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***The Overmighty Executive Reconsidered***

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## Introduction<sup>1</sup>

This chapter will deal with four main themes. At the outset, it will briefly examine the ‘over-mighty executive’ in ‘semi-presidential’ systems such as the one in Sri Lanka and discuss the ways in which such systems differ from parliamentary and presidential systems. It will then discuss the political, economic, and social frameworks within which such systems operate in post-colonial countries in general and in Sri Lanka in particular. The third part will evaluate the use of the semi-presidential system in Sri Lanka and examine how this ‘over-mighty’ executive reacts strongly to challenges and gradually accrues further powers. The conclusion will seek to provide some suggestions on how to restrain the power of the executive in order to protect the liberty of the subject.

## Semi-Presidential Systems

When the countries of South Asia gained independence from British rule in the late 1940s, political scientists differentiated between two liberal democratic constitutional systems, *viz.*, parliamentary systems on the model of Great Britain with the executive responsible to a majority in the legislature, and executive systems such as in the US where an independent executive elected by the people shares power with the legislature. Even at that time, there were a few countries with ‘mixed’ systems – Austria, Finland, Iceland and Ireland – where “a popularly elected fixed-term president exists alongside a prime minister and cabinet who are responsible to parliament.”<sup>2</sup> However, these were regarded as exceptions. It was only after the adoption of such a system by France that it was proposed that this type of

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<sup>1</sup> This is a completely revised version of an essay that I wrote in 1988, ten years after the promulgation of the Constitution of 1978, entitled ‘*The Overmighty Executive: A Liberal Viewpoint*’ in C. Amaratunga (Ed.) (1989) *Ideas for Constitutional Reform: Proceedings of a Series of Seven Seminars on the Constitution of Sri Lanka, November 1987-June 1989* (Colombo: Council for Liberal Democracy): pp.313-325. I gratefully acknowledge the assistance of my colleagues Glenn Sussman, Elizabeth Esinhart and Imtiaz Habib who read through earlier drafts of this chapter.

<sup>2</sup> R. Elgie, ‘*The Politics of Semi-Presidentialism*’ in R. Elgie (Ed.) (1999) *Semi-presidentialism in Europe* (Oxford: OUP): p.13.

constitutional structure, termed ‘semi-presidential’ by Maurice Duverger in 1970,<sup>3</sup> might be analysed as a different constitutional system. Duverger used the term ‘semi-presidential’ to describe France in 1970 but by 1974 he included six other countries as semi-presidential ‘monarchies republicaines’ (republican monarchies).<sup>4</sup> By 1980, the number of states using semi-presidential systems had risen to eight with the addition of Portugal (1976) and Sri Lanka (1978). With the adoption of semi-presidential systems by many former communist countries of Eastern Europe, and its popularity in Francophone Africa, the number of states with such systems exceeded 50 by the end of the first decade of the 21<sup>st</sup> century.<sup>5</sup>

Some analysts point to the advantages of the semi-presidential model arguing that it “combines the best of both worlds [i.e. parliamentary and presidential systems]”<sup>6</sup> Duverger claimed that it had “become the most effective means of transition from dictatorship towards democracy in Eastern Europe and the former Soviet Union.”<sup>7</sup> Giovanni Sartori suggested that semi-presidential systems provide political flexibility by enabling shifts of power from a president to a prime minister and *vice versa*, when political support shifts from one party to another.<sup>8</sup> The argument that such systems provide more ‘institutional flexibility’ is also supported for the same reason by Gianfranco Pasquino,<sup>9</sup> while

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<sup>3</sup> M. Duverger (1970) *Institutions Politiques et Droit Constitutionnel* (Paris: Universitaires de France)

<sup>4</sup> M. Duverger (1974) *La Monarchie Republicaine* (Paris: Laffont)

<sup>5</sup> R. Elgie, ‘Semi-Presidentialism: An Increasingly Common Constitutional Choice’ in R. Elgie, S. Moestrup & Yu-Shan Wu (Eds.) (2011) *Presidentialism and Democracy* (Basingstoke: Palgrave Macmillan): p.7; J.A. Cheibub & S. Chernykh, ‘Are Semi-presidential Constitutions Bad for Democratic Performance’ (2009) *Constitutional Political Economy* 20: pp.202-229.

<sup>6</sup> A. Lipjhart (1994) *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990* (Oxford: OUP): p. 104, fn.7.

<sup>7</sup> M. Duverger, ‘Reflections: The Political System of the European Union’ (1997) *European Journal of Political Research* 31: p.137.

<sup>8</sup> G. Sartori (1997) *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes* (Basingstoke: Palgrave Macmillan): p.125.

<sup>9</sup> G. Pasquino, ‘Semi-Presidentialism: A Political Model at Work’ (1997) *European Journal of Political Research* 31: p.136.

Jean Blondel makes the case that semi-presidential systems enable power sharing between social groups in divided societies.<sup>10</sup>

Having said this, it is worth noting that Cindy Skach argues that a president in semi-presidential systems is less accountable than the executive in both presidential and parliamentary systems. She proposes that, “The greater the president’s scope – particularly of decree, veto and emergency powers – and the lower the limitations on these powers, the greater the possibility he will govern without the prime minister. Presidents who rely extensively on these powers over an extended time move the regime out of semi-presidentialism into non-democratic constitutional dictatorship.”<sup>11</sup> Bernhard Bayerlein suggests that semi-presidential systems often experience both Bonapartist and populist phases.<sup>12</sup> Analysing data on political systems between 1974 and 2003, Sylvia Moestrup points out that, in effect, the overall level of democratic freedoms in semi-presidential systems seem to be lower than those in both parliamentary or presidential systems.<sup>13</sup>

In the end, the operation of a semi-presidential system also depends on historical traditions, the extent to which the party system is fragmented, the economic challenges facing the political

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<sup>10</sup> J. Blondel, ‘Dual Leadership in the Contemporary World’ in A. Lijphart (Ed.) (1992) *Parliamentary versus Presidential Government* (Oxford: Oxford University Press): p.167.

<sup>11</sup> C. Skach (2005) *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton: Princeton UP): p.14. The dangers of decree-making power given to the president is also pointed out in R. Elgie & P. Schleiter, ‘Variation and Durability of Semi-Presidential Democracies’ in R. Elgie, S. Moestrup & Yu-Shan Wu (Eds.) (2011) *Presidentialism and Democracy* (Palgrave Macmillan): p.46; C. Skach (2005): pp. 16-17, 124 also argues that “divided minority governments” in semi-presidential systems where the government is a minority government and the president and the prime minister do not belong to the same party are more likely to breakdown but this proposition was not supported by the results of a study of a data-set of democratic states in the period 1946-2006. See, Cheibub & Chernykh (2009): p. 220.

<sup>12</sup> B. H. Bayerlein, ‘Sobre a origem bonapartista do regime politico semi-presidencial Portugal’ (1996) *Analise Social* 31(4): pp.803-830.

<sup>13</sup> S. Moestrup, ‘Semi-Presidentialism in Young Democracies: Help or Hindrance?’ in R. Elgie & S. Moestrup (Eds.) (2008) *Semi-Presidentialism Outside Europe: A Comparative Study* (London: Routledge): p.35-46. See also R. Elgie & P. Schleiter (2011): p.55.

regime, and the political culture of the country. It is to the particular context of these factors in Sri Lanka that we turn to in the next section.

### **The Context**

“It is important to realize that the problem of institutionalization and integration of a new nation becomes eventually one of re-institutionalisation and re-integration. It has to move from old universals and their institutional forms ... to new institutions, and often to new universals” – Rajni Kothari<sup>14</sup>

A starting point for our analysis could well be the nature of the colonial state, because in Sri Lanka, as in many other so-called new states, the contemporary political and administrative structure owes a great deal to the colonial legacy. Despite several studies on the importance of the collaboration of the conquered in maintaining colonial power, it is hardly ever denied that, in the last analysis, the colonial state was based on force. The actual armed force stationed in the colony was small because it could be reinforced from the metropolitan country and, moreover, in the heyday of colonialism, the colonial power faced virtually no restraints from world opinion on its use of coercion. In addition, the colonial power generally had overwhelming superiority in arms and military technology.

Since the objectives of the colonial power were limited, in the main, to the control and exploitation of trade and economic resources, the functions of the colonial state were, by and large, restricted to the maintenance of peace and order with little regard to individual freedom. Related regulatory functions in respect of property, banking, land use, public works and limited health and educational facilities were also tied to those main objectives. As a result, the colonial state and colonial administration were centralised, at best paternal, and at worst authoritarian.

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<sup>14</sup> R. Kothari (1970) *Politics in India* (Boston: Little Brown): p.150.

Moreover, there was no significant development of local government.<sup>15</sup>

In most parts of South Asia, the end of the colonial state, as defined above, began in the 1930s and the process was completed in 1947-49. However, despite many constitutional changes in Sri Lanka as well as in other parts of the post-colonial world, much of the political and institutional structure of the colonial state has remained after independence. Liberation from colonial rule has often been a matter of the local elite taking over colonial institutions rather than destroying them. In a few countries where new structures have been created, they have been subject to nominal alterations but have not really changed from being centralised and authoritarian.

This is not to deny the very real advances in the choice relating to wielders of power that has occurred in South Asian countries such as Sri Lanka and India. It hardly needs to be mentioned that Sri Lankan voters have ousted the party in power eight times in the last sixty years while Indians have done so seven times. Nevertheless, it is also significant that the voters have a restricted choice and limited chances of influencing actual political decision-making (except at elections). Writing on a related theme forty years ago, Sri Lankan sociologist Tissa Fernando wrote perceptively (though perhaps with some exaggeration) about the new political process. "The new elite is no nearer the masses than were their colonial masters. The cleavage between the elite and non-elite is far more fundamental in the new states than in the industrial societies of the West. Elections are a mock battle between factions of the elite giving the masses the choice of electing Tweedledum or Tweedledee. The fact is that General Elections have no effect on the focus of power and influence."<sup>16</sup> The argument is that the new state is controlled largely by an educated and articulate section of its citizens who are drawn from a certain group or are 'socialised' into that group. The fact that in more recent times leaders who are more familiar with the local idiom and more fluent in local languages have taken over

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<sup>15</sup> C. Clapham (1985) *Third World Politics: An Introduction* (London: Croom Helm): pp.18-19.

<sup>16</sup> T. Fernando, 'Elite Politics in New States: The Case of Post-Independence Sri Lanka' (1973) *Pacific Affairs* XLVI (3): pp.367, 379.

leadership positions has not fundamentally changed this gap between the elites and the people because the political system has continued to reward those who gain power and thus differentiates them from the vast mass of followers. Furthermore, the voter is denied the power of influencing decisions in post-colonial states because of the lack of grass root political organisations (this is perhaps less true of India than in the rest of South Asia). In Sri Lanka, for instance, despite liberal party constitutions on paper, virtually all political parties are oligarchic and authoritarian in practice.<sup>17</sup> Sri Lankan parties are well known for dissolving recalcitrant party branches and replacing them with more docile ones. Key politicians move effortlessly from allegiance to one party to the bosom of their opponents.<sup>18</sup> In effect, despite the legitimisation of power through elections, a great deal of decision-making power is concentrated at the heights of the political pyramid and commands to flow from the top.

While the new political structure retains several essential characteristics of the colonial state, the role of the new political leadership and the challenges faced by it are somewhat different. Political leaders in new states with democratic structures depend on popular support for the retention of power. Given the lack of institutionalised party structures down to grass root levels, the best way of ensuring popular acclaim appears to be the development of a personality cult and the reliance of traditional loyalties relating to family, religion and (in South Asia) caste. These ties are reinforced by political patronage. Thus, charismatic leaders are the rule in post-colonial countries, and indeed political parties, are often built around the personality and programme of a

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<sup>17</sup> See C. Amaratunga, 'The Structure and Organisation of Sri Lankan Political Parties' in C. R. de Silva (Ed.) (1987) *Political Party System of Sri Lanka* (Colombo: Sri Lanka Foundation Institute): pp.27-29.

<sup>18</sup> For example, G. L. Peiris, a former professor of law, served as Minister of Justice and Constitutional Affairs under the President Kumaratunga from 1994 to 2001, then moved to the opposition, and when the opposition won control of Parliament, was Minister of Enterprise Development, Industrial Policy Investment Promotion (2001-2004) under Prime Minister Ranil Wickremesinghe. Soon after, he reverted to his old political party and is currently Minister of External Affairs (2010-) under President Mahinda Rajapaksa. This is by no means an isolated example. See the multiple defections from both government and the opposition in December 2014 ahead of the January 2015 Presidential Election in Sri Lanka.

charismatic leader. There is a good example of this in contemporary Sri Lanka under President Mahinda Rajapaksa where state policy is portrayed as flowing from the president and members of the president's family have numerous positions in the government and in the private sector.<sup>19</sup>

In this situation, in Sri Lanka, as in many other new states, political leaders have tended to further strengthen their image by reviving convenient historical memories. There are well placed references in political speeches to powerful rulers of the past. Colonial pageantry in the form of uniformed guards has been supplemented by allusions to the fact that the current head of state is but the most recent of a long and illustrious line of monarchs. When Sri Lanka's first President J. R. Jayewardene shifted Sri Lanka's capital to Jayawardanapura Kotte ('fort city of continuous victory'), an old capital abandoned in the sixteenth century, he was not unconscious of historical memory. His successor, Ranasinghe Premadasa, was also cognizant of centuries of royal patronage of the Temple of the Tooth when he had a 'golden roof' installed at that temple.<sup>20</sup> The current President Rajapaksa's supporters are not hesitant about drawing parallels between the regime's successful crushing of the separatist movement in the Tamil north to King Dutugemunu who, in

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<sup>19</sup> State policy is officially termed *Mahinda Chintanaya* (Vision of Mahinda), see Department of National Planning & of Ministry of Finance and Planning (2010) *Sri Lanka, The Emerging Wonders of Asia: Mahinda Chintana- Vision for the Future* available at:

[www.treasury.gov.lk/publications/mahindaChintanaVision-2010full-eng.pdf](http://www.treasury.gov.lk/publications/mahindaChintanaVision-2010full-eng.pdf) (accessed 22<sup>nd</sup> December 2014). President Rajapaksa's family is in control of significant parts of the polity. The president's elder brother, Chamal, is Speaker of Parliament, and his younger brother Basil is a Cabinet Minister, designated in 2013 as a special envoy to India, and another brother Gothabhaya is Secretary of Defence. The President's son, Namal, a member of Parliament, is widely seen as the heir apparent and the President's nephew Shasheendra is Chief Minister of Uva Province. See, 'Sri Lanka's Powerful President, Putting the Raj in Rajapaksa: Reconciliation takes a back seat as a band of brothers settles in', *The Economist*, 20<sup>th</sup> May 2010, available at: <http://www.economist.com/node/16167748> (accessed 22d December 2014).

<sup>20</sup> For other references to the model of kingship see J. van der Horst (1995) *'Who is He, What is He Doing': Religious Rhetoric and Performances in Sri Lanka during R. Premadasa's Presidency, 1989-1993* (Amsterdam: V.U. University Press): pp.100-103. See also, in this volume, A. Abeysekara. 'Religion, Nation, and Rulers'.

traditional historical accounts, united the country by defeating a Tamil ruler of the north. History, therefore, has become the handmaiden of politicians.

Unfortunately, while politicians in power in the new states do enjoy great authority and comparable economic benefits, they rarely have 'cushions' from defeat. The defeated politician faces not only the loss of political office but social degradation, economic ruin, and sometimes even threats to life and limb. Thus, politicians become more concerned with the prevention of political defeat than the attainment of developmental objectives. As Lester G. Seligman observes, "Under conditions of high risk the contest for political life becomes so intense that legal norms buckle under the pressure, and coercion and fraud are widely practiced. The extent of political risk also influences the degree of extremism of opposition such that the greater the risk for politicians, the more revolutionary will be the goals of the opposition."<sup>21</sup> This kind of situation generally favours political adventurers on the one hand, and political sycophants on the other. Emerging younger political leaders find plenty of scope to attack the existing leadership and its followers.

While the political structure thus stimulates bitter contests for power, economic conditions strengthen the same tendency. Larry Diamond writing in relation to colonial and post-colonial Nigeria summarises the situation well:

"In a dependent colonial economy where economic opportunities were severely constricted – where capital was scarce, indigenous entrepreneurial experience slight, private enterprise foreign dominated and poverty pervasive and extreme – the achievement of new status and the accumulation of the material wealth that marked it came to depend to an extraordinary degree on political office, political connections and political corruption."<sup>22</sup>

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<sup>21</sup> L.G. Seligman, 'Political Risks and Legislative Behaviour in Non-Western Countries' in G.R. Boynton & K. Chong (Eds.) (1975) *Legislative Systems in Developing Countries* (Durham: Duke UP): p.94. This conclusion is also supported by Clapham (1985): pp.40-41.

<sup>22</sup> L. Diamond, 'Class, Ethnicity and the Democratic State: Nigeria 1950-1966' (1983) *Comparative Studies in Society and History* XXV: 3, 462.

In post-colonial countries, personal wealth and occupational status as well as the control and distribution of national wealth have come to depend heavily on access to state power. State employment becomes a guarantee of status. Political influence can make or break a business venture. A scholarship could launch a new career. Power guarantees a large campaign treasury for the incumbent political party. Indeed, Richard L. Sklar went so far as to argue that in many African countries the “dominant class formation is a consequence of the exercise of power” and that “class relations at bottom are determined by relationships of power – not production.”<sup>23</sup> While this is not entirely true in the Asian context, it is incontrovertible that the capture of state power by a new group brings it relatively more economic advantages than in the West and that loss of power is certainly much more catastrophic.

There is yet another way in which economic conditions affect the political structure in post-colonial countries. All governments, elected or otherwise, seek to retain popular support. Thus, in poor countries, welfare and redistributive measures are accurately viewed as crucial in this respect. Apart from basic services such as education, health, housing, and the provision of water, politicians try to conjure new and attractive hand-outs. Indeed, for many citizens of post-colonial countries, while representation is an important role played by the elected official, the delivery of services is considered even more important. There is thus a tendency to expand the activity of government. New departments, corporations, and institutes proliferate and politicians who wish for quick results often become impatient with administrators who advise caution or a change of policy without immediately carrying out orders. Political control over large areas of economic activity inevitably degenerates into partisan political control. Yet the resources are inadequate and public expectations are always on the rise. The opposition, shut out of employment and economic opportunities begins to lose faith in the very political system especially if one party remains in power for a long period. Many feel neglected and condemned by their own rulers and begin to be attracted by movements which promise to make a clean sweep of

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<sup>23</sup> R.L. Sklar, ‘*The Nature of Class Domination in Africa*’ (1979) *The Journal of Modern African Studies* XVII: 4, 536-537.

the whole political system. Illiberal and anti-democratic forces gain ground.

In a controversial book he wrote almost thirty years ago, Lucien W. Pye asserted that the cultural pattern in Asia legitimises a paternal authoritarian system of government.<sup>24</sup> In essence, most of these ideas were enunciated by Pye in an earlier article he wrote over fifty years ago.<sup>25</sup> He argued that in non-Western societies, the political sphere is not strongly differentiated from social and personal relations. Political struggles, therefore, are often personal rivalries. Thus, while leaders have a high degree of freedom in determining matters of strategy and tactics, opposition is often seen as subversion. Clapham essentially talks of the same process when he says that those who are lower down in the social order are seen not as subordinate officials but as vassals or retainers whose positions depend on the leader to whom they all owe allegiance.<sup>26</sup> This attitude for example explains why so many ministers go to the airport to welcome or to wish 'bon voyage' to their political leader.

Traditional social ties are also actively seen in kinship, caste, or ethnic loyalties. A successful politician sees members of her group gather around her. The principle of mutual support, useful in an agricultural community, easily turns to nepotism. Then again, the practice of giving gifts in traditional society (called *dakum* in Sinhala) marked the recognition of the authority of the person who received it. Indeed, in traditional society the failure to give a gift was an expression of insubordination or contempt. Pye's implicit conclusion that such cultural biases make it difficult to operationalise democracy in non-western societies need not be taken at face value. (Lloyd I. Randolph called it psycho-cultural bunk).<sup>27</sup> Edward Shils has pointed out that "Tradition often possesses ambiguity and hence flexibility to allow innovation to

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<sup>24</sup> L.W. Pye (1985) *Asian Power and Politics: The Cultural Dimensions of Authority* (Cambridge: Harvard University Press).

<sup>25</sup> L.W. Pye, 'The Non-Western Political Process' (1958) *The Journal of Politics* XX: 3, 409-486.

<sup>26</sup> Clapham (1985): pp.47-48.

<sup>27</sup> Review of L. W. Pye's *Asian Power and Politics*, *New York Review of Books*, 9<sup>th</sup> February 1986.

enter without severely disruptive consequences.”<sup>28</sup> Nevertheless, it would be unwise to forget that the political cultures of many of these countries are in different degrees dissimilar to those of the West.

What has emerged so far is that political structures, economic compulsions and social forces tend to drive politicians in countries like Sri Lanka towards a ‘strong’ executive. It must not be forgotten that some of these forces also operate in Western democracies and have tended to strengthen the position of the executive in those countries too. The tendency of elected presidents to reach back to history to revive monarchical memories is not confined to post-colonial countries. Bahro, Bayelein and Vesper posit that changes institutionalising democracy occur only gradually and fitfully even in Europe, pointing to the revival of monarchical traditions with de Gaulle in France.<sup>29</sup> Michael Genovese argues that the United States, founded with “a circumscribed presidency under a constitutional republic with the rule of law and a system of separation of powers and checks and balances ... has become a presidential nation with a near imperial presidency.”<sup>30</sup> Increased powers have been accompanied by soaring expectations. Thomas E. Cronin<sup>31</sup> has evaluated the situation in the United States of America though his analysis contains many items of relevance to the situation in post-colonial states.<sup>32</sup> The executive must be a leader who does not promise more than he can deliver. Yet, to get office he must promise much that will remain unfulfilled. He must be the leader of all citizens but must help the party faithful. He must lead us but also listen to us. He must be the decent and just but decisive and

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<sup>28</sup> E. Shils (1950) *Political Development in the New States* (The Hague: Mouton): p.32.

<sup>29</sup> H. Bahro, B.H. Bayerlein & E. Vesper, ‘Duverger’s Concept: Semi-presidential Government Revisited’ (1998) *European Journal of Political Research* 34: p.209.

<sup>30</sup> M.A. Genovese (2011) *Presidential Prerogative: Imperial Power in the Age of Terrorism* (Stanford: Stanford UP): p.4. See also A.M. Schlesinger (2004) *The Imperial Presidency* (Boston: Houghton Mifflin Harcourt).

<sup>31</sup> T.E. Cronin (1980) *The State of the Presidency* (Boston: Little Brown): pp. 4-19.

<sup>32</sup> For more recent literature on concerns about presidential power in the US, see B. Buchanan (2013) *Presidential Power and Accountability: Towards a Presidential Accountability System* (New York: Routledge).

guileful leader. No wonder, the longer he is there, the less we like him.

### **Semi-Presidentialism in Sri Lanka**

“The Presidency is always too strong when we dislike the incumbent. His limitations are bemoaned, however, when we believe the incumbent is striving valiantly to serve the public interest as we define it.” – Thomas E. Cronin<sup>33</sup>

The first part of this chapter considered tendencies that have promoted the rise of a ‘strong’ executive in post-colonial countries, and indeed, in some states in the ‘developed’ world. In this section, we will examine the nature and limits of the powers of the executive president in Sri Lanka today. Most academics who have examined the constitution of the Second Republic of Sri Lanka (including myself) have come away with the impression that the President of Sri Lanka is a very powerful person indeed.<sup>34</sup> In terms of constitutional provisions this is very clear and perhaps too well known to require elaboration. Although the Sri Lankan president does not have a veto over legislation as in the USA, or decree making powers as in France, unlike in France from the inception of the 1978 Constitution, she is head of the cabinet, can appoint ministers without consulting the prime minister and can assign ministries to herself. She can also dissolve Parliament without consulting the prime minister.<sup>35</sup> These can be powerful tools in the hands of a president. In 1989, President Premadasa after he won election to office chose his cabinet before he

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<sup>33</sup>Cronin (1980): p. 22.

<sup>34</sup> See for instance C.R. de Silva, ‘*The Constitution of the Second Republic of Sri Lanka and its significance*’ *Journal of Commonwealth and Comparative Politics* XVII (2): pp.192-207; A.J. Wilson (1980) *The Gaullist System in Asia London* (London: McMillan); R. Coomaraswamy (1984) *Sri Lanka: The Crisis of the Anglo-American Constitutional Tradition in a Developing Society* (New Delhi: Vikas); R. Edirisinha & J. Uyangoda (Eds.) (1995) *Essays on Constitutional Reform* (Colombo: Centre for Policy Research and Analysis); R. Rajapakse (2008) *A Guide to Current Constitutional Issues in Sri Lanka* (Colombo: Citizens’ Trust).

<sup>35</sup> G. L. Pieris, S. Bandaranayake, N. Sivakumaran & R. Edirisingha, ‘*Lanka’s Executive Presidency: Whither Reform*’ in Edirisinha & Uyangoda (1995): pp.9-11. The authors point out that the president can function as prime minister between dissolution and the conclusion of the new general election.

announced his nominee for the post of prime minister. In November 2003, President Kumaratunga took over the ministries of defence, information, and the interior (the last ministry was in charge of the police) while Prime Minister Ranil Wickremesinghe, the leader of the principal opposition party who had won the parliamentary election of 2001, was in Washington for consultations with the US government.<sup>36</sup> She also suspended Parliament for two weeks to head off any action by the Prime Minister. Three months later, soon after she dissolved Parliament and called for fresh parliamentary elections, she dismissed 39 junior ministers loyal to Wickremesinghe to ensure that state resources remained under her control in the eight weeks leading up to the elections.

When a Sri Lankan president has control over a coalition that has a clear majority of the seats in Parliament, his power to enact law through a referendum gives him powerful weapons. President J. R. Jayewardene used this power to extend the life of the Parliament elected in 1977 for six additional years (up to 1989) through the Fourth Amendment to the Constitution. This enabled him to retain a two-thirds majority in Parliament elected through a first-past-the-post system although the constitution of 1978 specified a legislature elected through proportional representation. As important, Article 35 of the constitution also protects the Sri Lankan president from all lawsuits while in office.<sup>37</sup> This has made it possible for Presidents Kumaratunga and Rajapaksa to render the Seventeenth Amendment (which was designed to restrict the power of the President) inoperable in practice. This amendment, which was enacted in October 2001, required a Constitutional Council with representation from many political groups.<sup>38</sup> The president was required to obtain the recommendation of this council for the appointment of many important officers such as the Chief Justice and judges of the

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<sup>36</sup> The prime minister was not consulted on this step. At that time, the Defence Minister, Tilak Marapana was also in Washington, DC.

<sup>37</sup> The Constitution of Sri Lanka (1978): Article 35 as confirmed by the Supreme Court of Sri Lanka in *Karunathilaka v. Dayananda Dissanayake, Commissioner of Elections* (1999) 1 SLR 157. See also, in this volume, N. Anketell, 'The Executive Presidency and Immunity from Suit: Article 35 as Outlier'.

<sup>38</sup> The Constitutional Council was set up in March 2002 and abolished by the Eighteenth Amendment to the Constitution in September 2010.

Supreme Court and the chair of the Elections Commission.<sup>39</sup> President Chandrika Kumaratunga objected to the person nominated by the council as chair of the Elections Commission. The council considered the objections and refused to change its recommendation. The president thereupon did not appoint the Elections Commission. A lawsuit filed in the Court of Appeal by a private party led to the judgment that the president had to follow the recommendation of the Council, but it also ruled that no action could be taken because of the immunity conferred on the president against lawsuits.<sup>40</sup> This interpretation had far reaching consequences. When the terms of the five council members appointed for three-year terms expired in March 2005, President Kumaratunga did not appoint replacements. President's Kumaratunga's successor, Mahinda Rajapaksa also did not appoint nominees to the council and proceeded to appoint two judges to the Court of Appeal, the President of the Court of Appeal, and a Supreme Court judge on his own.<sup>41</sup> Presidents of Sri Lanka have been able to stretch the interpretation of articles in the constitution to enhance their already formidable powers.

This process reached its most notorious episode with the impeachment of Chief Justice Shirani Bandaranayake in November-December 2012 and her removal from office in January 2013 through a process that was seen by many as flawed and partisan.<sup>42</sup> This process will be discussed in detail in another chapter in this volume but it was yet another blow to the independence of the judiciary not least because the removal of the

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<sup>39</sup> Other offices and appointments requiring the recommendation of this council included the president and the judges of the Court of Appeal, the members of the Judicial Service Commission other than the chairman, the Attorney General, the Auditor General, the Inspector General of Police, the Parliamentary Commissioner for Administration (Ombudsman), and the Secretary General of Parliament. See C.R. de Silva, 'A Recent Challenge to Judicial Independence in Sri Lanka: The Issue of the Constitutional Council' in S. Shetreet & C. Forsyth (Eds.) (2011) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill: Koninklijke): pp.373-385.

<sup>40</sup> See *Public Interest Law Foundation v. the Attorney General and Others*, CA Application No. 1396/2003, CA Minutes, 17.12.2003.

<sup>41</sup> de Silva (2011): pp. 377-379.

<sup>42</sup> See, Statement of the International Commission of Jurists (ICJ) on the Removal of Chief Justice Bandaranayake, 23<sup>rd</sup> January 2013, available at: <http://www.article2.org/mainfile.php/1201/435/> (accessed 22<sup>nd</sup> December 2014).

Chief Justice was seen as a consequence of her refusal to provide a pro-government ruling on the Divinaguma Bill.<sup>43</sup> Radhika Coomaraswamy was correct in stating:

“The concentration of power in a highly exalted office, especially in a developing society may have disturbing consequences. The balance between stability and democratic participation may have in fact been tilted too much in the direction of a stable executive power.”<sup>44</sup>

A key component of presidential prestige and influence is the fact that she is the only politician directly elected by all the people. Presidents, therefore, tend to appeal directly to the people over the heads of the legislature and even their own party colleagues. This is why they are sometimes known as plebiscitary presidents.

However, those who are close to the workings of post-colonial states are often acutely aware of the limits of presidential power. These limits are generally not found in constitutional restraints but sheer inability to put programmes and policies into effect. A key weakness in many new states is the paucity of trained bureaucrats and technocrats of the first order. That leads to severe limitations in policy formulation and execution. Often the very authority of the state is challenged either by dissident ethnic groups or by revolutionary elements. This happened in Sri Lanka in 1971 and the late 1980s through uprisings by Sinhala nationalist forces and also in the north and east from the 1980s until the military defeat of the Tamil separatist forces in 2009. In many post-colonial states, security forces and intelligence units are often inadequately trained and are ineffective. Indeed, sometimes the use of these agencies becomes counter-productive. The new states are thus much easier to subvert than the old colonial state. The colonial state was, in essence, an alien centre. The officials of

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<sup>43</sup> On this bill see D. Samararatne (2013) *A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka, May 2009-August 2012* (Colombo: International Centre for Ethnic Studies): pp.35-36. See also, in this volume, N. Jayawickrama, ‘*The Judiciary under the 1978 Constitution*’.

<sup>44</sup> Coomaraswamy (1984): p.41. See also, in this volume, R. Coomaraswamy, ‘*Bonapartism and the Anglo-American Constitutional Tradition in Sri Lanka: Reassessing the 1978 Constitution*’.

the new state are part of the local political process, identified by class, religion, ethnic group, viewed as being subject to influence and inducement and suspected of furthering particular interests. The state is associated with those who control it and challenged by those who do not. The very political structure in new states is therefore a fragile one.<sup>45</sup> However, if the state is able to survive, as happened in Sri Lanka, the result is a more militarised state with an executive with fewer scruples about the use of force.

We have now come to the position that Sri Lanka, like many other new states has created an ‘overmighty’ executive, ‘overmighty’ in terms of power and authority laid down in the constitution, the ability to influence the legislature, and through the use of emergency regulations, capable of infringing many individual liberties. Nevertheless, this very presidency is unable to provide the expected largesse to the people because of the lack of economic resources, the shortage of efficient and committed administrators, and the variegated social divisions within the country. The unfortunate tendency in this kind of situation is to think that more authority in the forms of laws, regulations, and proclamations and a more vigorous policy of crushing disloyalty (read dissent) would solve the problem. This is simply to venture on the road to authoritarianism.

Indeed, the road to authoritarianism is what has occurred in Sri Lanka. As discussed above, there were many steps along this road. However, the most grievous step in the process came with the approval of the Eighteenth Amendment to the Constitution in 2010. The amendment removed the two-term limit for presidents that had been provided by the constitution as a safeguard against Bonapartist tendencies.<sup>46</sup> The Eighteenth Amendment also, in effect, gave the president the right to nominate the Chief Justice

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<sup>45</sup> Clapham (1985): pp.41-43.

<sup>46</sup> A. Welikala, ‘*The Eighteenth Amendment and the Abolition of the Presidential Term Limit*’ in R. Edirisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives): p.97 points out that “Technically under Article 31(2) of the 1978 Constitution a person who became President due to vacation of office by a President under Article 40 could serve two extra terms and a President who had served two terms and became an MP subsequently could have been chosen to replace a President who vacated office.”

and justices of the Supreme Court, the president and judges of the Court of Appeal, and a host of other agencies. For such appointments, all that was required was seeking observations of a Parliamentary Council, not the approval of that council. This negated some of the controls on executive power that had been set up under the constitution in 1978 and strengthened by the Seventeenth Amendment to the Constitution.<sup>47</sup> Theodore J. Lowi's words, although intended to describe dangers of a presidential system, has become applicable as to how the semi-presidential regime in Sri Lanka is viewed by those in power.

“The first assumption is that the President and the state are the same thing, that President is state personified. The second is that powers should be commensurate with responsibilities. The third assumption, intimately related to the second is that the President should not and cannot be bound by normal legal restrictions.”<sup>48</sup>

A search for alternatives must begin, sooner rather than later.

### **The Road Forward**

“Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect but equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's.” – Ronald Dworkin<sup>49</sup>

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<sup>47</sup> For a detailed discussion see A. Jayakody, ‘*The 18th Amendment and the Consolidation of Executive Power*’ in Edirisinha & Jayakody(2011):p.23-59.

<sup>48</sup> T.J. Lowi (1985) *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca: Cornell UP): p.174.

<sup>49</sup> R. Dworkin (1977) *Taking Rights Seriously* (London: Duckworth): p.273.

Dworkin's words encapsulate the essential role of the democratic state. The question that confronts us now is the design of the institutional structures that would best facilitate this objective. Some of those who criticise the executive presidential system in Sri Lanka seem to favour a return to the Prime Ministerial system. Yet, in constitutional terms, the Sri Lankan prime minister had very considerable constitutional powers. Tony Benn writing in 1980 about what he considered the excessive powers of patronage and influence of the prime minister of Britain had advocated restraints on those powers in the interest of a constitutional premiership.<sup>50</sup> J.A.L. Cooray writing a few years before that had commented that, "in Sri Lanka, the Prime Minister is even more powerful and influential than his British counterpart because in office he becomes far more indispensable to his party and can exercise great power."<sup>51</sup> Patrick Weller in a useful study of prime ministerial power in different countries has pointed out that the actual extent of power of prime ministers varies considerably according to context.<sup>52</sup> The right that Parliament possessed to extend its own tenure by a simple two-thirds majority seems much too risky in the light of events of the past two decades.

After surveying semi-presidential systems, Shugart and Carey point out that the power vested in the president varies according to whether the prime minister is responsible only to the legislature or both to the legislature and the president.<sup>53</sup> Shugart and Carey distinguish between 'president-parliamentary' and 'premier-presidential' systems. They point out that in the former, the president appoints and dismisses cabinet ministers, whereas in the latter they do not. Additionally, while governments in both systems were subject to parliamentary confidence, in the former category, it is the president, and not the legislative majority, who reconstitutes the government. Thus, the distinction between parliamentary and semi-presidential systems is less than clear-cut.

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<sup>50</sup> A. Benn, 'The Case of a Constitutional Premiership' (1980) *Parliamentary Affairs* XXXVII: pp.7-22.

<sup>51</sup> J.A.L. Cooray (1973) *Constitutional and Administrative Law of Sri Lanka* (Colombo: Hansa Publishers): p.237.

<sup>52</sup> P. Weller (1985) *First Among Equals: Prime Ministers in Westminster Systems* (Sydney: Allen & Unwin).

<sup>53</sup> M.S. Shugart & J.M. Carey (1992) *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: CUP): pp.23-25.

If the Westminster system can claim to have intrinsic advantages over the presidential system as it operates today, from the point of view of democratic values it would be largely in the realm of the accountability of the executive to the legislature. Such accountability, however, could mean very little if the prime minister had firm control over the majority party in Parliament. The presidential system, on the other hand, does ensure that the chief executive of the country is elected by all citizens and thus also represents all minorities, while the prime minister, elected from a small electorate might be viewed as being less representative of the people.<sup>54</sup> On the other hand, it is also true that in a divided society such as Sri Lanka, a president could well be elected on a chauvinistic platform and thus might not represent the minorities at all, while a prime minister would have to seek the support of legislators of all groups.

In essence, the choice between presidential, semi-presidential and the prime ministerial systems is a false one. Much depends on the package of institutions and the countervailing forces that are set up within the political structure. In this respect, the independence of the judiciary is crucial.<sup>55</sup> I have argued elsewhere that the burden on legal systems is greater in post-colonial societies than in the developed world, and that legal systems play a larger formative role in such societies.<sup>56</sup> Indeed, one of the key functions of an independent judiciary is to provide a balance of power between the executive and legislative branches of government. Shimon Shetreet has explained that what is needed is a culture of judicial independence.<sup>57</sup> As he views it, such a culture is created not only by the constitutional infrastructure and legislative provisions that provide for the functioning of the courts and the

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<sup>54</sup> See, however, in this volume, K. Guruparan, '*Flawed Expectations: The Executive Presidency, resolving the National Question, and the Tamils*' and A.M. Faiz, '*The Executive Presidency and the Muslims*'.

<sup>55</sup> USAID (2002) ***Guidance for Promoting Judicial Independence and Impartiality*** (Washington DC: USAID).

<sup>56</sup> C.R. de Silva, '*The Role of Law in Developing Societies*' in Shetreet & Forsyth (2011): pp.451-462.

<sup>57</sup> S. Shetreet, '*Creating a Culture of Judicial Independence: The Practical Challenge and Conceptual and Constitutional Infrastructure*' in Shetreet & Forsyth (2011): pp.17-67.

protection of the personal and substantive independence of judges,<sup>58</sup> but also by judicial review of legislation. This last factor, the judicial review of legislation, was part of Sri Lanka's constitutional tradition from 1948 to 1972.<sup>59</sup> It needs to be restored and the justiciability of fundamental rights needs to be interpreted in the broadest sense. This entails the removal of provisions in the constitution which validate all existing laws, both written and unwritten, despite any inconsistency with the provisions in the chapter on fundamental rights.

As important is the re-imposition of the two-term limit for Presidents. Some restriction on the President's power to appoint Supreme Court justices and other officials might also be useful. In this respect, it is not necessary to go back to the Seventeenth Amendment. Sixteen states in the US have a system (generally termed the 'Missouri Plan') through which judicial vacancies are filled by the State Governor from a list submitted by a nominating committee (and sometimes confirmed by the legislature or part of it).<sup>60</sup> Some form of this structure might be considered for the appointment of judges and members of key commissions to satisfy the balancing of merit with democratic accountability.

An ombudsman with much wider powers could perform a very useful role in the light of extensive abuses of human rights in the past.<sup>61</sup> Incentives towards greater democratisation within political parties might lead to constructive results. A well-planned second chamber could well have its merits. A restriction on presidential immunity conferred by Article 35 seems to be warranted. Greater and more secure access to the electronic media by independent

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<sup>58</sup> Personal independence of judges concerns security of life, tenure, position and remuneration. Substantive independence refers to the freedom of judges to perform their duties independently. See, S. Shetreet, '*The Mt. Scopus International Standards of Judicial Independence: Innovative Concepts and the Formulation of a Consensus in a Legal Culture of Diversity*' in Shetreet & Forsyth (2011): p.480.

<sup>59</sup> R. Edrisinha, '*Sri Lanka: Constitutions without Constitutionalism: A Tale Of Three And A Half Constitutions*' in R. Edrisinha & A. Welikala (Eds.) (2008) *Essays on Federalism* (Colombo: Centre for Policy Alternatives): p.20.

<sup>60</sup> L. Baum (1998) *American Courts: Process and Policy* (Boston: Houghton Mifflin): pp.114-131.

<sup>61</sup> International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Asia Report N°172, 30<sup>th</sup> June 2009, (Brussels: ICG).

and dissident groups would promote a healthier trend. Above all, we need to devolve power from the centre. It has been pointed out elsewhere that decentralisation in Sri Lanka under the constitution of 1978 is limited and easily undermined.<sup>62</sup> If the concentration of power and responsibility has moved us towards authoritarianism would not devolution of power help to ease the problem?

On the other hand, one might question whether a change at the institutional level alone can provide a solution. One might simply exchange one authoritarian ruler for a dozen petty despots. What is required includes a change in values as well as change in institutions. Thus for instance, judicial independence is best secured by the maintenance of standards of conduct and the development of a code of ethics for judges. In addition, however, there needs to be among judges a balance between respect for precedent and the recognition of social change. Old values and attitudes change slowly and indeed may change for the worse. Education can and must play a role and here, example and experience might be more important than precept. It is when the professed defenders of democratic values, surreptitiously or transparently, subvert individual freedoms and the very structure of politics that democracy is most in danger and it is important to remember that none of us are above temptation. Therefore, we need men and women committed to ideals higher than party loyalty. As Jennifer Nedelsky pointed out, “The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined.”<sup>63</sup> We need to support and strengthen independent

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<sup>62</sup> Rohan Edrisinha illustrates how devolution of power was undermined by the use of the provision which placed national policy in the ‘reserved list’. The preamble of the National Transport Commission Bill, which was presented in Parliament by the Minister of Transport and Highways on 23<sup>rd</sup> July 1991, began with the words, “Whereas it is the national policy of the Government of Sri Lanka....” Edrisinha points out, “Thus the central Parliament successfully encroached into the Provincial sphere by cloaking itself with the protection of the national policy rubric in the Reserved List.” See Edrisinha (2008): pp.36-37. See also Edrisinha & Welikala (2008) *passim*.

<sup>63</sup> J. Nedelsky, ‘Reconceiving Rights as Relationship’ (1993) *Review of Constitutional Studies/Revue d’études Constitutionnelles* 1(1): p.7.

non-governmental institutions. We need to foster a commitment to democratic values. As Ramesh Thakur reminds us, “where individual liberty is not underpinned by a firmly established liberal society, both are in due course, threatened by collectivist democracy”.<sup>64</sup>

In the end, what matters is not merely the form of institutions but the commitment to the preservation of liberty in its fullest sense. Yet the form of institutions is also worthy of our attention and care because some institutions are better designed to preserve democratic values than others. The failure to reconcile authority with autonomy has reached a critical stage. We also require new constitutional designs that preserve the integrity of the state while encouraging the autonomous developments of individuals and groups.

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<sup>64</sup> R. Thakur, ‘*Liberation, Democracy and Development: Philosophical Dilemmas in Third World Politics*’ (1982) *Political Studies* XXX (3): p.335.