Acts, the monarch was the executive both in name and in fact. Though Parliament was theoretically sovereign, the monarch was able to control it through

ministers who used royal patronage to manipulate both the Members of Parliament and the electorate. Ministers held office during the king's pleasure, not Parliament's confidence. They were responsible to the king, not Parliament. All this was possible because the franchise was extremely limited and the electoral system was wholly corrupt as exemplified by the infamous 'pocket boroughs' and the 'rotten boroughs'. The situation changed in the nineteenth century with the enactment of the Reform Acts of 1832, 1867 and 1884. These Acts extended the franchise, effected electoral reforms and established mass democracy, though women did not get their right to vote until well into the last century. The extension of the franchise meant that it was much more difficult to manipulate the electorate. There were just too many voters to bribe! The reforms brought about a dramatic change in the nature of parliamentary democracy. The vestiges of ministerial responsibility to the king disappeared and ministers became fully responsible to Parliament and Parliament became accountable to the electorate. Politicians needed mass support to get elected to government and hence needed to promise people what they desired. It was more important to be popular among the voters than to be liked by the king. Hence, the ministers became independent of the Crown and replaced the monarch as the true executive.

The nineteenth century has been described as the classical period of the British constitution. Following the Great Reforms, it seems as though the electorate was supreme. The voters could count on their representatives to keep the government honest and to remove it when it misbehaved. But this situation could not last. While the monarch was the real executive, Parliament could chastise his ministry with impunity. Parliament could call ministers to account, impeach them or otherwise force them out of office without disruption to the administration of the realm. There was a real separation of powers between the executive monarch and the legislature and each balanced the other. The independence of the judiciary had been secured by the *Act of Settlement 1701*. This is the constitution that Baron de Montesquieu observed and described in his *The Spirit of the Laws* as the epitome of a state where liberty is secured by the tripartite separation of

powers. Montesquieu's account was profoundly influential in the founding of the US Constitution, to the extent that Madison in *The Federalist No 47* spoke of him as 'the oracle who is always consulted and cited' with respect to the doctrine of the separation of powers and added that 'the British Constitution was to Montesquieu, what Homer had been to the didactic writers on epic poetry'.[6] It is fair to say that the fundamental features of the classical constitution of England were entrenched for posterity in the written US constitution, even as they withered away in the unwritten constitutional tradition of Britain.

Once real executive power was transferred to the ministry and the convention was established that the ministry that lost the confidence of the Commons had to resign, Parliament for the most part, could not express its lack of confidence in the ministry without actually ending the government's life and often that of the Parliament itself, as it would usually require a general election to produce another viable government. What occurred then was analogous to Darwinian selection. The new reality meant that only political parties that could secure the unquestioning obedience of its parliamentary group could form an effective government. The party whip was born and the independent member of Parliament became an oddity. Henceforth, intra-mural debate would be tolerated in the backrooms but not on the floor of the House where it mattered. It is one of the tremendous ironies of political history that the growth of Parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated and the executive regained its ascendancy over Parliament except in the unusual circumstances where no party secured a majority and the Prime Minister led a minority government.

Why did the electorate tolerate the subservience of its representatives to the will of government? Why did the people

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6 J. Madison, 'Federalist Paper 47' in G. Wills (Ed.) (1982) The Federalist Papers by Alexander Hamilton, James Madison and John Jay (New York: Bantam Books): p.242.

fail to insist on proper oversight of government? The reason is that it had no real choice. The system simply did not allow an undisciplined party to remain in power for any length of time hence no party allowed members any freedom in Parliament. The only alternatives to monolithic political parties were the independent candidates and they had no prospect of governing at all. As all the parties behaved in exactly the same way, the electorate had no real choice in this respect. There was another reason for the electorate's impotence in enforcing parliamentary discipline on the government. After the Great Reforms, the electorate was clearly in a position to make demands that politicians could not ignore. Then something funny happened. Politicians discovered that they could turn the tables on the electorate by making offers that segments of the electorate could not ignore. They found a fertile marketplace where benefits and privileges could be traded for votes. Elections could be won through distributional coalition building by putting together offers to a sufficiently large number of special interests. Politicians were helped in this enterprise by the absence of constitutional limits on parliamentary power. They were able to gather unto themselves vast powers with which they could create and dispense largesse to groups of voters, more often than not at the expense of other groups. As Professor Geoffrey Brennan notes, Parliament became 'a prize awarded to the winner of an electoral competition'.[7] There is much merit in Professor Brennan's description of the current state of Westminster democracy. He finds that Parliament today is 'just a piece of theatre' and the vote 'a pointless ritual',[8] but argues that this theatre plays an important part in the bidding process of the political marketplace that constitutes the main game.[9] Whether or not we put it as high as that, it seems reasonably clear that in routine circumstances, Westminster Parliament today is very much the servant of the executive.

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[7] G. Brennan, 'Australian Parliamentary Democracy: One Cheer for the Status Quo' (1995) Policy 11(1): p.17 at p.20.

[8] Ibid: p.17.

[9] Ibid: pp.20, 21-22.

In contrast, where the executive is directly and separately elected by the people for a fixed term of office, the legislature is free to play an independent deliberative role. Since a vote against the government's policies does not threaten the life of the government or of the legislature, individual representatives act independently or in direct response to their constituency wishes.

3. The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures

One of the most serious consequences of the subservience of Parliament to the executive is the incapacitation of the electorate to influence, directly and decisively, specific legislative measures. In the US model of separated powers, legislation proposed or favoured by the executive has no guarantee of approval by Congress. Even more importantly, Congress is able to pass legislation opposed by the President, although a special majority is required if the President chooses to veto the bill. In the Westminster model, for the most part, laws proposed by the executive pass and those opposed by the executive perish. The problem is more pronounced in Westminster systems that have no effective upper house to act as a house of review.

As already observed, under the Westminster system, accountability is enforced through the electoral process. The electorate is asked to choose between policy packages presented by political parties. These packages are designed strategically to appeal to a sufficient number of diverse interests that would deliver victory on the election night. Marginal constituencies become critical in this exercise. In theory, the electorate will punish the promise breakers at the next election. There are two major problems with this theory.

Firstly, it overestimates the capacity of the electorate to monitor and pass judgment on a government's term of office in

the context of a bargaining democracy. In implementing its program over a term of office, most governments would disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a government may still win with the aid of a new or modified coalition of interests. Except when major errors or abuses are committed, elections are decided by the ongoing bidding process that allows parties to recoup lost support with new promises to the disaffected groups or to alternative groups. The accounting process is also undermined by the fact that a great deal of governmental activity cannot be monitored as it happens outside Parliament within bureaucratic structures that elude parliamentary and judicial scrutiny.

Secondly, this kind of accountability carries an unacceptably high prize. The 'Parliament as prize' model requires that we choose from among competing bids that comprise whole packages or programs to be pursued over several years. They contain things that we like and things that we don't like. We can only get the programs that we like by agreeing to many programs that we don't like. For example, a voter cannot say to a political party, I accept your tax policy, your privatisation policy and your tariff reduction policy, but I reject your environment policy and cultural policy. Even if the voter says so, at the ballot box he or she cannot split her vote. If a voter takes one he or she also takes the other.

In electing a Senator or a member of the House of Representatives, American voters also must take their representatives as they find them, espousing some policies a voter likes and others he or she dislikes. However, the US voters are much better off, as their representative can be made to change his or her mind without endangering the lives of the executive and the legislature. Besides, the fact that candidates for Congress are not inextricably bound to a party policy package means that they can be far more responsive to their constituency in formulating their positions on individual issues. The flip side of this situation is that unlike in Westminster democracy, US voters can punish an individual legislator for betrayal of a cause without punishing a government. Australian voters cannot split their vote with respect to the

executive and the legislature, because the executive belongs to the party that wins the legislature. US voters can.

It is important to note this particular criticism of the Westminster system is not that it promotes the formation of political parties, but that it requires a degree of party discipline that destroys the principle of executive responsibility to Parliament. Political parties are a 'naturally' selected phenomenon in any large democracy. Candidates who band together can offer voters more things than those who remain independent. So, there will always be political parties. In the US model, the degree of cohesion within political parties is dictated by voter sentiment. Obviously voters see advantages in their delegates being members of a powerful group. At the same time they would like their delegates to break ranks when they think that the group is making a wrong decision. Therefore the American system tends towards optimality in party discipline as representatives constantly fine tune their performances between solidarity and independence. In contrast, Westminster democracy leaves no room for the evolution of an optimal party system.

4. The system tolerates greater arbitrariness in government owing to the fusion of legislative and executive powers

The separation of powers doctrine has been under severe pressure in both the presidential and parliamentary systems, but it has been most vulnerable in the parliamentary systems. History suggests that whenever there is executive dominance of the legislature, there is an accretion of legislative power to the executive. During the Tudor ascendancy Henry VIII manipulated Parliament into passing the infamous 'Henry VIII' clauses whereby the King was delegated the power to make laws that could even override Acts of Parliament. The legislative-executive divide in the parliamentary system is weak to begin with as the executive by definition and practice constitutes the group that commands majority support of at least the lower house of parliament and hence has a decisive

role in enacting legislation. This executive control of legislation allows the governments to procure the enactment of Acts that delegate vast amounts of legislative power back to itself. A certain degree of delegation of legislative power to the executive is unavoidable given the legislature's lack of time, resources, and knowledge to work out the detail of the law. Until well into the twentieth century, there existed an unwritten rule of parliamentary democracy that parliament must not delegate wide law making authority to the executive, particularly authority to determine the policy and principle of the law. This was the finding of the famous report of the Committee on Ministers' Powers.[10] This constraint has weakened in the face of increasing executive demands for regulatory power and discretionary authority and judicial reluctance to police the non-delegation rule.

The rule against the delegation of wide law making power to the executive is a major component of the classical doctrine of the separation of powers. When officials can both legislate and execute their legislation, they have the potential to place themselves above the law, for the law is what they command it is. Where officials are given the power to make orders determining the law for the particular case, they end up making law at the point of its application. Courts in the United Kingdom have been powerless in the absence of competence to review Acts of Parliament to contain the growing volume of unguided legislative discretions bestowed on the executive. In Australia, the High Court, despite having full judicial review power has declined to impose on Parliament any significant constraint on its competence to delegate its legislative power to the executive. The Court has chosen to emulate the British position on delegated legislation rather than draw a line in the sand against excessive delegation, despite the clear differences between its powers and the powers of British Courts. In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*, the High Court upheld the constitutional validity of section 3 of the *Transport Workers Act 1928-1929* which empowered the Governor-General in

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[10] Report of the Committee on Ministers' Powers (1932) Cm.4060: pp.30-31.

Council to make in his absolute discretion regulations affecting every aspect of employment of transport workers. The power was described by Dixon J as giving the Governor-General in Council 'complete, although of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be adopted'.[11] The breadth of this power was such that the decision is regarded widely as sanctioning the conferment of legislative power on the executive, without significant limits.

Art 76(1) of the 1978 Constitution places an important limitation on executive law making in providing that: 'Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power'. Art 76(3) allows the delegation of power to make subordinate legislation for prescribed purposes. A delegation will fail if the purposes are not prescribed or if the power allows the making of laws that are not subordinate in character. The effectiveness of this prohibition depends critically on how the Supreme Court interprets the terms 'subordinate' and 'purposes'. The term 'purpose' by itself does not limit law making to detail as opposed to policy and principle. The High Court of Australia regarded executive law that remained subject to repeal by Parliament to be subordinate in character.[12] The Sri Lankan Supreme Court hopefully has applied this prohibition more rigorously. Yet, a large volume of executively made laws that offend this prohibition may enter and remain on the statute books as the parent Acts have passed into law without constitutional challenge. It needs to be remembered that under the 1978 Constitution, the validity of Acts of Parliament cannot be questioned after their enactment. This is one of the great failings of the 1978 Constitution that it shared with the Gaullist Fifth Republic. Both constitutions require constitutional challenges to primary legislation to be made before enactment, which means they must be challenged in

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11 (1931) 46 CLR 73, 100.

12 Ibid: p.102 (Dixon J).

abstract principle before their impact is felt by citizens. However, the 2010 Amendment to the French Constitution allows *post fact* challenges to legislation where there is a breach of fundamental rights and freedoms.

The rule that the elected representatives in Parliament should determine the policy and principle of legislation is critical for constitutional government. Leaving the custody of this principle in the hands of the Westminster executive is a bit like entrusting the sheep to the wolf. A Parliament that is separated and independent of executive control is much better positioned to uphold this principle.

5. The system reduces talent in government

It would be tempting to accept the loss of the deliberative and supervisory capacities of Parliament if there was a payoff in the form of excellence in governance. Unfortunately, not only is there no such pay-off but the Westminster system is structurally handicapped from producing excellence in government. The system requires the great departments of government to be administered by ministers of state and for ministers of the state to be Members of Parliament. Undeniably, there are very able men and women in most Parliaments. However, Parliament by its very nature provides a very poor talent pool from which to select the administration of the state. Consider the following.

A member of Parliament to get preselected by her party and then get elected at the poll must have a certain range of skills and attributes. However, they are not necessarily the skills and attributes that relate to excellence in administration. On the contrary, they may be impediments to good administration, which we associate with qualities such as efficiency, work ethic and fairness. Of those who get elected, only members of the government party or coalition are eligible for the ministry. Even from within this small group ministers are not necessarily chosen according to talent but according to a whole host of attributes such as seniority, factional support and loyalty to the leader. In countries with numerically large parliaments, such

as the United Kingdom, the problem is not acute as there are large talent pools in the parliamentary parties. In Sri Lanka the introduction of national lists of candidates has mitigated the problem by enabling parties to introduce to Parliament experts who are not professional politicians.

In the US by contrast where the Constitution forbids executive officers being members of the Senate or the House of Representatives, the US President may choose the administration from an unlimited national pool of talent. The French Council of Ministers, though responsible to the National Assembly is also chosen from outside the legislature. It is true that administering a government department is very different to the management of a business or the conduct of scientific research. Ministers must not only make technical and managerial decisions but also political judgments. However, it is easy to exaggerate this dimension. In practice, political judgment often translates into partisan strategic thinking. Increasingly though in mature political communities, governments are realising that good economics and good management also make good politics. In any case there is no reason to think that only incumbent members of Parliament possess the political judgment needed in public administration.

The main theoretical reason for requiring ministers to be members of Parliament concerns the need for individual and collective ministerial responsibility. In theory, ministers can be held accountable for their actions through questions and censure motions. The practice as we know is very different. A government that has a majority will use question time to its own partisan advantage. Censure motions have no chance of success in a House governed by party whips and dominated by a ruling party. The key to ministerial responsibility to Parliament is the capacity of members to act independently of the executive. Unfortunately the Westminster system, as it has developed, leaves no room for such independence.

Westminster democracy is a magnificent achievement that marked the emergence of states from monarchic absolutism to democratic constitutionalism. The aim of this paper is not to

belittle the historical contribution of this form of government but rather to show that like all institutions, its efficacy needs to be reassessed in the light of experience and change. The experience of the twentieth century shows that Westminster democracy no longer promotes its own ideal and that if we value this ideal, we must seriously consider alternative means for realising it, namely the system of tripartite separation of powers.

The Logic of the Tripartite Separation of Powers

The President of the United States enjoys more *practica*l power than the French or Sri Lankan Presidents by virtue of being the head of the government of the most economically and militarily powerful nation on earth. Yet, the US President's *constitutional* power is severely curtailed. The President cannot dissolve Congress or choose the timing of his own re-election, because the terms of the President and of Congress are constitutionally prescribed. The President may veto legislation but Congress can override his or her will. The President can nominate federal judges and heads of the public service but Senate must ratify them. Judges cannot be removed except upon impeachment by Congress. The President has certain inherent executive powers and Congress cannot intervene in the purely executive domain. Congress alone can create the higher executive offices but the President makes the appointments (Art II, § 2, cl. 2). The President can sign treaties but they become law only with the Senate's consent. The Congress may deny the President's legislative and financial requests without destabilising executive government. The Supreme Court exercises comprehensive powers of judicial review of legislative and executive action. The result of these arrangements is a tripartite separation of powers that is not absolute but effective. The separation is maintained by the checks and balances that each branch of government presents to the others.

One of the greatest expositions of the logic of the tripartite separation of powers is found in *The Federalist Papers.*[13]The utility of the separation of powers doctrine is most commonly explained in terms of its tendency to prevent tyranny by the dispersal of power. However, the absence of tyranny is an essential but not sufficient condition of constitutional government as the democracies of the classical world discovered. Aristotle noticed that democratic assemblies that decide every detail of the life of the community without the guidance of general laws are soon captured by demagogues.[14] The challenge for the constitutionalist is not simply to work out ways of preventing tyranny but also to devise ways of preventing democracy from the capture of factions. This is a challenge that occupied much attention of the authors of *The Federalist Papers* and the other founders of the American Constitution.

Madison and other key founders proposed a far-reaching scheme involving, in addition to a system of tripartite separation, federalism, representation and institutional checks and balances among and within the great departments of government. They sought by these means to reduce the capacity of individuals or groups to pursue their separate ends and thereby to compel government to conform to rules that represent general interests. The idea of a government of laws achieved through the dispersal of power is the recurrent theme of *The Federalist Papers.*

In *The Federalist No. 10*, Madison diagnosed the great mischief that the Constitution was intended to remedy as the pursuit by factions of their separate interests. Madison considered the proper concern of the legislators to be 'the permanent and aggregate interests of the community' and not the transient and particular purposes of factions. Herein lies the profound problem for democracy; how to secure the public good and private right

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13 G. Wills (Ed.) The Federalist Papers by Alexander Hamilton, James Madison and John Jay (New York: Bantam Books).

14Aristotle (1916) *Politics* (Trans: B. Jowett) (Oxford: Clarendon Press): p.157.

against the danger of faction. He concluded that a constitution cannot remove the cause of faction but can control its effects. The success in this regard is the 'great desideratum, by which this form of [popular] government can be rescued from opprobrium under which it has so long laboured, and be recommended to the esteem and adoption of mankind'.[15] The function of the legislature, Madison argued, is to adjust clashing interests and render them all subservient to the public good taking into view 'indirect and remote considerations'. The problem of popular democracy is that these considerations 'rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole'.[16] Legislation must be concerned with general propositions (which serve the permanent and aggregate interest of the community), whereas it is the function of the executive and the judiciary to apply the general norms to particular situations. Madison hoped that representative (as opposed to direct or pure) democracy would serve to 'refine and enlarge the public views, by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations'.[17] But although this was Madison's hope, it was not his belief. He envisaged the likelihood that men of fractious tempers would get elected and betray the interests of the people. That is the reason for the auxiliary constitutional precautions. The two great auxiliary precautions are the horizontal division of powers effected by the separation of legislative, executive and judicial powers, and the vertical division effected by federalism.

Madison devoted *The Federalist No 47* to the argument that the tripartite separation of powers is a means of suppressing tyranny and by this he also meant the tyranny of majorities.[18]

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15 Madison (1988): p.45.

16 Ibid.

17 Ibid: pp.46-47.

18 Ibid: p.244.

The removal of the executive and judicial powers from the legislative assembly is the key means by which the legislature is constrained to the making of laws in the general public interest. The independent judiciary helps to confine the legislature to its proper function and the executive that is charged with the administration of the government under the law and the execution of the laws is denied the legislative power through which it can validate its own actions.

The expectations of the founders were not fully realised. Congress is notoriously open to special interest lobbying and the practice of logrolling has become institutionalised. The President has capacity to pork barrel through bargaining with Congress. The Bill of Rights takes much credit for the openness of American government. Yet few will argue that the tripartite separation of powers and the federal dispersal of power are cornerstones of American liberty, which makes the nation, for all its failings, the preferred destination of most people seeking to escape political oppression and economic deprivation.

If the tripartite separation of powers is adopted as the constitutional template, two features of the US Constitution should be avoided. One is the Electoral College for the election of the President. This institution was well meant as a body that would filter the passions of factions, leading to a sober choice of the head of government. However, it has turned into a redundant formality with delegates chosen on the basis of their committed support for particular candidates from each State in proportion to its population with some weight attached to smaller States. An unintended consequence of the Electoral College is its capacity to distort popular choice. A candidate may win the national vote but lose the Electoral College. A Sri Lankan executive President should be chosen on a preferential ballot as at present or on the 'run off' election system practised in France. The second feature that should be avoided is the Presidential veto. The founders installed the veto as a means of strengthening the executive branch, as a check against what they considered was the most dangerous branch, the legislature. The founders felt that while the executive and the judiciary were constrained by law the

legislature was capable by making law to extend its reach beyond the legislative sphere. Congress can overcome the Presidential veto by two-thirds majority and public opinion is not an insignificant deterrent against the unreasonable use of the veto. Yet, it is a device that in the political culture of Sri Lanka may prove divisive if not destructive of the democratic process.

Concluding Thoughts

Nations have achieved acceptable levels of constitutional government under different types of constitutions ranging from the parliamentary to the French and American presidential systems. Political history of the modern era shows that each of these models can succeed if supported by favourable economic and cultural conditions. Where the political culture has disintegrated together with the economic conditions that support law governed behaviour as occurred in Sri Lanka, constitutional recovery will need a resetting of the distribution of political power. The subjection of parliament to executive power is the principal cause of the constitutional debacle in Sri Lanka. It commenced in 1972 with the replacement of the Independence Constitution (the Soulbury Constitution) by the first Republican Constitution that made the legislature nominally supreme but factually supine to the will of cabinet. The Second Republican Constitution of 1978 worsened the position by creating an overwhelmingly powerful presidency. A return to a Westminster type sovereign legislature that remains under the control of a prime minister and cabinet will not necessarily restore the constitutional balance conducive to government under law. That object is more likely to be achieved if a system of checks and balances as found in the tripartite separation of powers is adopted. No constitutional system can succeed without a supporting political culture. However, the system that I commend in this contribution is more likely than others to foster such a culture by demarcating more clearly the boundaries of power.