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Exporting the American Presidential System to Sri Lanka: A Sceptical View of the Prospects for Democratic Consolidation under an Executive President in a Plural Society

Nikhil Narayan

Introduction

The debate resurfaced most recently when U.S. Supreme Court Justice Ruth Bader Ginsburg appeared on Al Hayat Television in February 2012 to discuss Egypt's constitutional reform process.[1] The question raised during the interview was whether Egypt should look to the American or other constitutions as models, or come up with its own formulation from scratch.[2] Justice Ginsburg responded that Egypt would be better served looking to modern (i.e., post-World War II) constitutions than the American constitution written in 1787, in designing its own democratic constitutional framework in the year 2012.[3] Justice Ginsburg's point was that these more recent documents, as evidenced by their detailed delineations of human rights protections, among others, deliberately addressed and more closely reflected analogous historical and political circumstances facing present-day transitioning societies than the U.S. Constitution written over 200 years ago.[4] The American political Right of course quickly took the opportunity to wrap itself in the Stars and Stripes and scream treason, that our very own Justice of the Supreme Court, one of the three pillars of our democratic way of life, had besmirched the very system that she swore to uphold.[5]

Nevertheless, the larger implication raised (or re-raised) by this otherwise-quickly forgotten interview, namely, whether or not the American constitution is the best model to emulate for 21st century post-conflict plural societies undergoing turbulent democratic transitions, is equally relevant for Sri Lanka's own constitutional reform debates. More precisely for Sri Lanka and the purposes of this chapter, the question is whether or not an executive presidential system modelled on the American system

[1] Al Hayat Television, interview with U.S. Supreme Court Justice Ruth Bader Ginsburg, 1st February 2012: http://www.youtube.com/watch?v=KuMXqcK4Nrg (accessed 2nd February 2015).
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] See, e.g., D. Schaub, '*South Africa's Orwellian Constitution*' in Hoover Institution (2012) ***Defining Ideas*** (Stanford: Stanford UP): http://www.hoover.org/print/publications/defining-ideas/article/113041 (accessed 2nd February 2015).

would be the best model to address the multifaceted set of imperatives driving any future constitutional reform process in Sri Lanka.

The arguments in favour of a presidential system like that of the United States are understandably compelling: true democratic accountability through direct election of the chief executive; efficiency of governance; avoiding the gridlock and ineffectualness often faced by a coalition government. But these salutary effects are not necessarily forsaken in a parliamentary system. Nor are they automatically achieved under a presidential system. The countervailing negative effects a presidential system encourages could actually weaken the principles of liberal democracy. The potential for authoritarianism, usurpation of governmental power, and majoritarian abuse of human rights can outweigh any salutary effects on efficiency and accountability that the presidential system might provide.

Furthermore, the questions as to whether the American presidential model works for the rest of the world, particularly those countries with plural and divided societies undergoing post-conflict democratic transitions in the 21st century, is vastly different than the question of whether or how the American presidential system has worked for America. The American presidential system has worked well enough in the United States as much due to historical serendipity as to its institutional safeguards. Governmental tyranny has been held in check, and majoritarian chauvinism has not exploded into full-blown ethnic or race wars (the Civil Rights Era turmoil notwithstanding), because of certain unique aspects of the American polity that are not replicated in most other countries in the world, including Sri Lanka.

It is true that the U.S. Supreme Court has had a vital role in periodically rolling back the President when he has gone too far. But this has depended on the threshold condition that the Supreme Court itself enjoys that level of independence and legitimacy in the eyes of the rest of the government and of the public to be effective. This legitimacy was not a foregone conclusion at the birth of America's constitutional history; it evolved, not least because of historical circumstances and the

fortuitous foresight of individuals at various points in the Court's history. It is also true that the U.S. Congress plays a vital oversight role in balancing the President on legislative, fiscal and foreign policy matters. But as evidenced by the last twenty years alone, this oversight role is easily and frequently circumvented.

It is apparent through a cursory overview of U.S. history that the pitfalls of executive overreach inherent in an executive presidency are easily exploited. Why this overreach by successive U.S. presidents has not precipitated a further slide into full-blown authoritarianism or majoritarian dictatorship in the U.S. is as much due to certain unique characteristics of America's socio-political history and evolution as it is to the virtues of the system's institutional checks and balances. The American political class was at its beginning an essentially homogeneous and narrow slice of the political spectrum and American society at large. The scope of divergent interests and groups was easier to manage as a result. These competing interests that did exist, moreover, were not so deeply rooted in fundamental identity-based politics, but rather policy-based interests at the margins. Even as the country evolved in its socio-political diversity into the 'melting pot' that it is regarded as today, the political playing field upon which competition among political actors, parties, and groups played out has still remained largely driven by policy- or interest-based considerations, as opposed to ascriptive group identity considerations. American political culture has evolved over 200 years to firmly entrench certain rules of the game, even in the face of extremist factions on either end of the political spectrum and a highly polarised polity today, to eventually self-regulate towards the moderate middle.[6]

But what about a country where these socio-political preconditions do not exist? Where this moderating political culture has not yet taken root? Where identity-based politics are still the driving force of a highly plural and divided society? What about a country where militarisation is part of the political

[6] Take, for e.g., the declining influence of the Tea Party faction of the Republican Party, whose extreme policy stance is increasingly being viewed, even within the Republican Party establishment itself, as hurting the party's ability to engender broad national appeal.

culture? What about a country where the legislature is barely a rubber stamp, where the opposition party or parties are so small, weak, disorganised, feckless, or all of the above, that in those instances where the executive circumvents congressional oversight or legislative authority, the legislature cannot or will not return to the next session and quickly put the president back in his place?

In Sri Lanka, these are not hypothetical concerns. Sri Lanka's very real history is one of sectarian civil war, a conflict marked by and perpetuating the identity-based cleavages of its pluralistic society, along with periods of more or less democratic governments, including a tradition of sitting presidents (and their coteries of advisors) practicing dynastic and dictatorial politics. Sri Lanka's next constitutional reform project would be well-served to have as its principal aim the formulation of a system that works towards the reconciliation of its plural society by ensuring representation, inclusivity, participation, access to the levers of governance and government, whatever form that may take, and safeguarding of the rights and interests of all groups in society. This is more likely to be successfully achieved by steering away from a presidential system.

Presidentialism versus Parliamentarism

It should be stated at the outset that this is not a discussion of presidentialism versus parliamentarism as such. Rather, the relevant issue is whether the American model of presidentialism and its clear separation of powers is the right model for Sri Lanka today, as a country emerging from conflict and still facing the imperatives of a plural society. For purposes of clarity, it should also be noted here that this discussion refers to parliamentary and presidential systems in their respective classical forms: parliamentarism refers to a system in which the legislature is the only democratically elected institution, and the executive is formed by and from within the legislature, the former's authority being drawn from, dependent on, and directly accountable to the latter. Presidentialism refers to the American model of strict separation of powers among branches, in which the chief executive is directly elected through a national election and possessing all the constitutional functions and powers as set forth

in the U.S. Constitution.[7]

The exercise of constitutional design, including even the exact contours of a presidential or parliamentary government, is not isolated to these two prototypes. Even within the presidential and parliamentary models, there are a number of other variables and elements of the constitutional framework to consider that can affect the exact nature of the system: among them, the choice between a bicameral or unicameral legislative body; the nature of the judiciary (the appointment process, fixed or indefinite terms of appointment, its powers of judicial review, etc.); and the electoral system itself. Each of these affects the exact shape of the system, and warrants lengthy discussions in its own right. For the practical convenience of the present discussion, however, we will set aside these additional institutional factors for the time being and assume, for purposes of discussion, that they are held constant. Similarly, this discussion will not elaborate on any form of mixed presidential system along the lines of Sri Lanka's current constitutional framework or the French Gaullist system on which it was modelled.[8] It is fairly well settled, both from Sri Lanka's own experience as well as among the commentators referenced here, that this system is the worst of all possible worlds and should not be on the table for Sri Lanka going forward.[9]

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[7] As Juan Linz elaborates, the president under an American-style classical presidential system, has full control over the composition of the cabinet and the administration – which are appointed and not elected, as in a parliamentary system – and the president is directly elected by the people, for a fixed term, and can only be removed by an impeachment and super-majority vote; the president is the ceremonial head of state *and* the chief executive and head of government. See J.J. Linz, '*The Perils of Presidentialism*' (1990) ***Journal of Democracy***: pp.51-69 at pp.52-53.

[8] See chapters by Chandra R. de Silva, Rohan Edrisinha, Kamaya Jayatissa, and Jayampathy Wickramaratne in this book.

[9] See, e.g., Linz (1990): p.52; see also B. Ackerman, '*The New Separation of Powers*' (2000) ***Harvard Law Review*** 113(3): pp.633-729 at p.658, calling a mixed presidential system such as the French (and the current Sri Lankan framework) "the most toxic form of separation".

Separation of Powers as Madison Envisioned in America in the 18th Century

The Madisonian argument in favour of strict separation of powers is by now well known: (1) democratic self-rule through a directly elected chief executive; (2) bureaucratic efficiency, i.e., independence and professionalism in implementation of laws; and (3) protection of individual liberties against the threat of governmental tyranny.[10] The idea behind the Madisonian separation of powers was to thwart majority rule and government tyranny, characterised by arbitrary and capricious rule resulting in a government of men, not of laws.[11] The rationale behind the separation of powers in the United States was to *weaken* the president vis-à-vis the other two branches. The fear of tyranny and the concentration of power in the hands of any one individual was the driving force. An important aim of the constitutional drafters was to make the executive independent and powerful enough to do his job, without being dangerous.[12] The constitutional status of the executive was originally held in a position of relative inferiority vis-à-vis the legislature.[13]

It must be remembered that the U.S. model of separation of powers is a product of the unique history of the American colonies in the latter half of the 1700s.[14] It should also be remembered that the evolution of the constitution was a product of colonial trial and error; there was no abundance of real-world precedents for the drafters to follow, apart from the post-colonial state constitutions themselves.[15] Early state constitutions even had legislative election of the executive.[16] While the constitutional delegates eventually dispensed with a legislative election of the executive in favour of a popular election, thereby increasing the

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[10] See Ackerman (2000): p.640.
[11] See G.W. Carey, '*Separation of Powers and the Madisonian Model: A Reply to the Critics*' (1978) ***The American Political Science Review*** 72(1): pp.151-64.
[12] B.F. Wright, '*The Origins of the Separation of Powers in America*' (1933) ***Economica*** 40: pp.169-185 at p.177.
[13] Hence, the U.S. Constitution begins in Article I with the functions and powers of the Congress, and then addresses the President in Article II.
[14] Wright (1933): p.171.
[15] Ibid: p.176.
[16] Ibid: p.178.

executive's independence and powers, they did not go so far as to allow an absolute veto. Even the compromise method of election of the president – the convoluted electoral college system under which the U.S. still suffers today – reflected a mistrust of the powers of the executive and a balancing act to give it sufficient powers as to check the legislature, but not too much.[17]

The Framers thus constructed an intricate and ingenious system of government based on the separation of powers and checks and balances among three distinct but overlapping branches of government, which ensured the protection of individual liberties against governmental as well as majoritarian tyranny. It is an achievement to be lauded and admired. But, as a model for replication elsewhere 200 years later, it must be understood in its historical context. Among others, the Framers' understanding of 'liberty' and 'minority vs. majority' was much narrower and therefore less applicable to circumstances in, for example, Sri Lanka today.

The Madisonian separation of powers was viewed as a mechanism by which to protect "certain minorities whose advantages of status, power, and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammelled majority."[18] The problem of governmental tyranny was distinct from the problem of tyranny through majority rule and oppression of the minority.[19] The latter was more in line with a deprivation of a natural right. James Madison believed the problem of majority tyranny would be resolved by the multiplicity of interests, the mutual suspicions that inevitably arise between interests, and the probability that representatives will be men "who possess the most attractive merit, and the most diffusive and established characters" as barriers to majority tyranny.[20] He made no mention of institutional separation of powers or safeguards, because he believed that "social checks and balances" based on these diverse interests would be a natural safeguard to protect

[17] Ibid: pp.180-181.
[18] See Carey (1978): p.151; R. Dahl (1956) ***A Preface to Democratic Theory*** (Chicago: University of Chicago Press): p.31.
[19] See Carey (1978): p.151; see also *The Federalist No. 10* (J. Madison).
[20] Carey (1978): p.155; quoting *The Federalist No. 10*. This is James Madison's "extended republic" theory.

against majority tyranny.[21] Madison was concerned with governmental tyranny, and its prevention through the separation of powers, as distinct from majoritarian tyranny, which he believed would be handled by the diversity of interests in the polity.[22] Madison's vision of this 'extended republic' was elaborated in *The Federalist No.10*:

> "In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; and there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of that former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of society itself."[23]

The understanding of 'liberty' by the Framers was likewise narrower in 1787 than is useful for modern day constitutionalism and plural societies. As Ann Stuart Diamond has suggested, the theory of liberty as understood by the Framers was essentially a *negative* duty on the state: "One object [of the principle of the separation of powers in the constitution] was to reduce the danger of the power of government to liberty, by not lodging executive and legislative powers wholly in the same body."[24] Diamond makes a distinction of political liberty, i.e., protection against the slide to tyranny: "Admittedly to some liberty simply meant no governmental involvement with religion, speech, press, and property. At the same time many of the same men believed (or understood) that too little government (weak, unable to act) could result in anarchy and thus in desperation lead to despotism, which all knew was totally destructive of liberty."[25]

It is noteworthy for our purposes that this conceptualisation of

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[21] Ibid.
[22] Ibid.
[23] *The Federalist No.10*.
[24] A.S. Diamond, '*The Zenith of Separation of Powers Theory: The Federal Convention of 1787*' (1978) ***Publius*** 8(3): pp.45-70 at p.59.
[25] Ibid: p.60.

liberty and tyranny is a narrow one, resting on the premise that efficiency and minimalist interference by government in the daily lives of its citizens ("decent and effective government") would be the cure to safeguard individual liberties and prevent despotism. Ineffective government would lead to anarchy which would lead to despotism which would lead to the destruction of liberty, defined as the absence of governmental involvement or restraint on religion, speech, press, and property.[26] Strict separation of powers based on "the nature of the power" and functions of each branch of government was the best/only way to achieve "decent and effective" government, which was, in turn, the best/only way to preserve liberty and prevent tyranny (as defined above).[27]

The Madisonian Separation of Powers in Sri Lanka in the 21st Century

The Madisonian separation of powers doctrine is indeed an ingenious mechanism that has withstood the test of time in preserving basic individual liberties and preventing outright government tyranny. But this does not answer the question as to whether this is better done through a strictly separate and independent executive president or a parliamentary executive. The question, put another way, is not whether the separation of powers principle or objective itself is right, but rather, what is the best way to get there. It is an issue of constitutional design, not of purpose. The choice of design, at least for Sri Lanka's purposes, must also factor in more contextual features to decide whether the stated purpose of the separation of powers as Madison and his contemporaries envisaged, and our contemporaries have interpreted, are sufficient. That is, for Sri Lanka, is government tyranny and individual liberty, as the Framers defined them, the end of the story? It is not. Given its own unique history circumstances, a principal aspect of the constitutional reform process in Sri Lanka must include consociational modalities for power-sharing, inclusivity, representation, and participation, not just in the sense of participatory democracy and electoral accountability, but rather, truly representative and inclusive

[26] Ibid.
[27] Ibid.

government in access to the levers of power and decision-making for all segments of the society.

The Framers' conception, ingenious as it was for its time, must be understood in its historical context before attempting to replicate in Sri Lanka. It is important to note for our purposes here that the definition of 'minority-majority' in 1787 America was vastly different, and therefore, not analogous, to Sri Lanka's in 2015. The context of minority-majority relations there was essentially class-based; whereas, in Sri Lanka, it is ascriptive identity based, in terms of ethnic, linguistic or religious group minorities and majorities. These ascriptive traits and social cleavages are not as easily displaced, especially when they have in fact had a history of being at the centre of violence and discrimination.

The Framers' conceptions of majority tyranny and liberty were narrow formulations for modern purposes, and for Sri Lanka, the equal or more profound imperative as a structure for reconciliation and inclusivity in a plural and divided society emerging from internal conflict and with deep societal cleavages. In such a case, strict separation does not address these equal or more profound constitutional design imperatives. The formulation that 'liberty' – or human rights, as it were – is restricted to the political rights of religion, speech, press and property, and the absence of governmental involvement in these matters, is decidedly antiquated in modern day understandings of human rights. The notions of positive rights, i.e., government playing a role in actively promoting rights – and rights beyond the basic civil rights of speech and religion, i.e., economic development, housing, livelihood, dignity, political participation, etc. – are now entrenched. Particularly in the context of post-war reconciliation and plural social cleavages, government is expected to be far more active – proactive – in safeguarding or promoting the rights of minority groups or historically disadvantaged or marginalised, or oppressed or discriminated groups, than the American constitutional approach of 'absence of government interference.'

Another distinction to note is that the competing interests that Madison and the Framers had to manage and check were political interests, as opposed to identity-based interests. The citizenry (at

least the politically recognised portion of the citizenry) itself was largely homogenous in character and composition; that is, white Christian males. The majority-minority divide was based on vested interests of power, wealth, status, land, etc. The divides were not based on ascriptive fundamental social distinctions of language, religion, ethnicity, race, etc. This divergence is important because the 'social checks and balances' of interest-based politics that Madison assumed would prevail do not necessarily apply when political parties and leaders can exploit social cleavages as political forces in and of themselves, and supplant interest-based politics. Hence, in Sri Lanka, the proliferation of the multi-party system in which several of the parties are explicitly organised and based along these sectarian or ascriptive lines. Thus, by extension, the distinction of governmental tyranny and social majoritarian tyranny gets blurry, when it is possible, and in fact evidenced by history, that the government itself is captured by the same sentiments of majoritarian sectarian interests.

Again, for our purposes, the essential point is that the constitutional objectives in the U.S. centred around concerns that are not entirely analogous in Sri Lanka: liberty is defined by personal liberty from invasion by the government as a whole; anti-majoritarianism is not with reference to the plural polity, but rather with reference to the educated and landed versus the masses. Efficiency of government and independence, were driving forces; not so much plural representativeness or inclusivity or reconciliation. The preconditions and purposes of the drafters' project are different from Sri Lanka.

The question might be asked as to whether the Framers of the U.S. Constitution would themselves have formulated such a system if they faced the same questions that Sri Lanka does. In Sri Lanka, any proposed constitutional re-drafting, whether wholesale or at the margins, must necessarily have another, even more or at least equally, vital driving purpose in mind: namely, that of inclusivity, representativeness, participation, and some element of power-sharing and/or reconciliation. The negative side effects of a presidential model, in a society such as Sri Lanka's, with a pluralistic, divided society, emerging from a long history of sectarian internal conflict, and continuing to show the

predilections towards majoritarianism and authoritarianism, outweigh the benefits of efficiency or accountability that a directly elected President with a full separation of powers can possibly provide. What is more, with the right arrangement, a more consociational approach can have sufficient room to promote efficiency and accountability without the negative side effects.

The American President in Practice

Ann Diamond declares that "[t]he Framers found the means to entrust vast powers to a popular government and to make their exercise safe to liberty."[28] A brief review of the U.S.'s own recent history unfortunately belies the simplicity of this assertion.

Winner-Take-All Elections versus Coalition Governments

Proponents of presidentialism argue that frequent turnover of government, fragility of coalition governments, fragmented political parties, and political horse-trading in order to reach a compromise for governing are shortcomings of the parliamentary system, as compared with the stability, efficiency, and direct accountability associated with presidential systems.[29] Proponents

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[28] Ibid.

[29] See, e.g., Ackerman (2000): p.654, for a delineation of the opponents' critique. See also S. Mainwaring & M.S. Shugart, '*Juan Linz, Presidentialism, and Democracy: A Critical Appraisal, Comparative Politics*' (1997) ***Comparative Politics*** 29(4): pp.449-471. Mainwaring and Shugart offer a counterpoint to Juan Linz's seminal work, in which they emphasise that it all depends on the specific type of presidential system – how much powers the president has – as well as the electoral system, the number of political parties, level of discipline of parties, level of party fragmentation, etc.[29] Yet, by the end of the critique, Mainwaring and Shugart themselves reinforce the essential points that presidentialism is dangerous where there are deep political cleavages and numerous political parties; that in a multiparty system the president's party will not have close to a majority of seats and therefore will have to rely on coalition forming; but that interparty coalitions are inherently more fragile in a presidential system than in a parliamentary system; and that coalitions in presidential systems are formed before an election and are not binding, whereas in parliamentary systems the governing coalitions are formed after the election and are binding, thereby creating a more closer level of accountability and responsiveness among parties, interests and groups that they represent. See Mainwaring & Shugart (1997): pp.465-466. As they go on to note, "[t]he

may argue that the stability and predictability afforded by a clear mandate through a presidential election is what is required to govern effectively.

Proponents of parliamentary systems, on the other hand, point to these very same outcomes of the electoral process as the strengths of the system.[30] The nature of the presidential election process makes the presidential system a zero-sum, winner-takes-all, game. A parliamentary system, on the other hand, allows representation of a number of parties and requires an element of power-sharing and coalition-forming, thereby requiring the government to pay attention to the interests of all groups, including those represented by the smaller parties.[31] It is highly unlikely, and almost impossible where there are multiple parties, that any one party can obtain an absolute majority in order to form a government of its own without consociational institutional features outright. As a result, power-sharing and coalition government is an institutional feature and gives all groups a vested interest and stake in the system. In a plural, divided society, with multiple parties representing multiple ascriptive group interests, this is essential towards the larger project of representativeness, inclusivity, protection of interests of minority groups, and reconciliation.

Moreover, political impasse can and does regularly occur in a presidential system where citizens cast two separate ballots, one for the individual president, and one for their legislative representatives. It is not uncommon that this electoral process gives rise to instances where the president does not have his party as majority in the legislature, which then can lead to what Bruce Ackerman refers to as the "Linzian Nightmare" – with reference to Juan Linz, the eminent political scientist and strong opponent of presidential systems in deeply divided plural societies.[32] According to this 'nightmare scenario,' evidenced in Latin America among others, the constitution will eventually be exploded by a frustrated president who finds a

problems in constructing stable interparty coalitions make the combination of extreme multipartism and presidentialism problematic and help explain the paucity of long established multiparty presidential democracies.": ibid, p.466.

[30] See, e.g., Linz (1990); Ackerman (2000): p.654.

[31] See Linz (1990): p.56.

[32] See Ackerman (2000): p.646; see also Linz (1990)

parliament/congress that he cannot work with, and may resort to force and authoritarian rule.[33]

In his own seminal work on the subject, Linz points to the fact that no single country in Latin America, where there have been many transitions to presidentialism, has maintained its system without falling back into military authoritarianism.[34] Linz points out that the majority of stable modern democracies in the 20th century are parliamentary, and that the few, or only stable long-running presidential democracy is the United States – Linz references Chile but notes that even Chile broke down into military dictatorship in the 1970s.[35] Linz's point is that this is not a coincidence but a correlation between the nature of the executive vis-à-vis the other branches, and the propensity towards stability or backslide into authoritarianism. [36] Especially in countries with deep political cleavages and pluralistic and divided societies, and numerous political parties, parliamentarism has better hope or odds of preserving democracy; of weathering political storms rather than spiralling into full-blown regime crisis and the end of democracy itself.[37] Under a parliamentary system, the possibility of high or frequent turnover of government owing to the coalition-based electoral process can serve as a degree of flexibility to weather crises without full blown existential implosion – an advantage that the rigidity of a presidential system does not afford.[38]

Another deleterious side effect of the majoritarian winner-take-all nature of the electoral process in a presidential system is the very real scenario in which the winner wins by a slender majority or even only a plurality, and assumes office without a truly representative mandate. This eventuality in fact played out in the U.S. as recently as the 2000 presidential election, in which President George W. Bush assumed the office of the president (with a little help from the U.S. Supreme Court) when he in fact had *less* popular votes than his opponent. In 2004, though his

[33] See Ackerman (2000): p.646; see also Linz (1990): p.55.
[34] Ibid.
[35] See Linz (1990): p.51.
[36] Ibid: pp.51-52.
[37] Ibid.
[38] Ackerman (2000): pp.655-656; Linz (1990): p.55.

margin of victory was wider and in fact an absolute majority, it was nonetheless a relatively slim majority. Bush nonetheless proceeded to govern as if he had a wide popular mandate, pushing forward a partisan policy agenda that appealed to his support base at the expense of inclusiveness and conciliation towards his opponents.

In the U.S., the electorate and the political parties are largely moderate and centrist on the grand political spectrum. Even the extremist wings on either side of the two major parties are just that – wings at the fringes. As a case in point, as much noise as the Tea Party has made in the last three election cycles, they have not had a viable candidate at the national presidential level. They have, through a combination of gerrymandering, been able to successfully take over congressional seats to become a political force within the Republican congressional caucus. But they have failed to garner broader support for their candidates, even within state-wide Senate elections let alone for national presidential elections. Increasingly, even within the Republican Party, the trend is swinging back towards the middle as the political establishment on the Right realises that the extremist Tea Party has been successful in hijacking intra-party primary elections, but then losing to more centrist Democratic candidates in the congressional elections. When it comes to Senate seats, where the candidate has to appeal to the entire state electorate and not just a gerrymandered congressional district, the results are even more stark – and still more apparent when looking at the national presidential election. In the U.S., the 'Left versus Right' spectrum is still fundamentally within the centre portion of the larger political spectrum when compared with other countries. Thus, the divisiveness of the presidential election is largely routinised; the losing party focuses on the mid-term congressional elections, and meanwhile regroups in hopes of resurrecting itself in four years. This is an atypical case given the unique circumstances and preconditions that exist in the U.S. but that do not exist in plural and divided societies with multiple parties representing ascriptive groups. In such countries, the stakes in a zero-sum presidential election are much higher, and the ability or willingness to lick their wounds and regroup until next time much lower. As Linz states:

> "[S]ocieties beset by grave social and economic problems, divided about recent authoritarian regimes that once enjoyed significant popular support, and in which well-disciplined extremist parties have considerable electoral appeal, do not fit the model presented by the United States. In a polarised society with a volatile electorate, no serious candidate in a single-round election can afford to ignore parties with which he would otherwise never collaborate."[39]

He continues later:

> "I am *not* suggesting that the polarisation which often springs from presidential elections is an inevitable concomitant of presidential government. If the public consensus hovers reliably around the middle of the political spectrum and if the limited weight of the fringe parties is in evidence, no candidate will have any incentive to coalesce with the extremists. They may run for office, but they will do so in isolation and largely as a rhetorical exercise. Under these conditions of moderation and pre-existing consensus, presidential campaigns are unlikely to prove dangerously divisive. The problem is that in countries caught up in the arduous experience of establishing and consolidating democracy, such happy circumstances are seldom present. They certainly do not exist when there is a polarised multiparty system including extremist parties."[40]

In the U.S., successive administrations have 'normalised' partisan policy-making without threatening the fabric of the system itself largely because of the moderate nature of the parties, the largely homogeneous nature of the polity, and the mostly interest-based nature of political debate in the U.S. Where a country, such as Sri Lanka, is much more polarised and politics and political parties are often centred and defined around group identity of the populace rather than political ideology, this incentive to govern towards the base can have disastrous effects. This tendency is

[39] Linz (1990): p.57.
[40] Ibid: p.60.

alleviated under a parliamentary system, where power-sharing, coalition-building, and representation and inclusion of all interests and groups is the norm. On the other hand, whether a president wins with 51%, 75%, or 49%, he attains the same amount of power to the executive, which is by its nature vast, more so than a parliamentary executive. This can be problematic in a plural and divided society.

Cult of Personality Politics and the 'Personalisation of Power'[41]

The foundation of presidential power is personality.[42] The nature of the election process of the president feeds into the cult of personality of the person and the office.[43] Government and governance under a presidential system is heavily dependent on the personality and political style of the individual in office. In the scenario described in the previous section, in which a president wins with only a slim majority or even only a plurality, it is entirely subject to the individual personality and style of the holder of office whether he chooses to govern by inclusivity and restoring unity to the nation, by bringing into the fold the defeated opponents through a gesture of conciliation such as, for instance, appointing opposition members into his cabinet, or by catering triumphantly to his support base.[44] The office of the executive presidency affords him the same amount of (considerable) powers regardless of how slim the margin with which he wins; there is no constitutional mandate that an elected president with a thin majority or plurality must govern through coalition, consensus or compromise.

The political style of the president is, moreover, often influenced by the characteristics of the office itself; that is, it is not just the president that influences the presidential system, but the system that influences the behaviour of the individual occupying it. As a result of the fixed term of office, the fact that the president is at once the head of state and representative of the whole nation, and at the same time the leader of a clearly partisan political opinion,

[41] Ibid: p.54.
[42] T.M. Moe & W.G. Howell, '*Unilateral Action and Presidential Power: A Theory*' (1990) ***Presidential Studies Quarterly*** 29(4): pp.850-873 at p.850.
[43] See Linz (1990): pp.53-54.
[44] Ibid: p.60.

the president runs the very real risk of believing that he is the only truly elected representative of the people – having faced a direct election – and conflating 'the people' with his supporters.[45] In such a case, defeated individuals and parties are excluded from any chance of sharing in the administration, making the process more polarising and high-stakes. In the case of a plural society such as Sri Lanka's, moreover, certain groups will *always* be excluded through a straight-up majoritarian plebiscite election, with no chance of gaining access to executive power in subsequent elections. In this case, the project of representativeness and inclusive governance will always fall short.

Unilateral Action, Executive Overreach, and Encroachment on Legislative Functions

The potential for executive overreach and usurpation of power is far greater in a presidential system because of these different behavioural incentives that the institution encourages. This is especially true when the president has full authority vis-à-vis the legislature; that is, when he has a political majority and therefore compliant legislature to push through his agenda.[46] But even when he is faced with a non-compliant legislature, the behavioural incentives of the office of the executive president encourage the office-holder to circumvent the congressional impasse through bureaucratic fiat – the president can surround himself with loyalists in the executive bureaucracy who will feed the need to serve the person of the president and his agenda, and politicise the bureaucracy and laws.[47] In the U.S.'s case, this has indeed manifested itself in the proliferation of quasi-legislative executive decrees as a means to circumvent congressional impasse. In its most egregious examples in the U.S., this scenario has played out in the form of the infamous Justice Department torture memos and other creative legal interpretations of domestic and international laws by the executive branch to justify unilateral executive actions, including the indefinite detention and torture of enemy combatants, the legal limbo of designating detainees as

[45] Ibid: p.61. These doomsday scenarios that Linz paints have in fact come to fruition in Sri Lanka.
[46] Ackerman (2000): p.651.
[47] See ibid: p.713, et seq.

'enemy combatants' itself, and domestic surveillance, to name a few, and to do so virtually unchecked and away from any public scrutiny.[48]

Terry Moe and William Howell have articulated a rational choice theory based interpretation to describe the incentive structures of the office of the executive president that encourages imperialism.[49] According to Moe and Howell, a distinctive feature of the modern presidency in America is his power to act unilaterally and thus make law on his own. Presidents, the argument goes, have incentive to push the limits of the ambiguities inherent in their constitutionally demarcated powers "relentlessly" to expand their own powers, and the nature of the institutions themselves means that Congress and the judiciary will do little to stop it.[50] Presidents' principal motivation, according to Moe and Howell, is their own legacy; how history will perceive them. Combined with the fact that they have a relatively short time frame – four years, eight if they are re-elected – presidents feel the need to act fast to leave behind a legacy as strong and effective leaders with tangible successes and accomplishments. This in turn requires control and power.[51] Among others, the president has the advantage of being a 'first mover,' in that if he wants to shift the legal status quo by taking unilateral action, whether or not his authority to do so is clearly defined by the constitution or laws and without prior notice or consent of Congress or the public, he can do so.[52] The rest of the branches and the public are then left with a fait accompli and have to decide whether and how to respond. If they do not respond, the president gets what he wants; if they do respond, it may still take months or years to resolve the issues, and the president still gets what he wants.[53]

Similarly, there is an incentive towards 'maximalism' with regards to legislation and policy for presidents – a race against the clock to pass as much of the president's most ambitious portions of his

[48] Ibid.
[49] See Moe & Howell (1990): p.851.
[50] See ibid: pp.851-852.
[51] Ibid: pp.854-855.
[52] See ibid: p.855-856.
[53] Ibid: p.856.

agenda as quickly as possible before his party loses its legislative majority.[54] At the same time, entrenchment of laws and policies is longer and deeper in a presidential system, because even if the president's party does lose the legislature, it is still in control of the executive bureaucracy and can continue to implement and enforce those laws that are on the books. In the U.S., this legislative maximalism manifests through ambitious but partisan policies, such as on national security or on health care. In Sri Lanka, this manifests in constitutional shifts altering the electoral process, removal of term limits, redistricting and restructuring of provincial authorities in regional minority-dominated areas, and other policies to curtail fundamental rights, speech, and minority protections.[55]

These incentives towards unilateral action and usurpation of powers have been disastrous enough in the U.S. when they involved issues of domestic surveillance, war-mongering, indefinite detentions, torture, fiscal spending, bureaucratic expansion, domestic policy, etc. They are even more disastrous when placed in the context of a country with a history of ethnic, religious and linguistic cleavages, civil war, majoritarianism and authoritarianism.

The question may be raised by advocates of a presidential model as to whether these outcomes would not have equally happened in a parliamentary system with a prime minister under the right set of circumstances. In response, in a parliamentary system where the prime minister would have had to stand up in the parliament the same day, the next day, the day after that, and day after day, to report and justify the actions of his cabinet to the parliament, where the cabinet itself may take the form of a coalition consisting of opposition and minority parties, the opportunity for scrutiny and challenge of executive overreach would have been greater.

[54] See Ackerman (2000): p.653.
[55] See ibid.

The legitimacy of the judiciary is essential to its ability to serve as a check on the executive president.[56] Yet, under the American presidential model, the president himself has the authority to appoint federal judges, including those on the Supreme Court. The legislative approval process for judicial appointments is only an illusory check on the politicising effects of a presidential system of judicial appointments. It is a rare occurrence to see presidential nominees not ultimately approved, even if after a bruising and confrontational congressional hearing. In recent times, there have been more number of strike downs of judicial nominees, but this is a reflection of the uniquely unqualified nature of Bush-era nominees, and not a testament to the system itself. For the most part, even extreme partisans such as Antonin Scalia, Clarence Thomas, Samuel Alito, John Roberts, and Sonya Sotomayor, have all ultimately been appointed. And this does not even touch the lower federal circuits and district courts, which get even less scrutiny than cabinet level or Supreme Court nominees.[57]

It is true that the U.S. Supreme Court has served an important oversight function through the exercise of judicial review. However, the legitimacy of the Court's authority and its ability to exercise this vital checking function and have its decisions implemented and adhered to was not a foregone conclusion at its inception.[58] *Marbury v. Madison* was a landmark judgment in American constitutional history, by which it entrenched the power of judicial review, precisely because it was not preordained or even constitutionally explicit that the U.S. Supreme Court would have this power over the executive or be taken seriously when it did exercise this power.[59] Recognising that it had no power to enforce its judgment, and that it would suffer irreparable damage to its nascent institutional credibility if President Jefferson and then-Secretary of State James Madison simply chose to ignore its decision, the Supreme Court itself stopped short of compelling action on the part of the executive in its disposition of

[56] See ibid: p.670.
[57] See ibid.
[58] See Wright (1933): p.170.
[59] *Marbury v. Madison*, 5 U.S. 137 (1803).

the case.[60] Had Chief Justice John Marshall attempted to decide the merits of the case and compel executive compliance through a writ of mandamus, and/or had the President and Secretary of State chosen to ignore the Court, the Supreme Court's authority as a check on the executive branch might be vastly different today. Similarly in *Brown v. Board of Education*,[61] it was not clear until the federal government stepped in, whether the Supreme Court's edict to desegregate schools would be implemented. There was in fact considerable resistance to implementation by some southern politicians, and the Supreme Court has no enforcement capability or power to compel implementation of its ruling. Its sole source of legitimacy derives from the people's and the government's implicit faith in its rulings, and their (in the case of the government) voluntary submission to its authority. If President Eisenhower had decided not to federalise the Arkansas National Guard and call upon the U.S. military in order to break the Arkansas Governor's blockade preventing black students from entering Little Rock high school, the course of the Supreme Court's and country's history would have been dramatically altered.

On balance, however, given its institutional limitations, the Court is an imperfect means to check executive overreach. Here too, Moe and Howell's rational choice theory approach to the differing incentives of the different branches is instructive in giving a picture of how the Court's institutional limitations predisposes it to defer to the president on most matters involving the president's own powers.[62] Among other things, Moe and Howell point out that the appointment process serves as a favourable mechanism for the president, though not always a perfect indicator; on average, the Court acts according to 'type.'[63] The Court's lack of enforcement power also makes it reliant on the executive to execute its judgments. We already noted above how this played out in *Brown v. Board of Education.* If the president had chosen not to implement the Court's ruling in *Brown*, this could have vastly altered the course of civil rights in the U.S. as well as the Supreme

[60] Ibid.
[61] *Oliver Brown, et al. v. Board of Education of Topeka, et al.*, 347 U.S. 483 (1954).
[62] Moe & Howell (1990): pp.865-870.
[63] Ibid.

Court's own legitimacy and prestige. Likewise, Moe and Howell note that the Court has incentive to be pragmatic and self-restraining in picking and choosing which cases, controversies, or issues it shall decide; in particular, the Court is more favourable on issues of presidential power and its exercise.[64]

As Moe and Howell describe, if the Court decides against the president, he may simply evade or 'slow-roll' the implementation of the ruling; if the Court decides against the president too often, it may be perceived as 'anti-president' and the president will in turn become 'anti-Court' and ignore his enforcement responsibilities, thus weakening the court as an institution. The Court has thus turned to a few artifices to strategically avoid this problem: (1) simply choosing not to handle an issue, under the guise of the political questions doctrine or foreign affairs or national security – exercising deference to the president's authority in these spheres – thereby, paradoxically, reinforcing the president's otherwise limited authority in these spheres; (2) holding in favour of the president by arguing that the president's action must be consistent with legislative intent, and then proceeding to construct a legislative intent and statutory interpretation which will meet this criterion and justify the president's action; (3) and on occasion, in very egregious circumstances, rule against the president. [65] These same calculations do not exist between the Court and the legislative branch, however, because the legislature by its institutional nature does not have the same leverage or 'club' over the Court that the president does.[66]

The War on Terror and the Rise of the Imperial Presidency in America

The American experience in the War on Terror under the Bush Administration is a ripe example for considering the potential for executive overreach. Following 9/11, the Congress basically rolled over by passing vague, open-ended statutes that gave the executive extremely wide latitude with little or no oversight.

[64] Ibid: pp.867-868.
[65] Ibid: p.869.
[66] Ibid.

Since then, the Congress continued to stay absent or silent even where that it did have oversight capabilities or duties. The result was that the executive subsumed much of the functions of the other branches.[67]

In the aftermath of the 9/11 attacks, Madison's grand vision set forth in *The Federalist 51*, of "[a]mbition [being] made to counteract ambition" so as to resist encroachments of one department upon the other through a gradual concentration of several powers in the same department, has been debunked by an abdicating legislature.[68] Within a week of the attacks, the USA PATRIOT Act and the Authorisation to Use Military Force (AUMF) were passed granting sweeping authority to the president without adequate oversight provisions.[69] No provisions were included to regulate the detention of U.S. citizens, to go along with these vast expansions of military and intelligence and law enforcement powers. Congress remained silent with the Bush Administration's use of military commissions to try enemy combatants, or even the highly dubious legal formulation that led to the designation of 'enemy combatants' itself, which, if nothing else, severely compromised the U.S.'s standing in relation to the Geneva Conventions and long-standing principles of humanitarian law to which it was party.

The Bush Administration hid behind the broad language of the AUMF and the USA PATRIOT Act, as well as its own loose interpretation of presidential powers under the constitution, to justify these and other unilateral actions in the name of the War on Terror. In later years, these actions came to include domestic surveillance, detention of U.S. citizens, and of course the use of waterboarding and other prohibited forms of interrogation in contravention of long-standing international laws. Through it all, the administration stonewalled disclosure of any information

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[67] See N.K. Katyal, '*Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*' (2006) ***Yale Law Journal*** 1159; '*The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power*' (2006) ***Yale Law Journal*** 2314-2349 at p.2316.

[68] Katyal (2006): p.2316, et seq.; *The Federalist No. 51* (Madison).

[69] See Katyal (2006): p.2319; Pub. L. No. 107-40, 115 Stat. 224 (2001); Pub. L. No. 107-56, 115 Stat. 272 (2001).

regarding these actions, even when eventually subpoenaed by Congress, and remained largely hidden from public scrutiny and accountability.[70]

Under the subsequent Obama Administration, despite a president who campaigned on a platform promising to reverse much of the Bush-era abuses of power, the U.S. continued to face instances of unilateral executive action and overreach, including the NSA wiretapping scandal, and assassinations of U.S. citizens in foreign territories unilaterally deemed to be terrorists or enemy combatants with little or no oversight of these legal determinations and military actions, to name two. Add to these the proliferation of executive decrees, which usurp legislative functions ("chock full of rampant lawmaking"[71]) as further evidence of the inherent potential for executive usurpation of power. Even though Congress can technically overrule these decrees through legislation, two factors work against them: (1) as administrative orders and quasi-legislative documents, by the time Congress gets to them, they are already operational and functioning within the enormous bureaucracy – it becomes much harder to retroactively rescind and return to status quo ante when the entire machinery of the state has already started operating under these quasi-legislative directives; (2) Congress, even when it does act, must make sure to pass any overruling legislation with a substantial majority that will ensure being able to withstand a presidential veto.[72]

This phenomenon, combined with the custom and practice of judicial deference to the executive especially in the realm of foreign affairs or national security, has led to what Neal Katyal refers to as the 'ratchet-and-lock' scheme, which makes it nearly impossible to rein in the executive.[73] The President, as Katyal

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[70] See Katyal (2006): p.2320.
[71] Ibid.
[72] See ibid, describing how the Bush Administration threatened to veto any bill that would modify AUMF, which in turn was the blanket justification under which they conducted much of their unilateral war activities. The president can simply veto any legislation that threatens their executive decrees, and ensure that they remain on the books; meanwhile, Congress has to have a 2/3 majority – in both houses – to override the veto.
[73] Katyal (2006): p.2321.

describes, can interpret a vague statute to give himself extraordinary powers, even those which Congress never intended, receive deference in that interpretation from the courts, and then lock that decision and authority into place by brandishing the threat of veto against any legislative enactment that might attempt to rectify the misinterpretation.[74] As a result, any legislator will rather do nothing at all than present a bill that can get derailed through compromise and/or executive misinterpretation, followed by judicial deference, followed by executive veto.[75] And, finally, the executive sees this opportunity to continue doing what it is doing, through executive decree and secret unilateral action.

Protecting Minority Rights Through a Consociational versus Majoritarian System

The constitutional reform project in Sri Lanka has another imperative that the Framers of the American Constitution did not have to grapple with to the same extent in 18th century post-colonial America, namely, that of safeguarding minority rights in its highly pluralist society. As discussed above, the Framers' conception of the protection of liberty went only as far as a negative duty on the state to not interfere with the most basic civic rights of speech, property and religion. The concept of human rights and duties has since evolved and expanded to include a broad spectrum of political, economic, social, and cultural rights, and to include positive duties on the state to actively promote the full realisation of these rights, particularly among historically marginalised or disadvantaged segments of the population. Similarly, as also discussed earlier, the challenges of 'minority rights' and 'majority rule' that the Framers were faced with was fundamentally different from the challenges that those terms represent in Sri Lanka today.

To illustrate these distinctions using the case study of the constitutional reform debates in the Netherlands in the 1960s and

[74] Ibid.
[75] Ibid. Katyal highlights the aborted detainee rights bill sponsored by Senator McCain that would have reined in some of the unchecked powers initially granted under the AUMF, only to have it abandoned under threat of presidential veto by the Bush Administration.

1970s to consider whether Holland would switch to an American-style presidential system, Myron Levine refers to "situational preconditions" in America that allow the presidential model to work there but not elsewhere where those preconditions do not exist.[76] In Holland, Levine points out, historically it has been a population divided by class and religion and highly segregated into separate groupings.[77] Group loyalties and suspicions – 'group' referring to the class or religious association – have been a historical fact.[78] Levine argues that in deeply divided plural societies, democracy can survive only if a strict majority-rule conceptualisation is supplanted by one that emphasises respect for fairness and minority rights – the 'consensus democracy' or 'consociational democracy' that Arend Lijphart famously articulated.[79] The consociational model, which was eventually successfully applied in the Netherlands, Levine continues, allowed for 'grand coalition' government whereby the process of 'elite bargaining' ensured that the interests and concerns of all groups, not just one or the major group, were afforded representation and access to control of the state.[80]

On the other hand, a presidential system can threaten the system of accommodation or compromise that is vital in a divided or plural society, because a popularly elected president represents the interests of only one segment of the society, and has no incentive to respect or consider the concerns of the rest of the population segments. The Dutch, Levine states, opted for a parliamentary system because of its enhanced protection of minority rights.[81] The consociational model emphasises power-sharing and the 'grand coalition' as a means to accommodate all segments of the population in a divided plural society.[82] This cannot be easily achieved with a presidential executive in which

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[76] M.A. Levine, '*Is a Presidential System For Everyone? Some Reflections On The Dutch Rejection of an American-Style Presidency*' (1988) ***Presidential Studies Quarterly***, 18(2): pp.277-281 at p.277.
[77] Ibid: p.279.
[78] Ibid.
[79] Ibid, citing A. Lijphart (1977) ***Democracy in Plural Societies*** (New Haven: Yale University Press); A. Lijphart (1975) ***The Politics of Accommodation*** (University of California Press).
[80] Levine (1988): p.279.
[81] Levine (1988): p.280.
[82] Ibid.

the entire powers of the executive is concentrated in one individual. The American model has fit the U.S. because of its unique history and culture – the U.S. has been fortunate to largely avoid deep-seated religious, ethnic or class cleavages that characterise plural societies. In plural societies, on the other hand, a populist executive may become the source of injustices promulgated on minority populations.[83] In Sri Lanka, moreover, these have proven to be not just abstract hypotheticals and potentialities, but have played out over the course of even its most recent history, and with grave consequences.

Conclusion

The overarching point that this discussion has tried to highlight is (1) the predilection towards excess of power is easiest to exploit in a presidential system, even when this example suggests you have a president who is otherwise reluctant to exercise such power; and (2) the avoidance of this spiralling into a crisis of government itself, instead of a constitutional argument, depends heavily on the individual personalities, and the respect and trust the various departments have invested in one another; that is to say, historical accident. There was a high degree of self-restraint. The issue is not that one system *cannot* work, or that the other system *will always* work – but rather, that the odds in favour of one is higher than the other.[84] The necessary social preconditions to enable the success of the powerful executive president in the U.S. do not necessarily exist in Sri Lanka. Of course, even in a parliamentary system, the question of *what kind* of parliamentary system needs to be addressed, i.e., what other specific institutional features will be in place. Even still, the issue here is one of probability and tendencies.[85]

The success of any system also depends on the support and legitimacy derived from society, the trust in the system and leaders by society, and the respect and trust that the leaders have in the system, including their own limits to their power.

[83] Ibid: p.281.
[84] Linz (1990): p.69.
[85] Ibid.

Paradoxically, these factors of faith, trust and self-restraint are most needed in a presidential system, which is precisely where they are hardest to achieve.[86] Heavy reliance on the personal qualities of a political leader is a risky business, more so under a presidential system given its vast powers and rigid structure, and even more so when combined with a plural and divided society.[87]

Despite the odds against it, the system works in the United States, largely because it is part of our political fabric; it has become second nature to us, and deeply rooted in our political culture. But this did not happen automatically. Nor should we expect that this will work in the same way for other countries trying from scratch. The United States has had 200 years of political evolution to tinker with the system, and that too in a different era of geopolitical realities. Even still, the United States continues to face its own challenges along the way.

Edward Levi points out that the number of cases in which the allocation of power among branches – that is, the encroachment or usurpation of power by one branch from another – is in fact relatively few.[88] He goes on that this is a testament to the fact that each branch has an inherent degree of respect for the other.[89] This is questionable at best in Sri Lanka, where the Sri Lankan President has eviscerated the roles of both the Parliament and the Supreme Court in the past few years alone.

In Sri Lanka, any remaining public confidence in the independence and impartiality of the Supreme Court has eroded as a result of the politicised impeachment of the former Chief Justice orchestrated by the President. By the same token, the President has effectively rendered the Parliament into little more than a rubber-stamp, as evidenced by the impeachment of the Chief Justice as well as the steamrolling of the Eighteenth Amendment that removed term limits on the President. The slippery slope towards demagoguery in Sri Lanka is well lubricated by now.

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[86] Ibid.
[87] Ibid.
[88] E.H. Levi, '*Some Aspects of Separation of Powers*' (1976) ***Columbia Law Review*** 76(3): pp.371-391 at pp.385-386.
[89] Levi (1976): p.386.

Contrast this with the fact that President George Washington voluntarily refused a third term in office, even when he had overwhelming support from his colleagues and the public to do so. This established an unwritten precedent adhered to all the way until President Franklin Roosevelt's four-term tenure, after which the Twenty-Second Amendment to the Constitution establishing the term limit of two terms was ratified. However, as America's own case indicates, so much of the presidential system, even in its most successful incarnation, is heavily reliant on the voluntary respect and trust afforded to the rules of the game between rulers and ruled, and among the rulers themselves. Imagine the potential slippery slope in the United States if President Washington had in fact stood for a third or fourth term.

Can Sri Lanka afford to roll the dice and hope for historical accident to provide the personalities and preconditions to materialise that will allow for an effective and democratic executive president who will remain in his or her box?