Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects

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Asanga Welikala

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Failure of Quasi-Gaullist Presidentialism in Sri Lanka

Suri Ratnapala

Constitutional Choices

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

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

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

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

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

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

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

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

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

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

Role of Underlying Institutions in Securing Constitutional Government

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

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

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

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

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

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

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

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

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

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

Economic Conditions and Constitutional Government

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

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

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

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

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

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

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

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

The 1978 Constitution: Gaullist Presidentialism Gone Wrong

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

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

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

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

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

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

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

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

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

5 Ibid: p.15.

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

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

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

Five Failings of Westminster Democracy

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

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

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

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

1. The system does not ensure popular government

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

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

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

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

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

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

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

2. The Westminster system makes Parliament subservient to the executive

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

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

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

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

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

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

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

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

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

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

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

[8] Ibid: p.17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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11 (1931) 46 CLR 73, 100.

12 Ibid: p.102 (Dixon J).

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

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

5. The system reduces talent in government

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

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

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

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

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

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

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

The Logic of the Tripartite Separation of Powers

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

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

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

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

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

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

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

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

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15 Madison (1988): p.45.

16 Ibid.

17 Ibid: pp.46-47.

18 Ibid: p.244.

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

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

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

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

Concluding Thoughts

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

19

Making of the Imperial U.S. President: A Review

Mark Hager

Background

In devising the U.S. Constitution, the Framers adopted a version of Montesquieu's recommended 'separation of powers' among legislative, executive and judicial functions. Innovating on classical endorsements of 'mixed' governments—those with blended elements of kingship, aristocracy and democracy—Montesquieu famously argued that liberty could best be reconciled with effective government by maintaining clear institutional separation among the three great governmental functions. According to the Framers, moreover, separation of the three would conserve liberty by preventing concentration of power in any single branch. In exercise of their delineated functions and in their institutional vigilance over their respective prerogatives, the separate branches would 'check and balance' one another and thereby forestall tyranny. Though adopted somewhat accidentally, separation of powers soon became a touchstone of U.S. constitutionalism.

Perhaps the boldest stroke was in conceptualising the Presidency. It would not be a prime ministership with occupants drawn from and beholden to the legislature, but neither should it be a kingship wielding power vastly disproportionate to Congress. In contrast with monarchies, so thought the Framers, the legislature would be the new republic's 'most dangerous' branch. This was part of the reason for dividing Congress into two branches, Senate and House of Representatives, which could check and balance each other. James Madison and Alexander Hamilton defended the proposed new Constitution against its opponents in a series of newspaper essays called *The Federalist*. In *The Federalist No.*48, Madison underscores multiple factors posing danger of legislative aggrandisement. The legislature's powers are broad and only vaguely limited, he argues, in contrast with executive and judicial functions. Hence the legislature "can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The legislature, moreover, wields the crucial powers of taxation and of setting salaries for executive and judicial officers.

In *The Federalist No.70*, Hamilton extols the virtues of "energy in the Executive." Opponents of adopting the Constitution feared

precisely that. Virginia's George Mason, for one, worried that a democratically elected president, with popular support behind him, could become the most dangerous and lawless kind of monarch. Hamilton took pains in *The Federalist No.69* to point out various constraints on power that would make the Presidency a far weaker office than that of British kings. The President is subject to impeachment, he hastened to point out, and his veto on legislation can be overcome by a two-thirds vote of both legislative houses.

The Federalist notwithstanding, textual limits on presidential power are virtually nil. The Constitution specifies only that the President shall exercise 'executive Power' and take care that the laws be 'faithfully executed.' Congressional responsibilities, by contrast, are itemised in detail, partly to establish the federal government's limited power vis-à-vis the states.

Hamilton's analysis proved accurate for the Constitution's first century but increasingly faulty over the course of the second and into the third. During this latter period, presidential power has expanded mightily on both foreign and domestic matters, to the point where some fear that America's constitutional republic has essentially been overthrown. An elective emperor controls levers of power that would have left the Framers aghast, while Congress slips slowly to the margins. Was this the executive presidency's ordained destiny, despite the Framers' intent and Montesquieu's elegant theory? One hopes not, for America's sake and maybe the world's. Complacent in their power to elect presidents, most Americans now accept the office's engorged parameters and never dare suspect that maybe Montesquieu erred. Comparative analysis suggests that presidential regimes rank lower on freedom indexes and higher on corruption than do parliamentary regimes. The U.S. stands out as the great exception, though not entirely and not perhaps forever.

National Security President

The most predictable source for presidential aggrandisement lay in the overlapping zones of foreign relations, foreign policy, defence and war-making. Though such matters were widely

understood as inherently executive in nature, the Framers saw republican danger in this. Accordingly, they divided these functions intricately so as to ensure legislative voice. Most prominently, they reserved to Congress the awesome power to declare war. They viewed exclusive kingly power in this area as the historical source of excessive warfare and burdensome taxation. Under republican government, no single person should have the power to take the nation to war. That power should lie with the people, through their elected representatives. Moreover, the Framers recognised warfare as the single greatest accelerant of executive aggrandisement. "It is in the nature of war to increase the executive at the expense of the legislative authority," writes Hamilton in *Federalist No 8*. Hence, the war-declaring power provided Congress a check against executive usurpation.

Additionally, Article I, Section 8 confers Congress with responsibilities for 'the common Defence,' especially powers to 'raise and support armies,' to 'provide and maintain a Navy,' and to 'make rules for the Government and Regulation of the land and naval Forces.' At the same time, however, Article II confers the President with weighty military responsibility as 'Commander in Chief' of armed forces and with diplomatic authority to 'receive Ambassadors and other public Ministers.' This complex dicing of authority proceeds further in the areas of treaties and diplomatic appointments. The President holds power to negotiate treaties, but they take effect only upon a two-thirds approval from the Senate. Similarly with 'Ambassadors, other public Ministers and Consuls,' Presidential nominees require two-thirds support from the Senate to secure appointment.

At a certain level of abstraction, as Schlesinger points out, this complicated scheme posits presidential control over foreign policy, while allocating the ways and means of warfare to Congress. Aggrandisement of either function may potentially poach on the other. Bellicose presidential foreign policy, for example, must fail if Congress refuses to prepare for war or declare it. At an extreme this may allow Congress to substitute its own foreign policy for the President's. On the other hand, bellicose presidential policy may back Congress into a corner where it feels it must endorse warfare, thereby ceding its purported authority into presidential hands. The check-and-

balance framework may foster a consultative relationship between the two branches on issues of both foreign policy and warfare. But it may also fail to do so where circumstances allow either branch to gain aggrandising momentum. Ultimately, Schlesinger indicates, maintaining the joint framework requires on-going comity between the two branches in the intended constitutional spirit of balancing executive initiative with republican popular sovereignty.

Additional tensions loomed over well-understood situations where the executive might responsibly use military force without a congressional declaration of war. In all such scenarios, the president's authority to wield military force could be thought to spring either from inherent executive authority or from his constitutionally-designated function as Commander in Chief. Situations of invasion or other emergency, for example, might require rapid action without recourse to Congress. Even without outright invasion, hostilities from foreign powers might place the nation in a state of war requiring prompt response to avoid strategic deterioration. Furthermore, foreign events might place Americans or their property in imminent danger, requiring forceful protection. Episodic interventions to protect life and property--especially from rogue, non-state actors--should not require the full machinery of a Congressional declaration.

It was clear, of course, that presidential aggrandisement on these scenarios could effectively usurp Congress's posited power over war and peace. Supposedly exceptional presidential declarations of emergency or states of hostility could, if overused, swallow the rule of Congressional prerogative. Executive unilateralism should ideally be rare, brief and fully-reported to Congress. In theory, executive abuse or poor judgment might subject the President to impeachment and removal by Congress. In the first few decades under the Constitution, however, it became clear that impeachment would operate only against extreme derelictions of duty. This understanding defanged impeachment as a meaningful check on presidential unilateralism.

Aside from comity, however, there remained one other critical restraint on presidential unilateralism. This was the broad consensus that America had no national interest in alliances or

wars outside the Western Hemisphere. In his Farewell Address upon leaving the Presidency in 1797, George Washington counselled his countrymen against partisan entanglement in the intricate power struggles and interminable warfare of the Old World. American involvement would tend to create divided loyalties, stoke U.S. domestic partisanship, destabilise republican institutions and engender persisting antipathy from powers abroad.

"The great rule of conduct for us in regard to foreign nations is…to have with them as little political connection as possible," Washington advised. "It is our true policy to steer clear of permanent alliances with any portion of the foreign world...."

Roughly a quarter-century later, in the wake of Napoleon's wars, the future president and then-serving Secretary of State, John Quincy Adams, counselled that U.S. military force in the name of freedom abroad would do no good but would instead corrupt America herself into still another agent of oppression. America "goes not abroad in search of monsters to destroy." Better for the world that America take pains first, last and always not to lose its republican character at home. He did not need to add what he surely believed: that warfare abroad would inherently threaten republicanism at home, most likely through an aggrandising presidency.

The Washington/Adams consensus against foreign entanglements and war prevailed through the nineteenth century. It was not much tested during that long period of relative peace in Europe. In consonance, there were few signs of executive usurpation. To be sure, President Lincoln asserted broad emergency powers upon outbreak of the Civil War: jailing 'disloyalists' without legal process; summoning and enlarging the armed forces in contravention of authority conferred on Congress; and spending money without congressional appropriation. Even more audaciously, his Emancipation Proclamation freed the slaves in states defying federal authority. He explained his unilateral Proclamation as driven by military necessity in his capacity as Commander in Chief. (He did not spell out the Proclamation's military advantages, though several can be surmised, among them: undermining the South's labour system by de-legitimating

slave docility; giving slaves incentive to aid Union forces; and providing blacks an idealistic rationale for enlisting in those Union forces.) Though slave emancipation was expanded to the entire nation and made permanent by the Constitution's Thirteenth Amendment, other aspects of Lincoln's expanded executive emergency lapsed with the war's end. It was followed by several decades of strong congressional voice in matters of state.

With Theodore Roosevelt's 1901-09 presidential tenure, however, came glimmerings of novel presidential assertiveness. In foreign policy, there was increasing resort to the 'executive agreement' for compacts with foreign governments. Executive agreements foster presidential unilateralism and sometimes even secrecy, as opposed to the treaty power shared between President and Senate. When the Constitution was adopted, treaties were understood as perpetual unless rescinded, while executive agreements concerned single-act obligations. Hence, treaties were the appropriate device for major compacts, while executive agreements were appropriate for lesser ones. The superior convenience of the executive agreement, however, creates presidential temptation to use it more broadly. As decades passed, executive agreements came to be used more and more frequently and on increasingly major matters, as opposed to treaties. During his tenure, Roosevelt accelerated this trend, most notably striking executive agreements with Japan on limiting emigration to the U.S., on maintaining the 'Open Door' policy in China and on recognising Japan's 'special interests' there. Later presidents followed Roosevelt's lead in resorting more and more heavily to executive agreements in foreign policy. With time, the earlier relationship between treaties and executive agreements turned upside down. On major matters where controversy might prevent securing treaty approval from two-thirds of the Senate, Presidents used executive agreements. Meanwhile, treaties came to govern increasingly minor and uncontroversial matters.

Disillusionment with the results of World War I provoked a dramatic uptick in congressional assertiveness on foreign policy. As the troubled twenties became the totalitarian thirties, it grew increasingly clear that President Woodrow Wilson's military intervention to make the world 'safe for democracy' in a 'war to

end all wars' had accomplished neither. Invoking the Washington/Adams tradition, Congress resolved to keep America's future clear of Europe's bloodletting. It controlled foreign policy more tightly than ever before or since. Most Americans supported the congressional Neutrality Act, mandating non-involvement with looming renewed hostilities in Europe, though the Act contravened the presupposition that while Congress should lead on domestic affairs, the President should lead in foreign policy. Many perceived Hitler's regime as uniquely evil, but others at the time were unconvinced, pointing out that neither the Soviet Union nor the French and British empires could qualify as exemplars of democracy or human rights.

Over the course of the decade, however, the administration of Franklin Delano Roosevelt (FDR), along with influential media and portions of the public, began to see the Third Reich as an especially dangerous and aggressive tyranny that must be resisted. Within constraints imposed by the Neutrality Act, FDR launched a series of manoeuvres as the war broke out designed to ensure Great Britain's victory over the Nazis. As the Nazi-Soviet war began, FDR extended assistance to the U.S.S.R. as well. He moved by careful steps, knowing that he would need to win over a sceptical public along with Congress.

In part, FDR sold the anti-Nazi war as essential to America's own safety. A Third Reich controlling all Europe would be poised to strike at America, which therefore faced an emergency calling for prompt executive action. The notion that Hitler could have launched military force across the Atlantic in the teeth of America's far stronger navy struck many as fanciful at the time and seems even more so in retrospect, though Schlesinger still seems to believe it. Closer to plausibility is that the British and Soviets would lose without American assistance and that prolonged Nazi hegemony in Europe would disastrously reverse history's apparent progress toward democracy and human rights.

Scenarios of imminent British or Soviet defeat without American aid also seem exaggerated in retrospect. As it happened, British naval strength stymied Hitler's thought of lunging across the Channel, while Soviet military and industrial muscle ground the

Wehrmacht down across the vast Russian landscape. U.S. aid and eventual arms unquestionably hastened the demise of the Third Reich. In his heart of hearts, FDR may have felt that this alone merited U.S. military intervention. Contrary to the Washington/Adams position, a second war to make the world 'safe for democracy' would work out better than the first one.

Throughout 1940 and 1941, FDR ramped up executive assertiveness in dealing with the world crisis. Without recourse to treaty requiring Senate approval, he arranged by executive agreement the transfer of mothballed destroyers to Britain in exchange for U.S. use of bases on British soil. Constitutional law professor Edward S. Corwin denounced the deal as "an endorsement of unrestrained autocracy in the field of our foreign relations." Also by executive agreement, FDR stationed troops in Greenland, then in Iceland, as forward measures to protect munitions shipments to Britain against U-boat raids and other Nazi countermeasures. As troops went to Iceland, Senator Robert Taft complained that FDR was eroding the exclusive congressional prerogative to declare war. FDR launched naval convoys of merchant ships carrying supplies to Britain, with a 'shoot-at-sight' order regarding German U-boats. This arguably usurped congressional war powers.

But even FDR did not dare neglect Congress on initiating Lend-Lease, the provision of munitions and other critical goods to Britain and later the Soviet Union. He secured Lend-Lease as a measure for avoiding U.S. military involvement, not for hastening it. Congress seemed to accept this rationale, though Lend-Lease clearly aligned America with some belligerents against others.

It is noteworthy that FDR couched his pre-war initiatives in terms of presidential emergency power, not inherent executive authority or exercise of powers as Commander in Chief. In theory, this placed his assertions of power under tighter constraints than otherwise. His assertion of emergency power quickly widened, however, culminating in his announcement of 'unlimited national emergency.' It is unclear whether prolonged aggrandisement could have engendered a constitutional confrontation with Congress over presidential steps toward higher belligerency.

The Japanese attack on Pearl Harbour foreclosed any such possible confrontation. Congress enthusiastically declared war, first on Japan, then on Germany after Hitler recklessly declared war on America, in fidelity to his Japanese ally. Referring increasingly to his powers as Commander in Chief, FDR soon controlled vast agencies on production, mobilisation, information, transportation and so forth. As Schlesinger points out, these agencies sprang largely from presidential initiative, without congressional authorisation. In contrast to its pre-war stance, Congress by and large acquiesced to this 'energy in the Executive' for purposes of running the war.

In view of what the world learned about Japanese and especially Nazi atrocities, quick destruction of the Third Reich and Imperial Japan seems worth the blood spilled. Whether it made the world 'safe for democracy' is a different question, though the war did usher in durable democracies for both Germany and Japan. Eastern Europe, unfortunately, managed only to replace Nazi with Soviet tyranny. Still another question is whether the blood spilled was excessive. FDR's declared policy of 'unconditional surrender' rather than negotiated peace for both Germany and Japan arguably prolonged the war with hundreds of thousands of needless deaths, both military and civilian. In FDR's defence, some argue that rapid democratic makeovers for Germany and Japan could not have occurred without their unconditional surrender. In any case, 'unconditional surrender' was FDR's unilateral pronouncement, meekly accepted by Congress. What might have happened had Congress pronounced otherwise is anybody's guess.

Hard on the heels of victory came confrontation with the Soviet Union, as Stalin installed communist regimes in Eastern Europe and seemed capable, so it was thought, of enchaining Western Europe as well. President Truman's initial Cold War 'containment' policy pursued the limited but vital role of ensuring democracy in Western Europe. Over time, however, the Cold War metastasised into a hyper-vigilant worldwide campaign against communist influence, subversion and military opportunism. A sense of permanent emergency seemed to warrant extravagant extensions of executive authority. When

North Korea invaded the South, Truman decided that quick U.S. military invention was needed to forestall the spread of communism. He sought no declaration of war from Congress, but instead declared a national emergency, citing his Commander in Chief power as authority for ordering armed intervention. Congress quibbled only as it acquiesced.

To be sure, the Korean intervention was first envisioned as a limited 'police action,' reminiscent of past actions to protect American lives and property against rogue actors. North Korea may have been a state but it was some sort of 'rogue' state. The disastrous later decision to invade North Korea, rather than merely repel the North from the South, was also unilateral on Truman's part, reflecting a policy of communist 'roll-back' that rose up in contention with the more modest 'containment' policy. Once again, Congress threw up its hands. Once war is begun, the Commander in Chief must be left to run it. Truman pushed his Commander in Chief prerogative even further when he announced the dispatch of four additional divisions to American forces stationed in Western Europe. Congress sputtered.

Truman met resistance only when, invoking the Korean War emergency, he ordered his Secretary of Commerce to seize and operate the U.S. steel industry, so as to forestall labour strikes that might curtail flows of supplies to the troops. The ensuing legal case reached the Supreme Court, which rebuked Truman's order as unconstitutional. As the justices explained, the President was Commander in Chief of the armed forces, not the whole country, and he could not seize private property without benefit of authorising legislation.

The decade following the 1953 Korean ceasefire saw entrenchment of a worldwide apparatus for stifling communism, supervised by the President (first Dwight Eisenhower, then John F. Kennedy). A far-flung network of foreign military bases and high on-going defence expenditures became hallmarks of permanent 'emergency.' Covert CIA operations meddled with actual or attempted regime change in Iran, Guatemala, Indonesia, Egypt, Laos and Cuba. Potential threats to 'national security' could be seen in any developments anywhere that might

even potentially abet communism. Moreover, widespread commitments to protect other countries from communism wrote a new chapter in the dream of making the world 'safe for democracy.' If strategic alliances against communism meant partnerships with autocratic or abusive regimes, such regimes could be portrayed as at least potential democracies, as opposed to any lands that fell to communism. So much for Washington's warning against permanent foreign entanglements or Adams's admonition that America go not abroad in search of monsters to destroy.

Under Presidents Johnson and Nixon, the Vietnam War and its extensions into Cambodia and Laos brought unprecedented assertions of 'Commander in Chief' authority to wage hostilities without congressional authorisation. Neither bothered declaring emergency. Johnson's State Department lawyers explained that in an increasingly interlinked world, "an attack on a country far away…can impinge directly on the nation's security." They then arrived at a position that nearly eviscerates congressional prerogative over going to war, contending that, "The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress."

The Supreme Court has never taken up the challenge of deciding whether presidentially-ordered military action violates constitutional assignment of the war-declaring power to Congress. The Court has declined to recognise lawsuits challenging presidential military forays as unconstitutional, claiming that no legal standards can be found for determining whether any given armed intervention is or is not beyond proper executive authority. The whole matter is purely a 'political question,' one that can only be resolved through measures, countermeasures and negotiations between the two political branches, Congress and the President. Frustrating though this may be, the Court's reticence may be wise. On a matter where the Constitutional text is so ambiguous and where situations on the ground may vary widely, how could the Court conceivably lay down once-and-for-all rules

on the limits of presidential power? This leaves the question where else to look for such limits.

Presidential self-restraint seems an increasingly unlikely vehicle. Over the past 25 years, presidential unilateralism with military force has undoubtedly been a bipartisan project. Though the Cold War's end might have left the national security state somewhat adrift, the first Iraq war and armed interventions in the former Yugoslavia provided fresh breezes for presidential unilateralism. In none of these interventions was there any congressional declaration of war. As he ordered hostilities in the first Iraq war, Republican President George H.W. Bush sought and secured congressional endorsement, while disclaiming any obligation to do so. Democrat President Clinton proceeded without congressional authorisation for his anti-Serb bombing campaigns in Bosnia and Kosovo, claiming inherent power to act unilaterally. He did likewise with military interventions in Sudan, Somalia and Haiti, not to mention Afghanistan and Iraq (before 9/11).

Needless to say, the post-9/11 'war on terror' has been a bipartisan gale force in presidential sails. Like the Cold War, the 'war on terror' sustains an on-going sense of emergency, justifying extraordinary measures. George W. Bush launched vast military and intelligence operations overseas, including wars in Iraq and Afghanistan, alongside unprecedented domestic mechanisms of 'homeland security.' President Obama has supervised massive monitoring of domestic communications and a globe-spanning 'secret war' of terrorist assassination through drone strikes and other methods.

The 'war on terror' has featured tortured prisoners; innocent persons detained without charges, adjudication or hope of release; and Espionage Act prosecutions at unprecedented levels. It is difficult to decide whether to be troubled more by the current national security state's stealthy surveillance at home or its too-frequent destructiveness abroad. To be sure, there are dangerous people in the world who want to hurt America while they impose new tyrannies. But we need to weigh that menace soberly against

the potential danger and tyranny of the imperial presidency protecting us.

Administrative President

From their earliest days under the Constitution, Americans wrangled over the proper scope of federal government action on domestic issues. Opposing political parties, for example, were strongly defined by whether they favoured or disfavoured active federal effort to promote economic development. With the dawn of the twentieth century, both major political parties spawned factions favouring a larger federal role in ameliorating domestic problems previously left for the various states to address on their own. In time, often against great resistance, this viewpoint would engender construction of today's vast federal regulatory/welfare state. Often attributed to the exigencies of a closely-interdependent national-scale economy, this state greatly expands the operational scope of both Congress and the Presidency, not to mention the federal judiciary. President Theodore Roosevelt, promoting a more active federal government, became an advocate of presidential assertiveness vis-à-vis Congress in a fashion that prefigured the rest of the twentieth century.

On the domestic front, Roosevelt speechified on broad presidential power to act in times of 'crisis,' without specific legal authority. When "great national crises arise,"" as he explained, "it is the duty of the President to act upon the theory that he is the steward of the people." He seemed to be thinking that because the President is elected by the whole people (albeit indirectly, through the Electoral College), he enjoys ultimate democratic legitimacy to do whatever he thinks urgently needs doing, unless "forbidden by the Constitution or by the laws." This theory of plenary presidential power was a far cry from Madison's insistence in *The Federalist No.48* that the President--"bound within a narrower compass"—was less dangerous than the legislature. The devil, of course, lay in details of how a President might define 'crisis.'

Aside from high-flown rhetoric, Roosevelt cast an unprecedentedly jaundiced eye on congressional requests for

information about executive branch operations. As Schlesinger indicates, such requests historically had been honoured as a rule, within an understanding that refusal should be exceptional and for compelling reasons only. The congressional prerogative to secure executive branch information applied especially on domestic matters, less so on foreign policy. Roosevelt, however, refused a Senate request for documents on why his administration had failed to take certain legal actions against United States Steel. He boasted that the Senate could get hold of the documents only by impeaching him.

Though it is perhaps conceivable that expansion in the powers of all three federal branches could proceed without altering the pre-existing balance among them, such an outcome seems unlikely. More probable is that the pre-existing balance would come loose, that wobbles would ensue and that a new constellation of forces would emerge. Put another way, the expanded federal government challenges the check-and-balance republic with issues the Framers could never have imagined. Though it may not have been inevitable, an enlarged federal government has unquestionably expanded executive power relative to Congress. We may well wonder whether this expanded domestic Presidency remains within bounds of a check-and-balance republic.

A sea change in federal domestic policymaking came with the 1933 onset of FDR's presidency. In response both to the Great Depression and ideological proclivities, FDR and his Democratic Party in Congress launched sweeping socio-economic initiatives, unprecedented in both breadth and scale. They focused on what some have called the three Rs: relief, recovery, reform. Legislation included the National Industrial Recovery Act, the Agricultural Adjustment Act, the Securities Acts of 1933 and 1934, the Social Security Act, the Banking Act, the National Labour Relations Act and the Fair Labour Standards Act, to name just a few. New agencies included the Securities and Exchange Commission, the Social Security Administration, the Works Progress Administration, the National Labour Relations Board, the National Recovery Administration, the Federal Deposit Insurance Corporation, the Federal Emergency Relief Administration and the Farm Security Administration

The scope of laws to be 'faithfully executed' by the President soared, as did the size of administrative bureaucracy he supervised. Again, there is no reason in logic why this expanded power need outpace the simultaneous expansion in Congress's domestic prerogative. Congress still held the taxation and appropriation powers. Moreover, in theory at least, Congress could enact detailed laws and regulations constraining executive discretion in administering the expanded federal state.

Almost from the outset, however, Congress saw this as a chore beyond its capacity. Perhaps not foreseeing the full implications, perhaps daunted by the sheer potential workload, Congressional Democrats seemed to think their popular President should be trusted to steer the ship of state out of what could be seen as a domestic emergency. It tended to legislate in broad and general terms, leaving interpretation to executive judgment. This began taking the form of express congressional delegation of rule-making authority to executive departments and agencies. The constitutionality of doing so soon came under challenge. Was this a delegation of the law-making function from Congress to the executive, thereby violating the constitutionally mandated separation of powers?

The Supreme Court came to rule that such delegation was not inherently unconstitutional. After enacting broad legislative mandates, Congress may relegate detailed rule-making to specialised executive bodies, within constraints preserving the requisite separation of powers. Separation of powers requires that Congress articulate some 'intelligible principle' to guide executive branch rulemaking under a delegating statute. This is not a demanding requirement. The 'intelligible principle' can be gleaned from a statutory declaration of policy or purposes and need not be precise or detailed. Over dozens of cases examining delegated authority, the Supreme Court has found 'intelligible principle' even in such vague phrases as 'just and reasonable,' 'public interest,' 'unfair methods of competition,' and 'requisite to protect the public health.'

Of course, Congress may pass legislation overturning administrative rules or actions that it disapproves. This preserves

legislative supremacy but it is not the 'separation of powers' the Framers intended. Delegated authority may be nearly inevitable in governing complex modern societies. But it poses a question whether an eighteenth century check-and-balance republic can meaningfully operate in the twenty-first century.

Administrative agencies typically perform three major functions. First, they issue binding rules and regulations under their delegated authority. Second, through an office of general counsel, they investigate possible rule breaches and prosecute alleged perpetrators, seeking infliction of administrative penalties. Third, through 'administrative law judges,' they adjudicate prosecutions contested between the agency and those accused. Tellingly, these three functions reproduce Montesquieu's separation of powers among legislation (rulemaking), execution (investigation and prosecution) and adjudication (administrative law judge rulings). Equally telling, however, is that this facsimile 'separation of powers' occurs entirely within the executive branch.

For several decades in the twentieth century rise of America's administrative state, Congress sought to conserve a check-and-balance constitution through a device called the legislative veto. In this context, the legislative veto was a statutory provision allowing one or both houses of Congress, sometimes even a Congressional committee, to reverse an agency action for contravening the statute's meaning or purpose. Hence, Congress could retain a check on executive waywardness or aggrandisement. At its height, some 200 statutes featured some form of legislative veto.

This came to a crashing halt with the Supreme Court's 1983 ruling, *Immigration and Naturalization Service v. Chadha*. *Chadha* ruled the legislative veto unconstitutional after some five decades of common practice. An exercise of legislative veto, as the Court reasons, is essentially a legislative act. As such, according to constitutional fundamentals, it has no force of law unless presented to the President for signature or veto. This presidential presentment requirement forms part of the Framers' deliberate design for preventing autocratic government. The legislative veto, which tampers with that design, therefore cannot stand.

Three justices resisted this sudden overthrow of the legislative veto. A stern dissent warned that the legislative veto provided Congress a crucial accountability check over the executive.

> "Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role."

In its faithful textualism, *Chadha* purports to stand for a constitutional design against autocratic government. In doing so, however, it ignores the vast and looming threat of autocratic government posed by the presidentially-supervised administrative state. The legislative veto is precisely in the spirit of forestalling autocratic government. *Chadha* exalts the Constitution's text about autocratic government over an actually existing threat never imagined by the Framers.

Chadha, according to its dissenters, mistakes the whole point of the presidential presentment requirement and winds up topsy-turvy on the issue of preventing one branch from aggrandising on another.

> "The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton. Rather, the veto has been a means of defence, a reservation of ultimate authority necessary if Congress is to fulfil its designated role under Article I as the nation's lawmaker."

The dissent goes on to question *Chadha*'s presupposition that the legislative veto represents an exercise of 'lawmaking.' "The power

to exercise a legislative veto," insists the dissent, "is not the power to write new law without…presidential consideration."

Only a year after *Chadha* came a second Supreme Court ruling that helps insulate executive branch agencies from congressional constraint. How much latitude should agencies enjoy in interpreting and applying congressional statutes they administer and enforce? In theory, courts could curb agency power by overruling departures from congressional purpose as courts interpret it. Courts would thereby serve as Congress's watchdogs over executive branch tomfoolery. In *Chevron v. Natural Resources Defence Council*, however, the Supreme Court declined such a role. Instead, courts should honour any 'permissible' statutory interpretation an agency adopts. This green light follows from congressional delegation of administrative policymaking to agencies presumably expert on particular subjects. Hence there should be 'administrative deference' by courts to agencies in interpreting congressional statutes. This makes perfect sense on its own terms, but fails to reckon with its impact on the balance of power between executive and legislature. Impact in favour of the executive only grows as, in a simultaneous development discussed below, agency heads have increasingly become presidential loyalists, not neutral experts.

Bipartisan Power-Grabbing President

Recent decades have seen an acceleration of presidential aggrandisement that exploits Constitutional ambiguities as to executive and legislative prerogatives. The books listed above portray these developments as a kind of 'tipping point' for a nearly irreversible imperial presidency. Schlesinger argues that Nixon attained new heights of presidential imperiousness in domestic matters. He did so in three crucial ways capable of establishing on-going precedent.

First, he greatly expanded use of 'impoundment': refusal to spend congressionally-appropriated funds. Prior to Nixon there had been only isolated episodes of impoundment, as when Jefferson

postponed layouts for gunboats until a better class of craft became available. Nixon, by contrast, practiced 'policy impoundment,' meaning that he refused to expend funds based on simple disagreement with congressional policies standing behind particular appropriations. He claimed inherent executive authority to do so on grounds of keeping taxes low or preventing spending that could fuel inflation. Since all government expenditures implicate both taxes and possible inflation, Nixon under this rationale could override Congress on any spending matter he chose. He claimed, in effect, a second veto on legislation, one that Congress could not reverse by two-thirds vote as with normal presidential vetoes authorised by the Constitution. In the case of the Water Pollution Control Act, he refused to execute the law even though Congress *had* already overridden his earlier veto. Nixon asserted power to practice impoundment without declaring emergency, without requesting congressional reconsideration and without even giving notice.

Second, Nixon asserted novel use of the so-called 'pocket veto,' stemming from a curious wrinkle in constitutional text. Ordinarily, a bill enacted by Congress and presented to the President must be either signed into law or vetoed and returned to Congress, which may override the veto by a two-thirds vote in both houses. When Congress adjourns within ten days after presentment, however, the President may simply 'pocket' the bill without either signing or returning it. Such a bill fails to become law, just as if vetoed, but this 'pocket veto' may not be overridden as such. If it wants the bill enacted into law, Congress must take it through the entire legislative process another time. One apparent purpose of the pocket veto is to prevent placing the President under time pressure either to sign a bill or compose a veto message. If Congress feels a bill is important, it should get it to him before the last minute so that he may properly ponder it.

Prior to Nixon, the pocket veto was used for minor matters and by and large only upon a given Congress's final adjournment or at least the end of a session. Nixon, however, used it aggressively not only when Congress went out of session but when it went into recess. Like impoundment, this provides an override-free means of contravening congressional policy making. One bill, passed 64-

1 in the Senate and 345-2 in the House of Representative, authorised grants to support family medical practice. On a bill passed with such overwhelming support, a conventional veto would surely meet with congressional override. Justifying his pocket veto, Nixon pointed out that Congress was away on Christmas break.

Third, Nixon ramped up assertion of 'executive privilege' against congressional requests for information. Some view congressional power to investigate executive branch incompetence and corruption as equal in importance to the law-making function. There is no constitutional text supporting presidential privilege against such power. It soon became accepted, however, that presidents may rightly assert privilege in matters of special sensitivity or to forestall a course of harassment from Congress.

Following Theodore Roosevelt's dubious precedent, Nixon converted the exceptional into the normative. Necessary communications within the executive branch, he suggested, require an atmosphere of candour. As with lawyer-client and doctor-patient relationships, such candour cannot thrive without guarantees of confidentiality. Just as with lawyer-client and doctor-patient communications therefore, executive branch communications must be shielded from inquiring eyes. The logic is strong but it is easy to see how it leads straight to secret government, contravening fundamental republican principle. In a republic, with exceptions to be sure, the executive branch must operate not in an atmosphere of confidential candour but in an expectation of disclosure, however inconvenient that may be. Lawmakers were astonished to hear Nixon's attorney general assert that Congress could not compel disclosure from any executive branch employee if the President determined that it might impair exercise of his constitutional functions. If allowed to stand, this position could effectively nullify Congress's long-recognised investigatory prerogative, leaving as a check only its appropriations power, along with whatever might be made of impeachment.

Presidents since Nixon have continued to innovate in acquisition of power. What follows is a brief catalogue of key innovations.

Presidential Appointees and White House Staff

Recent decades have seen dramatic increases in the number of presidential appointees to departments and agencies and in the size of White House staff. The swelling number of presidential appointees supplants civil service professionalism with political loyalism. Meanwhile, from FDR's unprecedented six 'presidential assistants,' White House staff in recent years has routinely exceeded 500. Such staff, characterised by intense presidential loyalty, has meanwhile acquired increasing policymaking authority over or aside from the permanent departments and agencies. Just one example is the proliferation of so-called White House 'czars' on things like drugs, energy, e-commerce, domestic policy and whatever.

Executive Orders and Presidential Directives

'Executive orders' and 'presidential directives' allow Presidents to control regulatory policy in derogation of agency expertise and congressional mandates. Neither device holds any constitutional warrant or statutory basis. In his anti-regulatory viewpoint, President Reagan ordered that agencies submit all proposed regulation to a White House Office of Information and Regulatory Affairs (OIRA), empowered to kill any rulemaking that did not pass its 'cost-benefit' analysis. Favouring more active regulation by contrast, President Clinton used OIRA to impose particular White House agendas on rulemaking agencies. It is not clear what either Congress or the Supreme Court could do to stem such White House centralisation of regulatory policy or prevent its careening beyond rule of law boundaries.

Signing Statements and 'Executive Constitutionalism'

Presidential 'signing statements' set the White House up in independently ruling congressional legislation unconstitutional, while what Ackerman calls 'executive constitutionalism' sets the White House up as authority on the constitutionality of its own actions.

In 'signing statements,' the President signing a bill into law pronounces some portion of it unconstitutional and declares that he will therefore not enforce it. This side-steps the Constitution's textual veto mechanism and may covertly allow the President to substitute his own policy preferences for Congress's. Because the ten-day window for signing legislation leaves scant time for careful analysis, signing statements can be disturbingly *ad hoc*.

By contrast, 'executive constitutionalism' refers to the highly-polished professional work churned out by the Justice Department's Office of Legal Counsel (OLC) and the office of White House Counsel (WHC). Both offices produce constitutional analyses of presidential initiatives on par with the sophisticated output of Supreme Court justices and clerks. The problem is that OLC/WHC analyses almost invariably conclude that the presidential initiative in question is constitutional. Rather than acting as neutral constitutional evaluators, both offices view the White House as its client. Though the Supreme Court can ultimately pronounce the presidential initiative unconstitutional, it must wait for an on-point 'case or controversy' before it can issue a constitutional rebuke. By that time, the President's 'first mover' advantage and the prestige of OLC/WHC work product on the President's behalf may have established facts on the ground that the Court cannot easily undo.

Celebrity President

Aside from the national security state, the administrative state, and successful grabbinessin separation of power's grey areas, imperial presidentialism thrives on the increasing charisma of the office itself. Presidential charisma gains momentum from merger of functions as head of government (as with prime ministers) and head of state (as with kings). Head of state ceremonial functions such as receptions, award ceremonies and foreign travel seem trivial only if one ignores the media hype of such events.

Classical writers regarded demagoguery as democracy's chief danger. Both television and the presidential primary system favour the rise of candidates without track records in

statesmanship or party leadership. In recent decades, presidential primaries and incessant television have favoured charismatic outsiders, often with gifts of eloquence, over seasoned politicians. Kennedy, Carter, Reagan, Clinton, and Obama may all be examples of this. Though their presidencies may compare well with those of consummate insiders like Johnson and Nixon, the outsider cinematic trope of 'Mr. Smith Goes to Washington and saves America' remains a distracting popular delusion. The celebrity presidency seems to culminate in late night entertainment show appearances. The curious indignity of such exposure seems outweighed by its popularity.

Remedies?

The books listed here offer a variety of possible remedies for excessive presidentialism. Schlesinger, selectively focused on war-making power as the base for imperial presidency, suggests a less interventionist and militarised foreign policy. Though this ignores the administrative state and other drivers of presidential aggrandisement, the advice is welcome nonetheless. Obama illustrated the pitfalls of adventurism in his Libya campaign to stifle the dictator Qadaffi. The result of Qadaffi's demise has been heightened jihadi influence not only in Libya, but also in Algeria, Tunisia, Egypt and Mali, just for starters.

Since presidential incentives lie toward grandiose adventurism, a sceptical public speaking through Congress can provide indispensible restraint. It was a relief when Obama sought congressional approval for intervening against Syria's dictator Assad. This would almost certainly have aided jihadis again, while raising levels of instability and violence. Based upon precedent, Obama could easily have ignored Congress and acted unilaterally. In a new chapter we hope, he heeded a war-weary U.S. public, speaking through Congress: 'Don't do something. Just stand there.' From their graves, Washington and John Quincy Adams surely applaud America's rejuvenated instinct that armed force to 'do something' about foreign disasters is itself probably a disaster.

To fortify that sceptical public, Schlesinger wants to revitalise congressional prerogative over war and peace. He suggests legislation that would require the President to: 1) report fully, promptly and continuously, with justification, on all hostilities he orders; and 2) terminate hostilities upon a congressional vote that they cease. Such legislation, fostering consultation between the two branches, would protect presidential power to act quickly in the face of exigency while honouring the Framers' intent that a republican legislature should decide ultimate questions of war and peace.

Buckley scarcely conceals his yearning to replace the presidency with something more akin to a premiership. But he admittedly has little to offer for ameliorating the existing imperial presidency.

One suggestion is that Congress sponsor non-binding national referenda on key issues, the results of which could be used to strengthen congressional bargaining leverage against presidents. This vague notion seems pertinent only for situations where the President is strongly on the wrong side of public opinion and Congress on the right side. It also seems to presuppose a united Congress in place of the strongly- and evenly-divided Congress that actually exists these days.

Buckley also advocates liberal use of impeachment, suggesting that this would foster presidential deference to Congress. But liberalised impeachment would require overturning established understanding of 'high crimes and misdemeanours' needed to remove a President from office. 'High crimes and misdemeanours' would need to evolve from serious official misconduct under its current meaning to something more like simple maladministration or even defiance of congressional will and policy. This would make impeachment akin to parliamentary 'no confidence' votes on prime ministers. If such an evolution ever takes place, it will not be soon. Though the lower standard may actually embody what the Framers imagined, the current high standard has entrenched itself in subsequent interpretation.

Among the books reviewed here, Ackerman's is richest in suggesting remedies. I will briefly restate three of his suggestions. Though none can be counted as likely developments, Ackerman earns strong marks for effort.

Sharp Statutory Constraints on Emergency Military Powers

Under this proposal, military force could not be used without a congressional declaration of war, except in presidentially-declared emergencies. Declared emergencies would be limited by period deadlines unless renewed by congressional authorisation. Each succeeding renewal of a declared emergency would require higher levels of congressional approval: from majority, to two-thirds, to three-quarters, and so on. As Ackerman speculates, this would pressure Presidents to be forthcoming and persuasive about prolonged emergencies, would provide Congress a statutory basis and responsibility for evaluating uses of force, and would constrain use of force to compelling situations.

Senate Confirmation of Key White House Policymaking Staff

The original idea of Senate confirmation was that presidents should not wield unilateral prerogative in appointing key officers like ambassadors and department heads. This spirit has been circumvented by the expansion of White House staff and its increasing policymaking power, combined with the idea that the President should be able to appoint his own staff. The meaning of presidential 'staff' has morphed from office help to policymaking czars. As things stand today, the Senate confirms minor ambassadorships while the President enjoys a free hand in appointing powerful officials like the National Security Advisor. In this context, requiring Senate confirmation for high-level White House policymaking staff makes perfect sense. Ackerman's discussion focuses heavily on the bargaining between executive and legislative branches before such a reform could be enacted.

'Supreme Executive Council'

Under the requirement of an actual 'case or controversy' with adversary litigants, it has long been established that the Supreme Court will not issue 'advisory opinions' on constitutional issues. Ackerman proposes an executive branch quasi-judicial substitute to issue 'rulings' on the constitutionality of presidential initiatives. Nominated by the president, confirmed by the Senate, holding office for a set term, members would evaluate presidential initiatives professionally but neutrally, like a court. This would

balance out the prestige of OLC/WHC opinions on presidential power. It would check practices such as slapdash 'signing statements' and defiance of congressional statutes or intent. Though the president could refuse to comply with adverse rulings, the public, press and Congress would get an alert that something was amiss. The president would face meaningful political pressure. Over time, Ackerman suggests, Council rulings might even tempt the Supreme Court to modify its 'advisory opinion' and 'political question' doctrines so as to issue more robust constitutional rulings limiting executive power.

Conclusion

The American Presidency has been explained and defended in terms of Montesquieu's theory that 'separation of powers' secures republican liberty and good governance. There is increasingly strong reason to think that whatever America has achieved in republican liberty and good governance comes in spite of not because of this separation of powers. In view of today's Presidency, both America and the world may need to reconsider 'separation of powers' U.S.-style.

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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?

21

The French Fifth Republic

Kamaya Jayatissa

"*Dans le tumulte des hommes et des événements, la solitude était ma tentation. Maintenant, elle est mon amie. De quelle autre se contenter lorsqu'on a rencontré l'Histoire ?*"[1]

Charles de Gaulle

The Origins of the Fifth Republic

In the early 1950s, French political life was dominated by its colonial wars. Following the military defeat and humiliation of Dien Bien Phu, in May 1954, the government of Pierre Mendès France was forced to negotiate the permanent withdrawal of its troops from Indo-China, putting an end to nearly eight years of conflict.[2] For France, this defeat marked the beginning of the decolonisation process in all its colonies. Even though both Morocco and Tunisia gained independence without too much struggle in 1956, the situation was to be very different in Algeria where the links with the Hexagon were deeply rooted since 1830.[3] "Algeria was the trigger of the crises, which was fatal to the regime", stressed French political scientist, René Raymond. It indeed initiated the beginning of a conflict that was to drown the Fourth Republic in a severe institutional crisis.

Despite commendable achievements,[4] the Fourth Republic remained unloved by many. Known as *la mal aimée*,[5] it comprised

[1] "In the tumult of men and events, solitude was my temptation. Now she is my friend. How else to be content when we met history?"

[2] In June 1954, having signed the said agreement, newly appointed President, Pierre Mendès France announced to the French Parliament that he had achieve his aim of 'an honourable settlement' to end a war that had cost at least 300,000 lives.

[3] See H. Spruyt (2005) ***Ending Empire: Contested Sovereignty and Territorial Partition*** (Ithaca, NY: Cornell UP): Ch.3.

[4] A. Knapp & V. Wright (2006) ***The Government and Politics of France*** (London: Routledge): pp.49-50. The Fourth Republic 'achieved an extraordinary feat of reconstruction after five years of war and enemy occupation'. It marked the start of France's 'economic miracle' and most importantly a revolutionary period of modernisation. Many improvements were also made in terms of social security and European construction.

[5] See J. Barsalou (1964) ***La mal aimée: histoire de la IVe République***, (Paris: Plon): p.9.

of a strong parliamentary system and a weak executive power. This institutional mechanism was based on the requirements of the French republican tradition of 1877,[6] which could also be found in the Grévy Constitution. According to this tradition, the executive power should, in no way, antagonise the national will that is expressed through its elected representatives. With the right of dissolution falling into disuse[7] and an executive power that barely existed, predominance was given to a parliamentary monism, in which the assemblies were 'almighty'.[8] Favoured by the implementation of proportional representation, the need for alliances between the various political parties became a necessary requisite to obtain a governing majority. Hence, despite the tripartite alliance between the MRP (*Mouvement Républicain Populaire*), the PCF (*Parti Communiste Français*), and the SFIO (*Section Française de l'Internationale Ouvrière*), proportional representation caused the creation of a very unstable majority. This multiparty anarchy led to great ministerial instability that was considered to be the predominant reason for the collapse of the Fourth Republic. Between 1947 and 1959, a total of 24 governments succeeded one another;[9] all of which were unable to implement any consistent policy towards Algeria. Somehow, the institutional mechanisms of the Fourth Republic underwent an involution that led to a form of restoration of the Third Republic.[10] For Pierre Avril and Jean Gicquel, the Fourth Republic was simply stuck in between two republics.[11]

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[6] See e.g. P. Ségur (2014) ***La Ve République*** (Paris: Ellipses): p.7.

[7] During the Third Republic, the right of dissolution which was held by the head of state was only used once under MacMahon in 1877. Under the Fourth Republic, the right was then held by the head of the government. However, the conditions that enabled its implementation were so difficult that it was used only once, in 1955.

[8] According to Article 3 of the constitution of 1946, national sovereignty vests in the people who exercise it through their representatives.

[9] At that time, a government would, on average, not last more than six months. Only two Prime Ministers, Henri Queuille and Guy Mollet lasted more than a year. In a sort of ministerial waltz, the Fourth Republic would also undergo a period of 256 days without a government.

[10] See the pertinent explanation of J. Georgel, *Critiques et Réformes des constitutions de la République*, Thesis, (Rennes 1958: Paris, Celse, 1959 et 1960).

[11] See P. Avril & J. Gicquel, '*La IVe entre deux républiques*' (1996) ***Pouvoirs*** 76: pp.27-43.

Due to severe financial and international difficulties, French public opinion was divided between indifference and hostility towards a regime that became more and more discredited. In January 1958, expressing a consensus view, President René Coty warned that the "[…] basic institutions are no longer in tune with the rhythm of modern times". This was later virulently reiterated by both de Gaulle and Michel Debré, as well as by many communist leaders. With the existing institutional inability to resolve the Algerian crisis and under the pressure of a possible *coup d'Etat* by the French military leaders based in Algiers following the events of 13th May,[12] the main leading parties comprising the Right, the Radicals, and the SFIO gradually aligned themselves to seek the return of General de Gaulle as head of the government. 'The Man of June 18, 1940' was, once more, considered to be the only alternative to the on-going crisis.

De Gaulle, leader of Free France during World War II and head of the interim government of the French Republic between 1944 and 1946, had retired from the political life in 1953, beginning his famous *traversée du désert*. During this period, although he remained attentive to on-going events, de Gaulle barely intervened in the public and the political sphere. It is only following the famous '*Vive de Gaulle*' of the General Salan, that he declared himself 'ready to assume the powers of the Republic.' He nevertheless insisted on going through the regular processes of forming a Fourth Republic government. On 29th May, addressing the Parliament, President René Coty himself suggested that he would resign if the deputies disapproved the return to power of the 'most illustrious Frenchman'.[13] Two days later, de Gaulle delivered a

[12] On 13th May, a popular tribute to three French soldiers who were executed by the FLN (*Front de libération nationale*) turned into an insurrection with the complicity of dissident army officers and the active support of Parisian militants. Storming into the government, symbol of the Algerian republic, they created a *Comité de salut public* (Committee of Public Safety), which was placed under a Gaullist, General Massu, in order to promote the ascension of Charles de Gaulle to the French presidency.

[13] Full quote of President Coty: "In the peril of the mother land and the republic, I turn myself toward the most illustrious Frenchman. Toward the man who, during the darkest years of our history, was our chief, for the re-conquest of our liberties and who, having thus realised around himself national unanimity, refused a dictatorship in order to reform the republic." Coty then asked de

brief statement to the National Assembly, following which he was invested with 329 votes against 224.[14] He then left Colombey-les-Deux-Eglises to become the last President of the Council under the Fourth Republic, subsequently to which he formed a government of national union that excluded the French Communist Party.

Major concerns however remained. On 2nd and 3rd June, following the specific conditions that were more or less imposed by de Gaulle in his installation speech, the French National Assembly voted in favour of three consecutive laws of tremendous importance. The first two laws granted special powers to the government in regard to Algeria, as well as full legislative powers to govern by decree for a period of six months. Last but not least, a constitutional law was adopted in order to modify the amending process of the constitution and entrust the government with the drafting of a new constitution to be approved by referendum. For some, this not only went against Article 9 of the Constitution of 1946,[15] but also against the spirit of the Fourth Republic. The procedure pertaining to the drafting of a new constitution established by the constitutional law of 3rd June 1958, however, contained certain guarantees. These guarantees, which are today the centrepiece of the current institutions, were meant to safeguard the essential interests of the Parliament. As such, the following five principles were required to be included in the preparation of the new constitution: universal suffrage (as a guarantee of the democratic legitimacy of the future regime); separation of powers (which forbade any form of dictatorship); political responsibility of the government (ensuring the parliamentary nature of the institutions); the independence of the judiciary; and organisation of the relationship between the

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Gaulle to examine within the framework of republican legality the steps necessary to form a government of national union.

[14] Among the opposition were the communists, and 49 socialists out of 95, including François Mitterrand and Pierre Mendès France who both feared a military coup by the General.

[15] The constitution of 1946 provided in its Article 90 a revision process at the sole responsibility of the Parliament and the people, under strict conditions. Thus, the constitutional law of June transfers the constitutional competence of the Parliament to the government.

Republic and its associated people.[16] Before submitting the draft constitution to a referendum, the government was required to gather the opinion of an advisory committee composed of two-thirds of the deputies (appointed by competent commissions) and the *Conseil d'Etat* (Council of State).[17]

On 4th September 1958, which marked the anniversary date of the proclamation of the 1870 Republic, the General presented the draft constitution to the French citizens in a speech delivered at the very symbolic *Place de la République*, in Paris. Most of the political formations approved the proposal; except for the Communists, the Poujadists, and the Mendesists who persistently advocated against it. With a historic 80 per cent of voters in favour of the new constitution, the ratification referendum of 28th September was an immense success. The constitution was consequently enacted on 4th October 1958. Although the constitutional process had come to an end, a brief period of transition followed, during which 18 organic laws were adopted at the discretion of the government so as to complete the constitution. The cadence was given by de Gaulle. The French Fifth Republic was born!

De Gaulle and his Vision of the French State

The General was known to have entertained over the years a 'certain idea of France.' For Philippe de Saint-Robert, de Gaulle's unwavering commitment was to restore the idea of the state in France, so as to restore both its unity and its standing in the world. This idea was at the origin of de Gaulle's own concept of the state — a legitimate, democratic, and respected state — as well as of his very personal conception of the presidency,[18] the two

[16] Ségur (2014): p.11.

[17] The *Conseil d'État* is the highest administrative jurisdiction. It is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies, or any other agency invested with public authority.

[18] From 1848 to 1958, the presidential office was in constant decline. The main characteristic of the constitution of the Fifth Republic was therefore to radically modify the presidential status within a parliamentarian system. In the Bayeux speeches, speaking on the role of the head of state, de Gaulle said that, "The

essential components of which are natural, moderate, and hierarchic authority, and active arbitration.[19] In the absence of the said elements, the General believed that the state could risk drifting towards dictatorship. It is this notion of the state that is considered to be the fundamental concept of Gaullist discourse, both during de Gaulle's presidency and thereafter. An institutional system based on this overarching idea gave rise to a unique type of parliamentary regime.

The constitutional pragmatism of de Gaulle was founded on two major streams: the representative stream and the democratic stream. The first one was characterised by a strong executive power, a more rationalised parliamentary regime, and the resort to the referendum; while the latter, which conferred a deeper significance to the representative system, was based upon direct modes of expression with regard to sovereignty.[20] Article 3(1) of the 1958 Constitution most reflects this dual nature of the regime: "National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum."

The elaboration of the Fifth Republic was thus inspired by two fundamental principles that were first expressed by de Gaulle

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executive power must [therefore] proceed from the head of state, placed above parties, elected by a college that encompasses the Parliament but that is much larger than it and made up so that he can be the President of the French Union as well as that of the Republic. It behoves the head of state to pay attention to the general interest when it comes to choosing men with the prevailing orientation of the Parliament. The mission is his to appoint ministers and, first of all, obviously, the Prime Minister, who will conduct policies and lead the work of the government. The head of state's is the function of enabling laws and issuing decrees, because the former and the latter involve citizens towards the state. His is the task of presiding over cabinet meetings and exerting that influence of the continuity from which a nation cannot be deprived. His is the ability of serving as a referee above political contingencies, either ordinarily in attending cabinet meetings, or, in moments of serious confusion, in inviting citizens to express their sovereign decision in elections. His is the duty of being the warrant of national independence and of treaties concluded by France, should the fatherland ever be endangered."

[19] See V. Alibert-Fabre, '*La pensée constitutionnelle du général de Gaulle à « l'épreuve des circonstances »*' (1990) ***Revue française de science politique*** 40(5): pp.699-713.

[20] Ibid: p.710.

during the Bayeux speeches of 16th June 1946.[21] These principles were the separation of powers and the balance of powers. Reiterated on several occasions, including during his declaration to the media on 27th August and his Epinal speech on 29th September, these two principles were the starting point of the General's vision for France; a vision in which a rigorous separation and a strong balance of the three traditional powers, the legislature, the executive, and the judiciary, were to prevail. For de Gaulle, the initial aim was to return its internal sovereignty to the nation by providing it with the necessary tools and mechanisms to efficiently participate in political life, such as the possibility to dissolve the Assembly, the use of referendums, and implemented in 1962, the election of the head of state by direct universal suffrage. A complementary objective was to guarantee the sustainability of this new institutional balance through the creation of a Constitutional Council in order to avoid the instabilities of the past. For De Gaulle, legitimacy implied only one prerequisite: the need to ensure "the utmost interest of the country."[22]

In search of a lost legitimacy, the constitution of the Fifth Republic was therefore to reflect a philosophy and an institutional outline that were debated even prior to the establishment of the Fourth Republic. It is based upon the said principles that the then Minister of Justice, Michel Debré, began the drafting of the new constitution. This led many political scientists to believe that the constitution of 1958 was, for the most part, based on the Bayeux Constitution and that it was, as a result, drafted to match the personal requirements of the General. However, Debré insisted throughout his interventions that this was not a personal constitution which embodied the vision of de Gaulle alone. Debré, a strong liberal, had himself influenced its preparation in various ways so as to make it more conducive to values of freedom that were similar to those found in the ideologies of Montesquieu, Constant, or even Prévost-Paradol. René Capitant, another exceptional jurist of that time, also influenced the constitution at

[21] After the Appeal of 18th June 1940, these speeches were some of the most important speeches of General de Gaulle. The place and time were also symbolic as Bayeux was the first town to be liberated by the Allies during World War II.
[22] See Charles de Gaulle's Address in Bayeux (Normandy), 16th June 1946.

two major levels by making sure that the logic of the parliamentary regime was maintained, and most importantly, by restoring the referendum process. Moreover, State Ministers such as Guy Mollet, Pflimlin, Louis Jacquinot, and Félix Houphoüet-Boigny played a major role, for instance, in regulating the mechanism pertaining to the motion of censure. As such, the preparation of the 1958 Constitution reflects a compromise between the ideas of de Gaulle, Debré, and the parliamentarians.

But most importantly, according to Michel Debré, the real ambition of this new constitution was to correct the shortcomings of the republican institutions that existed since the Third Republic.[23] The main concern was therefore the need to overcome this unresolved *immobilisme*, which characterised the Fourth Republic's discredited *régime des partis*. In 1978, expressing his thoughts on the *raison d'être* and the evolution of the constitution of 1958, Debré wrote,

> "The principal merit of the Fifth Republic is that it restored to the French people the freedom to determine their own destiny; never had France voted so heavily and, what is more important, never had the French people turned out in such numbers and in such freedom to cast their votes. May their continued vigilance ensure that they do not lose what they owe to the tragic circumstances that gave one man, the General de Gaulle, a personal legitimacy which, as a good republican, he used to restore legitimacy to the Republic. May those who lead, educate or inform France play neither with the moral principles of society, nor with the public interest, nor with national sovereignty!"[24]

[23] See M. Debré, '*La Constitution de 1958: sa raison d'être, son évolution*' (1978) ***Revue française de science politique*** 28(5): p.827.
[24] Ibid.

The Major Concepts Developed in the Constitution of 1958

Subsequent to the development of this very singular vision of the French state, major concepts were revisited in the 1958 Constitution: the concept of the state, the nation, and the republic. This was mostly due to the perception of de Gaulle who considered that the notions of the state and of the nation represented the two indispensable concepts that were instrumental for the survival of the Republic. This mind-set was best illustrated by Debré: "They should now take care not to lose what they owe to tragic circumstances, which established a personal legitimacy for one man, General de Gaulle, which he, a good republican, used to restore the legitimacy of the Republic".[25]

In the eighteenth century, the Enlightenment philosophy and the well-known social contract theories developed by Jean-Jacques Rousseau confirmed the theoretical demarcations of the state. Similarly, as a historical and political reality, the nation became since the French Revolution, a legal concept of its own. According to Article 3 of the Declaration of Human and Civic Rights of 26th August 1789, "The principle of any sovereignty lies primarily in the nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it." Under this principle, the nation became the source of various powers and replaced the divine law that was once used to legitimise monarchy. Eventually, it modified the conception of the state by subjecting it to the principle of democracy. Today, both the state and the nation appear as two realities that are closely linked to one another which, during the nineteenth century, resulted in the emergence of a new concept: the concept of the state-nation. According to Ulla Holm, following the 1789 revolution, the nation was elevated to the condition of statehood, to the point that "… the nation became a state and the state became the embodiment of the nation. The two concepts became totally fused." In 1988, the then Socialist Minister of Defence, Jean-Pierre Chevènement wrote,

[25] Ibid: p.14.

> "The revolution, and the republic which grew out of 1789, shed light upon the French concept of the nation. This is a political notion because the nation perceives of itself as a body of citizens. The concept of the nation is based on the idea of the social contract between the individual citizen and the state-nation, where every citizen is a part of a whole in a universal perspective. […] A nation that bases its existence on a contractual and universal concept is a political nation. Only the political nation is able to create the political identity of one people thus preventing the interests of the individual from controlling society. Without a common will, there is no nation. Without a voluntary contract, there is no nation."

Within the 1958 Constitution, these concepts form a triptych that is intrinsically linked to President of the Republic who represents the nation but also embodies the authority of the state by ensuring its continuity, as well as the proper functioning of the public authorities (Article 5). The President is in the 1958 text what he was intended to be in the Bayeux speeches: the personification of the nation.

The Redistribution of Powers among the Institutions of the Fifth Republic

Often referred to as a 'semi-presidential'[26] or a 'dyadic' system due to its double executive structure, the institutions of the French Fifth Republic borrow classical features from both the parliamentary and the presidential systems. In congruence with the French republican tradition, the system was however originally conceived to function as a parliamentary regime.[27] As analysed further below, it is only after the 1962 presidential election referendum that the regime developed a more hybrid nature, which makes it today a unique political regime. In fact,

[26] For more details, see E. Veser, '*Semi-Presidentialism – Duverger's Concept – A New Political System Model*' (1998) ***European Journal of Political Research***, 34(2): pp.201-224.

[27] Article 50 of the constitution clearly establishes the principle according to which the government is responsible to the National Assembly.

this institutional 'mutation' marked the starting point of the political dynamic of the Fifth Republic. Thus, the current system cannot be entirely compared to a presidential regime, which would imply, as in the case of the United States, a strict separation of powers between the President and the Parliament.[28] Similarly, it cannot be compared to a traditional parliamentary regime, as the executive is a direct product of the people's will. This institutional innovation was mainly aimed at reversing the balance of power hitherto favourable to the Parliament.

Thus, based on the principles enunciated in the constitutional law of 1958, the constitution of the Fifth Republic operated a redistribution (or separation) of powers, which was fundamental in de Gaulle's mind, by essentially focusing on three dimensions: a drastic reinforcement of both branches of the executive powers, the radical rationalisation of the legislative power, and the submission of the political power to the control of a judge. Developed by Locke and later on by Montesquieu in his well-known work, *L'Esprit des Lois* (The Spirit of the Laws), the principle of the separation of powers or 'trias politica' is meant to limit the arbitrary exercise of power and to prevent abuses related to the exercise of sovereignty. Even though the concept is today invoked in many democratic regimes, it took an even more singular meaning in France where the Constitutional Council itself, following its January 1987 decision, referred to it as 'the French conception of the separation of powers.' This conception is based on an interpretation of the Act of August 1790, which is itself based on an institutional practice dating back to the French Revolution. The originality of the French conception is essentially due to the limitation of the attributes of the judiciary in relation to public authority. Therefore, its association with the existence of a duality of jurisdictions enables it to distinguish itself from the classical theory.

As a matter of fact, the Gaullist constitutional perspective of power reconfigured altogether the political institutions of France. The recent evolution of the said institutions, which goes beyond

[28] In the French system, the president can dissolve the National Assembly and the deputies can overthrow the government chosen by the president (Articles 20, 49 and 50 of the constitution).

the transformations of the constitution itself, demonstrates their ability to constantly adapt to diverse political contexts. This remarkable adaptability of the French political system enabled the emergence of the main institutions of the Fifth Republic, which are the Head of State, the Government, the Parliament, and the Constitutional Council. This eventually led many scholars to rethink the legal framework of the French political power.

The Main Institutions of the Fifth Republic

The ambivalence of the French political system was institutionalised in the (unequal) bicephalic quality of its executive branch comprising of a President and a Prime Minister. Within this atypical system, the President of the Republic occupies, since the referendum of 1962, a predominant position that derives from the popular legitimacy he receives from his election by direct universal suffrage (Article 6). Elected by a majority of votes, he represents an incomparable political power that makes him the custodian of the national sovereignty retained by the people.[29] Although this is today considered to be consubstantial to the Fifth Republic, in 1962 it represented an important constitutional shift. As earlier mentioned, under both the Third and the Fourth Republics, power was almost entirely concentrated within the legislature while the head of state merely retained a symbolic authority. Many such as de Gaulle believed that the lack of a strong executive was one of the main causes for the failures of the preceding republics. It is in order to deal with the flaws of the previous Republics that the constitution of 1958 gave such substantial predominance to the head of state, who no longer plays the role of a simple figurehead in the French political system. In the words of General de Gaulle, the President's actions can no longer be limited 'to the inauguration of chrysanthemums.' As such, Article 5 of the constitution provides that "the President of the Republic shall see that the Constitution

[29] According to the implementation of the two-round electoral system (top two run-off), if a presidential candidate obtains an absolute majority, he is immediately elected. Otherwise a second round is required, involving only the two candidates who led in the first round. This actually brings a structural change that goes beyond the traditional game of the political parties by putting in place a configuration which is more favourable to bipolarisation.

is observed. By his arbitration, he ensures the proper functioning of the public authorities and continuity of the State. He is the guarantor of national independence, territorial integrity and observance of treaties."

Representing the main pillar of the institutions, the President of the Fifth Republic was in 1958 provided with numerous individual powers which require no counter-signature (Article 19). He has, for instance, the authority to appoint the Prime Minister and can terminate his period of office (Article 8 (1)). According to Article 12, he may also, after consultation with the Prime Minister and the presidents of the two assemblies, declare the National Assembly dissolved and may decide to speak before both houses of parliament convened in congress (Article 18). [30] The constitution of 1958 also confers on the President two powers that are unusual within the French republican tradition: the recourse to a referendum and the use of exceptional powers in times of crises. Consequently, the President can submit to referendum certain bills dealing with the organisation of public authority, with reforms concerning national economic, social, or environmental policy, or with public services associated with such policies (Article 11). However, his most important prerogatives appear during times of crises where he has recourse to emergency powers of public safety as per Article 16 of the constitution. Despite certain limitations, [31] this provision represents one of the most controversial points of the 1958 Constitution. If implemented, during a state of emergency the distribution of powers provided for by the constitution is suspended and the President assumes full power. This was somewhat restricted by the constitutional revision of July 2008, whereby after thirty days of a state of

[30] Former President, Nicolas Sarkozy, used this right for the first time in June 2009. Article 18 enables an accentuation of the role of the President who does not put his political responsibility to risk when presenting his political programme to parliamentarians in place of the Prime Minister.

[31] For the President to have recourse to the emergency powers of Article 16, two conditions must be fulfilled simultaneously: there must be "a serious and immediate threat to institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments"; and the proper functioning of the constitutional public authorities must be interrupted. If he were to go beyond these limitations, the Parliament could convene itself as the High Court and dismiss him for a breach of his duties patently incompatible with his continuing in office.

emergency, it may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down concerning emergency powers in Article 16 are still met. In addition to the aforementioned powers, the President is also provided with a number of shared powers for which he must obtain the counter-signature of the Prime Minister and, in some specific cases, of the minister concerned. Also, his role as 'Head of the Armies' confers him the foremost position in regard to all defence-related matters (Article 15). Similarly, both the constitution and institutional practice recognise him with an eminent role in diplomacy, foreign policy being one of his reserved domains.

Given these distinctive features of the constitutional system, France is often defined by its presidential-executive style of leadership.[32] In order to further assert this supremacy, the head of state presides over the Council of Ministers (*Conseil des Ministres*). This solemn institution, which is specifically French, is the weekly closed-door collegial gathering of all the Ministers, at the *Salon Murat*. It is also the only government formation defined constitutionally and translates as such the organic autonomy of the government.[33] Since de Gaulle, it converted to a more efficient institution of government and became one of the means by which the presidential aspects of the Fifth Republic came to prevail over the parliamentary features of the regime. Hence, unlike in the Fourth Republic where he only played an honorary role, the President now convenes, approves the agenda of, and chairs the cabinet, and also signs the ordinances and decrees deliberated upon by the Ministers. All the important decisions taken by the government are therefore deliberated and announced at the said cabinet. Furthermore, according to Article 13, the President of the Republic makes appointments to the civil and military posts of the state. This power, which is shared with

[32] According to Bell and Gaffney, "Notions of an exclusive 'French exceptionalism' are debatable, but France does distinguish itself at least from comparable 'Western' regimes of representative government through the emphasis it places on presidential power (and in the right circumstances upon the enormous power and authority the President wields)".
[33] The 1958 Constitution referred to the cabinet in eight articles: 9, 13, 21, 36, 38, 39, 49, and 92.

the Prime Minister (Article 21), means that high-ranking civil servants, as well as heads of public establishments and companies, are appointed by the Cabinet of Ministers. Even though, in principle all points to the 'Republican Monarch' having the last say among his Ministers, in practice the work of the Cabinet is influenced to a large extent by the Prime Minister who presides and directs most of its preliminary meetings.[34] This is particularly the case under periods of *cohabitation* during which, as we will see, the Prime Minister plays a leading role in matters pertaining to the Cabinet.

The government which represents the other half of the twin-headed executive set up by the 1958 Constitution is considered to be the second most important body of the French Republic. Comprising of both the Prime Minister and an unlimited number of ministers appointment by the head of state (ministers of state, ministers, associate ministers, secretaries of state, and sometimes high commissioners), it is entrusted with 'determining and conducting the policy of the Nation' (Article 20). Among other specific powers, the constitution also allows the Parliament to delegate its legislative power to the government by means of ordinances, under certain conditions. In this institutional framework, the Prime Minister holds regulatory powers and plays a key role in the legislative procedure as he controls part of the parliamentary agenda, and is the only person in the executive branch to have the right to initiate bills. As for the members of the government, in accordance with the principle of the separation of powers, ministerial offices are considered incompatible with various other activities. For example, a government member may not simultaneously be a parliamentarian or hold a job as a public servant. Moreover, in case of the non-fulfilment of their responsibilities, each member of the government is politically liable for the actions of his or her administration. They are also criminally liable for all acts carried out in the exercise of their office.

The legislative power, on the other hand, belongs to the Parliament. In this regard, the current constitution remains faithful to the bicameral system inscribed in the French tradition

[34] See J.C. Zarka (2009) ***Institutions politiques françaises*** (Paris: Ellipses).

since the constitution of 1795. The Parliament is thus composed of two chambers: the National Assembly (577 deputies), which is elected by direct universal suffrage and represents the citizens; and the Senate (321 senators) which is elected by indirect universal suffrage and represents the territorial units of the Republic. The constant development of the monitoring activities concerning the executive has further characterised the role of these assemblies, which coexist although much broader powers than the Senate are held by the National Assembly.[35] Despite the temporary decline in the role of the parliamentary institutions, the recent modernisation reforms have enabled them to gradually regain quite an amount of their influence, as we will see in our final segment.

Last but not least, consisting of nine members, the Constitutional Council plays a particular role in the institutional structure of the Fifth Republic. The President of the Republic, the president of the National Assembly and the president of the Senate each appoint three members to the Council for a non-renewable term of nine years. Furthermore, former Presidents of the Republic are *ex officio* life members of the Council. The creation of this Council was meant to guarantee the respect for the new division of powers between the executive and the legislature. Another of its concerns was to prevent parliamentarians from getting round the constitutional provisions that govern them in order to regain the powers that were withdrawn from them by the new constitution. As a result, the Council symbolises a split with the parliamentarian tradition that reserved to the assemblies the sovereign power of elaborating the regulations. Despite having played a very limited role during the first years of its creation, this collegial body exercises its jurisdictional authority both in matters

[35] For e.g., it alone can call the government to account by refusing to grant it its confidence or by passing a censure motion. Following the same logic, only the National Assembly can be dissolved by the President of the Republic). Furthermore, in the case of disagreement with the Senate, the government can decide to grant the National Assembly 'the final say' in the legislative procedure (except for constitutional acts and institutional acts concerning the Senate). Also, the constitution provides the National Assembly with a more important role in the examination of the finance bill and the social security financing bill. However, unlike the National Assembly, the Senate is characterised by its permanence, as it cannot be dissolved.

concerning the monitoring of the constitutionality of the laws prior to their promulgation, as well as in the area of electoral litigation. It is also interesting to note that, traditionally, France has been averse to such judicial review of legislation.[36] For some, these peculiarities indicate a certain continuity with the Jacobin tradition. Yet, today, the evolution of the constitutional jurisprudence testifies to the increasing political role of the judge. This new legislative reality represents a change in paradigm and marks as such an innovation in France's constitutional history and institutional traditions.

The Cohabitation: A Unique Variable-Geometry System

This delicate institutional balance had the potential to crumble whenever the citizens decided to penalise the executive during the election process. In May 1981, following the weakening of the Right and the decline of the French Communist Party (PCF), François Mitterrand became the first political figure from the Left to be elected as President under the Fifth Republic. This represented the first alternation in power by the Left since de Gaulle, and a wave of major reforms meant to transform French society followed, such as the abolition of the death penalty, the legalisation of private radios, and the increase of the minimum wage. Despite these measures, the economic instability continued to grow within the Hexagon and reforms were reduced to a policy of austerity. Combined with the rise of unemployment rates, this caused the defeat of the outgoing majority during the legislative elections of 1986.

As a result, in March 1986, for the first time in the history of the Fifth Republic, the presidential majority and the parliamentary majority were no longer consistent.[37] A unique institutional scenario began where the Socialist President, François Mitterrand and the Centre-right Gaullist leader, Jacques Chirac, were compelled to share power, calling into question the traditional

[36] See M. Troper, '*Judicial Power and Democracy*' (2007) ***European Journal of Legal Studies***: p.21.
[37] For further details, see: http://www.ladocumentationfrancaise.fr/dossiers/d000132-la-cohabitation-dans-la-vie-politique-francaise/introduction (accessed 24th December 2014).

bipolarisation of the French political life. According to Knapp and Wright,

> "[…] there is no concealing the fact that when the parliamentary majority is opposed to the president, a sizeable part of the power within the executive tandem crosses the Seine from the Elysée to Matignon."[38]

Known as the 'cohabitation' or 'divided government', this scenario is understood as the coexistence between a head of the state (elected by direct universal suffrage) and an antagonist parliamentary majority.[39] In such a context, an opposition party or coalition of opposition parties controls the legislature. Consequently, the institutional position of the president is weakened and his traditional domination of public approval is inverted, leading thus to a new reading of the constitution. Envisaged by de Gaulle prior to the legislative elections of 1967, the diarchy of the executive power was not without consequences as it systematically caused a temporary weakening of the presidential office in favour of the Prime Minister.

During cohabitation, the president loses certain of his prerogatives. Though he still has the power to appoint his Prime Minister as per Article 8 of the 1958 Constitution,[40] the president must imperatively choose him from within the parliamentary majority. Else, the contrary may result in the vote of a motion of censure against the newly elected government. Moreover, during such period, the president loses all power over the composition of the government team, with the non-negligible exception of naming both the foreign minister and the defence minister due to

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[38] See A. Knapp & V. Wright (Eds.) (2006) ***The Government and Politics of France*** (New York: Routledge).

[39] M.A. Cohendet, *L'épreuve de la cohabitation* (1991) (Université de Lyon: Ph.D. Dissertation); also see M.A. Cohendet (1993) ***La cohabitation, leçons d'une expérience*** (Paris: PUF); M.A. Cohendet (2002) ***Le Président de la République*** (Paris: Dalloz); M.A. Cohendet (2006) ***Droit constitutionnel***, (Paris: Montchrestien).

[40] The 1958 Constitution: Article 8: "The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government. On the recommendation of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments."

his *reserved domain*[41] in these particular areas. Thus, practice has shown that he has, at the very most, a right of veto for certain 'sovereign' portfolios. In the field of home affairs, the influence of the head of state is considerably reduced and it is only in the field of foreign policy, an area in which the constitution expressly recognises his personal powers, that the he keeps most of his prerogatives.

However, according to Cohendet, the notion of cohabitation did not call into question the political regime of the Fifth Republic.[42] Though not devoid of disadvantages, the cohabitation took place without causing any serious political crisis. In fact, it revealed its parliamentary nature by supporting a return to the written constitutional norm.

The situation, which is a peculiar French arrangement with no equivalent elsewhere, has occurred thrice. Hence, a situation which once was thought to be exceptional became common due to the non-coinciding electoral terms (parliamentary and presidential). The first two cohabitations (1986, 1993[43]) occurred at regularly scheduled legislative elections. The third, which took place in 1997, was the unexpected result of President Chirac's decision to dissolve the National Assembly prematurely.[44] In order to comply with the will of the people and avoid an eventual institutional blockade, both President Mitterrand and President Chirac played the game of cohabitation by naming a Prime Minister who was from an opposition party.

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[41] Both Article 14 and 15 of 1958 Constitution refer to the so-called presidential 'reserved domain': prerogatives in which the president has a determining power.
[42] M.A. Cohendet (2005) ***The French Cohabitation: A Useful Experiment*** (Academi Sinica: Research Centre for Humanities & Social Sciences).
[43] Known as the 'velvet cohabitation', this second cohabitation was much more consensual than the first one. During this period, there were no real issues between President Mitterrand and Prime Minister Balladur.
[44] June 1997 marked the beginning of the longest and most unexpected cohabitation. The Left having won the legislative elections, President Chirac was compelled to name Lionel Jospin, his opponent in the presidential elections of 1995, as Prime Minister. Jospin's government gathered for the first time a 'Plural Left', a coalition comprising of the Socialist Party, the Greens, and the French Communist Party.

Yet for some, this situation remained an anomaly of the Fifth Republic that made it difficult to conduct a proper policy. Moreover, it presented a risk of weakening France on the international platform in case of a disagreement between the two heads of the executive. To avoid the recurrence of such a detrimental situation, the *quinquennat* was introduced, with some reticence, by President Chirac following the constitutional referendum of October 2000, which gathered 73.21 per cent of votes. This referendum sought to reduce the risks of cohabitation by bringing down the presidential term to five years instead of the seven years as it used to be under the constitutions of 1875, 1946, and 1958.[45] Following this referendum, the legislature also adopted the organic law of May 2001, amending the expiration date of the powers of the National Assembly, so that the legislative election of 2002 took place in June, following the presidential elections that were held at the end of April the same year. Both these reforms limited the risk of cohabitation by providing a nearly simultaneous renewal of the presidential term and the parliamentary majority.

This revision to the electoral timetable was justified by the need to avoid the presidential elections becoming secondary to the legislative elections of which the main function remains the designation of a majority that reflects the views of the head of state. Since 2000, both the presidential elections and the legislative elections are now taking place within a few weeks. This constitutional reform however does not exclude the possibility of cohabitation (e.g., in case of resignation or death of the President, or in case of dissolution of the National Assembly).[46] Nevertheless, up to now, this reform decidedly strengthened the role of the President who now benefits from a majority at the National Assembly throughout the duration of his mandate, which consequently weakens the role of the Prime Minister.

Today, the constitutional doctrine divides itself between those who see it as a return to the letter of the constitution and those

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[45] See: http://www.larousse.fr/encyclopedie/divers/V_e_R%C3%A9publique/140715 (24th December 2014).

[46] See http://www.vie-publique.fr/decouverte-institutions/institutions/veme-republique/transformations/quinquennat.html (24th December 2014).

who consider that it paradoxically reinforces presidentialism. But in practice, cohabitation gave rise to a *renaissance* of the parliamentary culture by placing the support of the assemblies at the centre of the political game.[47] For Cohendet, cohabitation revealed the parliamentary nature of the Fifth Republic by supporting a return to the written constitutional norm. Overall, cohabitation reminds us of the hybrid nature of the Fifth Republic which is, as earlier mentioned, neither completely presidential, nor completely parliamentary. Moreover, it is the only time during which the head of state cannot freely exercise his role of a 'Republican Monarch.'

The French President, a Republican Monarch

The French Republic, and mostly the Fifth Republic, is marked by monarchical traditions that are best illustrated by Maurice Duverger in his (provocative) expression: '*monarque républicain*'[48] (or republican monarch).[49] As Duverger put it, "the French republican monarch might be seen as a Protean King, changing shape and power according to the nature of parliamentary forces."[50] This expression of the nature of the institution, which has been widely quoted over the years, characterised the new powers of the head of state set up by de Gaulle at the beginning of the Fifth Republic. The stature of the President and the political authority of de Gaulle reduced the role of the Prime Minister, leading Duverger to openly question the French diarchy with his famous remark on de Gaulle's then Prime Minister, Michel Debré: "*M. Debré existe-t'il?*" ('Mr Debré, does he exist?').[51] This republican monarchy is thus founded on the triptych of a President who embodies the nation and conducts its politics, a Prime Minister who implements the presidential preferences through his government, and a party or majoritarian coalition that adopts through the Parliament, the laws and budgets

[47] See Ségur (2014).
[48] See M. Duverger (1974) ***La Monarchie Républicaine*** (Paris: Robert Laffont).
[49] This was echoed by French Journalist, Alain Duhamel, who in 1980 wrote that 'France is governed by an elected sovereign, a republican monarch, almost an enlightened despot'.
[50] Duverger (1974): p.188.
[51] M. Duverger, '*M. Debré existe-t-il?*' (1959) ***La nef*** 30: pp.3-8.

requested by the President.[52] It does not contemplate any restraint of the President.

By suggesting a new balance of powers to define the Fifth Republic and establishing the head of state as the 'keystone' of all institutions,[53] General de Gaulle announced in September 1958 the end of a well-rooted French tradition that a strong executive power is incompatible with the notion of the Republic. De Gaulle's governing methods, which his opponents referred to as 'personal powers', were well consistent with the image of the republican monarch. In fact, from a 'Rousseauist' perspective, de Gaulle himself considered his regime to be a 'popular monarchy'. Although in his case, such a characterisation seemed conceivable due to his historical role and 'Bonapartist' prestige, it also instigated many concerns as to whether or not this image would be sustained following his mandate. Against all odds, this republican monarchy did not only survive its founder, but it also consolidated itself over the years by seeing its scope further extended.[54] The sustainability of such a situation was only made possible due to the anticipative measures of the founder and leader of Free France. De Gaulle knew that his own legitimacy came from his historic popularity. He believed that, without this legitimacy, it was very improbable that his predecessors will possess the required level of authority to govern the country. The risk was that, once he left, the Fifth Republic would be no more. It is to avoid such a potentiality that he decided to further institutionalise the system.

The occasion presented itself in March 1962 with the end of the war in Algeria. France was in pain and reconciliation was

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[52] S. Berstein & M. Winock (Eds.) (2008) ***La République recommence*** (Paris: Seuil).

[53] The 1958 Constitution places the President of the Republic in the highest position and makes him, in the words of Michel Debré, the 'keystone' of the system. Indeed, Article 5 of the constitution provides that "the President of the Republic shall see that the Constitution is observed. By his arbitration, he ensures the proper functioning of the public authorities and continuity of the State. He is the guarantor of national independence, territorial integrity and observance of treaties."

[54] See S. Berstein, '*Une monarchie républicaine?*' in J. Gaarrigues, S. Guillaume & J.F. Sirinelli (Eds.) (2010) ***Comprendre la Ve République*** (Paris: PUF).

unfortunately not immediate. Though the war was over, the *Organisation de l'Armée Secrète* (O.A.S., or 'Secret Armed Organisation') continued to perpetrate attacks in France and even led several assassination attempts on the General. The best known was the attempt of the *Petit Clamart*, planned by Colonel Bastien-Thiry. De Gaulle used the popular emotion stirred up by this failed attempt to announce, three weeks later, a referendum on the election of the President of the Republic at the direct universal suffrage. Through this constitutional reform, de Gaulle intended to guarantee a new source of legitimacy for himself and his successors. The referendum took place in October 1962 and was approved by 62.5 per cent of the votes. The first presidential elections under the direct universal suffrage took place three years later in 1965. Since then, the President's strength has come from the fact that he is elected by direct universal suffrage,[55] which gave him a much stronger legitimacy when conducting the politics of the nation. From then on, the President became the authority that retains a capacity of command that is made undeniable due to his popular legitimacy. In a way, the Gaullist project of 1962 marks the coronation of this monarchical practice.[56]

Today, the President of the French Republic occupies a preeminent position which is in particular reflected by the priority of appearance attributed to him in the constitution. This was not the case in 1946 and it is therefore of symbolic importance. In the constitution of the Fourth Republic, the president only appeared in Title IV, whereas the Parliament appeared in Title II. In the current constitution, the head of state appears in Title II. As historian Samuel Berstein wrote, the very organisation of the 1958 Constitution's text reversed the existing hierarchy of powers.[57]

However, the presidential powers guaranteed by the constitution do not differ textually from the Third and Fourth Republics. The

[55] According to Article 7 of the constitution, "The President of the Republic shall be elected by an absolute majority of votes cast. If such a majority is not obtained on the first ballot, a second ballot shall take place on the fourteenth day thereafter."
[56] In order to further affirm this supremacy of the head of state, de Gaulle requested his then Prime Minister, Michel Debré, to resign in favour of Georges Pompidou.
[57] Berstein (2010): p.113.

president still ensures compliance with the constitution as per Article 5. The Copernican revolution of the 1958 Constitution resides elsewhere. The constitution provides the President with three significant tools meant to further assert his authority: the right to submit to referendum any Government Bill which deals with, or affects, the organisation of the public authorities (Article 11), the right to dissolve the National Assembly (Article 12), and the ability to exercise 'exceptional powers' (within the limitations of Article 16). According to Berstein, this presidential pre-eminence goes however beyond the constitution. The propensity to preserve and even stress the monarchical characterisation of the institutions of the Fifth Republic was sustained not only by Gaullist President, Georges Pompidou. Both President Giscard d'Estaing and President Mitterrand, who often criticised the way de Gaulle used his powers, used the logic of the republican monarchy in a similar manner, leading them, at times, to put aside the republican tradition. The periods of cohabitation were the only periods which put this notion into question as the President of the Republic was then required to share powers with his Prime Minister who was supported by the parliamentary majority. For some, the *quinquennat* however restored the republican monarchy; but only to a certain extent as the President is now in some ways devalued and only seen as the chief of a majority. Overall, this illustrates how the presidential elections remain the major political action provided by the institutions of the Fifth Republic.

The Major Amendments to the Constitution of the Fifth Republic

According to Martin Rogoff,[58] the constitutional evolution of France has proved remarkable in its ability to adapt. Whereas constitutional reforms were almost non-existent in the previous republics, the Fifth Republic testifies of a certain trivialisation of its procedure. Since its inception, the constitution of 1958 went through 24 amendments, 19 of which were adopted in the early

[58] See: http://www.juspoliticum.com/Fifty-years-of-constitutional,391.html ((24th December 2014).

90s. [59] Some of these reforms profoundly modified the constitutional text and had major repercussions on the institutional and political practice of the Fifth Republic. Others, which were more of a 'technical' nature, either to give effect to requirements arising from European Community law, [60] or adapted the constitution to the evolution of democratic practices and environmental protection.[61] While for Rogoff, these reforms were a necessary element of regime flexibility, for French constitutionalist, Bertrand Mathieu, the recent profusion of constitutional reforms poses a major risk of inconsistency and devaluation of the constitution.[62] His argument is further stressed by Philippe Ségur who believes that, although it is necessary to adapt the Fundamental Law to societal evolution, a constitution must preserve the rigidity that is consubstantial to it in a system of written law in order to deserve its status.[63]

The constitution of 1958 initially provided two procedures of reform. Former Article 85, which was only used once in June 1960, required the agreement of both the French Parliament and the Senate of the Community. Article 89 lays down the current

[59] It is also interesting to note that several projects of constitutional reform have failed over the years due to a lack of agreement between the three authorities (Executive, National Assembly, Senate), each having, at one time or another, the power to stop a procedure of revision. These projects included the introduction of the *quinquennat* in 1973, the enlargement of the referendum in 1984, the creation of a referral to the Constitutional Council by way of exception (1990 and 1993), a reform of the *Conseil Supérieur de la Magistrature* (2000), as well as the evolution of New Caledonia and French Polynesia (2000).
[60] European integration was the base for four constitutional amendments. The first two reforms date back to June 1992 and June 1999. They were made to allow the ratification of the Maastricht Treaty and the Amsterdam Treaty, respectively. The last two were to allow the ratification of the Treaty establishing a Constitution for Europe, which was ultimately rejected by France, and the ratification of the Treaty of Lisbon in December 1997.
[61] For instance, one may refer to the constitutional reform of July 1999 on parity of access to electoral mandates and elective functions. Another major reform was the constitutional law of March 2005, which raises the rules contained in the Charter for the Environment of 2004 to a constitutional rank.
[62] See B. Mathieu, '*Les révisions constitutionnelles sous la V°République. Les objectifs des auteurs, le jeu des acteurs*' in E. Brouillet & L. Massicotte (Eds.) (2011) ***Comment changer une constitution*** (Laval: PUL).
[63] Ségur (2014): p.46.

amending mechanism.[64] According to the said article, bills pertaining to constitutional reforms, whether they are government bills submitted by the President of the Republic upon a proposal of the Prime Minister, or bills originating in Parliament, must first be passed by the two assemblies on separate occasions but in identical terms. The usual prerogative of the National Assembly to have the final say in the case of a disagreement with the Senate does not apply to constitutional bills, which may, by decision of the President of the Republic, either be submitted to the two assemblies meeting together in Congress at Versailles (the bill is passed if accepted by three fifths of the votes cast), or put to a referendum if it was originally government-sponsored.[65] So far, the constitution has been modified on 22 occasions following this procedure (21 passed by the Congress and only 1 by referendum).

A third procedure was however used with much controversy in the early 1960s. According to Article 11, the President of the Republic is able to submit a bill, in certain limited cases, through the recourse to a referendum. Using an extensive interpretation of this procedure, de Gaulle introduced, in October 1962, the election of the President of the Republic by direct universal suffrage. This historic referendum was approved massively by the people, despite the *Cartel des non*, which failed to mobilise an effective opposition. Furthermore, it marked a major clash between the new and the old republics, which led to the bipolarisation of French political life, and ultimately to a growing presidentialisation of the Fifth Republic, as envisaged by the General in Bayeux. Both Article 6 and 7 of the constitution were subsequently modified. Many of the French constitutionalists considered the use of Article 11 to be a major procedural shift, which gave rise to several disagreements in regard to its legality. This contested practice has however not been used since the failure of the referendum of April 1969 concerning the regionalisation and the reform of the Senate, after which President de Gaulle resigned. Hence, despite Mitterrand's

[64] The full article is available in the text of the French constitution, which is available in English in the International Constitutional Law website <http://www.servat.unibe.ch/law/icl/fr00000_.html> (accessed 25th December 2014).
[65]< http://www.assemblee-nationale.fr/english/synthetic_files/synthetic.pdf> (accessed 24th December 2014).

subsequent statement which sought to legitimise the use of Article 11 as a means to amend the constitution in conjunction with Article 89,[66] the latter remains the normal amendment procedure.

Profusely used in the last two decades, Article 89 enabled the implementation of major reforms which, as previously stated, had tremendous repercussions on the institutional and political practices of the Fifth Republic. For instance, the reform of October 2000, which finally introduced the presidential *quinquennat*, was debated for over 27 years following Pompidou's unsuccessful initiative in 1973. A single parliamentary session was also introduced in 1995.

Yet, the constitutional bill of 23rd July 2008 is perhaps the most substantial of all. Although it was adopted by an extremely narrow margin, the reform of 2008 affected all branches of government and was therefore known to be "the most important revision to which the Fundamental Law has been submitted."[67] Hence, known to be a large-scale reform, it aimed to restore balance to the functioning of the institutions in favour of the Parliament and strengthen the protection of the rights of citizens. Over the 89 articles of the constitution of 1958 – nearly half – were amended following its adoption. This constitutional reform was introduced by newly elected President Sarkozy, who, inspired by the attempted reforms of 1990, established a commission of thirteen members, chaired by former Prime Minister Edouard Balladur, to make proposals for the modernisation and restructuring of the institutions of the Fifth Republic.[68] The Balladur Report discussed three major points: a better controlled executive power, a strengthened Parliament, and new rights for citizens.[69] The introduction of a new form of *a posteriori* constitutional review of legislation (*contrôle de constitutionalité*) was also among the most significant provisions of the reform of 2008. Among its other measures were the reduction of the presidential term limit to two consecutive terms, the ability for elected

[66] See interview of F. Mitterrand (1988) ***Pouvoirs*** 45: p.137.
[67] P. Roger, '*La derniére mue?*' ***Le Monde***, 21st May 2008.
[68] Introduced by decree No. 2007-1108 of 18th July 2007.
[69] See ***Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Ve République*** (2008) présidé par Édouard Balladur, *Une Ve République plus démocratique*.

ministers to automatically recover their seat before entering the government, and the introduction of a referendum by popular or parliamentary initiative. The reform of 2008 was implemented gradually and generated a new balance of powers that strengthened the prerogatives of the Parliament. According to Rogoff;

> "Constitutional developments in France since 1958 provide an excellent example of the progressive entrenchment of constitutionalism in a nation that had long been hostile to the 'government of judges' by a combination of political and judicial techniques that assure continuity and legitimacy to fundamental changes in political and legal structures and values."[70]

Conclusion

From an institutional perspective, the creation of the French Fifth Republic, known as 'de Gaulle's Republic', was of great novelty. Its study provides a test bed of theories combining both the political art and the constitutional art. Even though similar systems based on semi-presidential government existed in the past, France remains today a major reference in comparative politics. More importantly, the Fifth Republic has proven to be one of the most stable political systems so far experienced in France, especially due to the stability of the executive, which enabled it to overcome various internal and external crises without the continuity of the state being undermined. Hence, the fate of the Fifth Republic does not seem to be sealed in its constitution. Instead it mostly seems to depend on France's socio-political context and the will of its leaders. As de Gaulle himself said, "For glory gives herself only to those who have always dreamed of her."

[70] M.A. Rogoff, '*Fifty Years of Constitutional Evolution in France: the 2008 Amendments and Beyond*' (2011) ***Jus Politicum*** 6: p.2.

22

Centralising Authority: Comparing Executive Power in India and Sri Lanka

Rehan Abeyratne

Introduction

On 4th November 1948, Dr B.R. Ambedkar, Chairman of the Drafting Committee of India's Constituent Assembly, presented a Draft Constitution to the entire Assembly. In a brilliant speech that set forth the fundamentals of constitutional government, Ambedkar noted that it was particularly difficult to design the executive. He said, "A democratic executive must satisfy two conditions - (1) It must be a stable executive and (2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree. You can have a system which can give you more stability but less responsibility or you can have a system which gives you more responsibility but less stability."[1]

Following independence from the British, India and Sri Lanka, like all former colonies, faced this quandary. Should they adopt the more responsible British parliamentary executive, or the more stable American presidential executive? Initially, they followed a similar path. Both countries instituted a bi-cameral legislature, with a directly elected lower house and a counter-majoritarian upper house selected via indirect elections and appointments. They vested the executive power in a largely ceremonial head of state who would act on the advice of a cabinet drawn from ministers in the legislature. Thus, India and Sri Lanka essentially adopted the British Westminster system of government, with slight adaptions peculiar to their post-colonial circumstances.[2]

When Sri Lanka adopted its second republican constitution in 1978, it diverged from its large neighbour across the Palk Strait. Following years of sluggish economic growth and fractured coalition governments, Sri Lanka opted for greater executive stability. It adopted a presidential system modelled on the French Fifth Republic, with a president who served not only as head of state, but also head of government, who would be 'responsible'

[1] Speech by B.R. Ambedkar, 4th November 1948, available at: http://parliamentofindia.nic.in/ls/debates/vol7p1m.htm (accessed 29th December 2014).
[2] H. Kumarasingham (2013) ***A Political Legacy of the British Empire*** (London: I.B. Tauris): pp.6-9.

but not 'answerable' to Parliament. [3] It therefore ended Westminster parliamentary government in Sri Lanka and concentrated power in a single individual, the new executive president.

The 1978 Constitution is now independent Sri Lanka's most enduring. While it was intended to promote greater stability and direct accountability to the people, it has, in practice, led towards authoritarianism and eroded the rule of law. As we reflect over 35 years of presidentialism in Sri Lanka, it is worth pondering a hypothetical question: how would Sri Lanka have fared over these years had it retained the Westminster parliamentary system? In this chapter, I address this question through a comparative lens. By surveying the history of executive power in India, which has stood by parliamentary government throughout its independent history, and contrasting it with Sri Lanka, this chapter seeks to draw some preliminary lessons about the nature of executive power in the subcontinent.

This chapter has five parts. Parts II and III detail the Indian constitutional experience with executive power, beginning with the Constituent Assembly Debates, through Indira Gandhi's administration and the Emergency, up to the present day. Part IV compares this experience to that of Sri Lanka, focusing in particular on the processes of constitutional formation and on how executive power has been shaped by common challenges, such as economic development. Part V offers some concluding thoughts. In short, the chapter argues, *pace* Ambedkar, that the choice of executive, whether more responsible or stable, has less bearing on executive power than the degree to which democratic government, and its conventions, are constitutionally entrenched.

[3] A.J. Wilson (1980) ***The Gaullist System in Asia*** (London: Macmillan): pp.43-44.

Designing the Indian Executive

A. The Constituent Assembly Debates

The drafting of the Indian Constitution began in December 1946 – eight months prior to independence – with the formation of a Constituent Assembly. The members of the Constituent Assembly were elected to their positions from across India. The Indian National Congress dominated the elections, controlling 82 per cent of the Assembly's seats after Partition, when the Muslim League's representation declined significantly. The fact that one party dominated the Assembly did not mean that dissent was silenced or that only a few select leaders drafted the constitution. The Congress was a large and diverse party that included representatives from all regions and religions, who voiced a wide range of views on social, economic, and political matters.[4] Moreover, the Indian National Congress had developed out of the struggle for independence, which began several decades before the Constituent Assembly was formed. The Congress had long demanded greater rights for all Indian citizens from the British Raj, which it set forth in various resolutions, including the Constitution of India Bill (1895), the Commonwealth of India Bill (1925), and the Karachi Resolution (1931).[5]

The animating feature of the Constituent Assembly was its desire to bring about a social revolution in India.[6] Jawaharlal Nehru, who would later become India's first Prime Minister, stated that the Assembly's first task was "to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself."[7] Speaking before the Assembly in 1949, Dr B.R. Ambedkar told Assembly Members not to be content with mere "political democracy", but to "make our political democracy a social democracy as well … In our social and economic life, we

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[4] G. Austin (1966) ***The Indian Constitution*** (New Delhi: OUP): p.9.
[5] M. Mate, '*Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*' (2010) ***San Diego Journal of International Law*** 12: p.175 at pp.224-225.
[6] Austin (1966): pp.26-27.
[7] J. Nehru (1948) ***The Unity of India: Collected Writings 1937-40*** (New Delhi: Nabu Press): p.11.

shall, by reason of our social and economic structure, continue to deny the principle of one man one value … we must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy."[8]

Despite these radical intentions, members of the Constituent Assembly (the 'framers') were conservative in their choice of government. This is likely due to the framers' educational and vocational backgrounds. While they represented India's religious, ethnic, and regional diversity, they were generally eminent, English-speaking men who had knowledge and experience of the British parliamentary system.[9] Thus, there was little discussion of indigenous forms of government – such as the village-level administration that Gandhi advocated – or more radical alternatives, such as a Soviet-style communist regime.

The framers widely agreed that India must be a representative democracy. But what form would this democracy take? Prominent jurist and scholar B.N. Rau, who served as constitutional advisor to the Drafting Committee of the Constituent Assembly, was tasked with presenting information to the framers about other constitutional systems. Rau circulated a questionnaire to the fifteen members of the Union Constitution Committee asking for their feedback on how the Indian central government should be designed. The questions concerned both form ("What should be the designation of the head of the Indian Union?") and substance ("What should be the functions of the President?").[10] Rau also supplemented each question with a description of how other countries have dealt with the particular issues raised.

On the question of executive power, Rau put forth a number of possibilities in the questionnaire. Aside from the British model, which he noted "is the one with which we are most familiar in India and its features are well known", Rau expounded on the

[8] Speech by B.R. Ambedkar, 25th November 1949 available at accessed: http://parliamentofindia.nic.in/ls/debates/vol11p11.htm (29th December 2014)
[9] Kumarasingham (2013): p.33.
[10] B.N. Rau (1960) ***India's Constitution in the Making*** (Bombay: Allied Publishers): pp.16-41.

features of three other systems: the American, the Swiss, and the Irish.[11] As he explained, the British and American executives – the Cabinet and President, respectively – are both directly elected and accountable to the people, but the British executive must resign if the legislature loses confidence, while the American executive has a fixed term. Meanwhile, the Swiss executive is elected by the legislature for a fixed term, but cannot be forced to resign during that term. The Irish Free State Constitution of 1922 adopted elements of both the British and Swiss systems: it created a British-style cabinet with additional ministers who held office for a full fixed term.

Rau received only five responses to his questionnaire from members of the Union Constitution Committee. All five supported the adoption of a parliamentary executive; that is, a constitutional head of state advised by a cabinet. This is eventually what the Drafting Committee would adopt. Drawing from the American model, the head of state would be called the 'President' and would be elected via an electoral college for a fixed five-year term.[12] The President would act on the advice of a 'Council of Ministers', or cabinet, drawn from members of the majority in Parliament.

When this proposal was placed before the whole Constituent Assembly, it drew concerns from minority groups, particularly the Muslim community. They feared that the pure majority rule contemplated by this system would marginalise or even completely exclude minority voices from government. Some Muslim leaders believed that an American-style presidential system would provide more protection to minorities. Referring to India's painful history of communal violence, K.S. Karimuddin asked:

> "What has happened in India? In all provinces there were acts of rioting, arson and murder and the ministers were not courageous enough to come forward and stop them

[11] ibid.: pp. 22-24.
[12] Unlike the American system, however, the Electoral College would comprise of members of the lower house of Parliament and the lower houses of the state legislatures.

> immediately, being afraid of their constituents. If you introduce non-parliamentary executive, the members of the executive would not be afraid because they are not liable to be removed by their supporters. Therefore in parliamentary executive the Government is naturally weak, and vacillating because the ministers have to depend for their continuance on communally minded supporters."[13]

Other Muslim leaders, however, advocated for the Swiss system. In their view, it would provide true democracy and avoid the 'tyranny of the majority' by allowing all groups to be represented.[14] The notion here was that the principal divisions in Indian society were based on religion and sectional interests (such as caste), not on political ideology. The Swiss system recognised these interests and ensured their participation through proportional representation; the British parliamentary system did not.

The Constituent Assembly rejected any form of proportional representation in Parliament, and likewise, rejected the idea of reserving seats in the Cabinet for minority groups.[15] Minority interests, though, continued to be championed by the Drafting Committee, headed by Dr. Ambedkar. Ambedkar, who is widely regarded today as the father of the Indian Constitution, was from a Dalit ('untouchable') community and rallied against the evils of the caste system throughout his political life. To reassure Muslims and other minorities that their interests would be represented in the executive, the Drafting Committee prepared an 'Instrument of Instructions' for the President as an amendment to the Draft Constitution. This would require the President to include among his Council of Ministers, "so far as practicable, members of important minority communities."[16] In a subsequent Instrument of Instructions, Ambedkar included a provision requiring the President to form an 'Advisory Board', comprised of at least

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[13] Statement of K.S. Karimuddin, Constituent Assembly Debates, 5th November 1948 available at: http://parliamentofindia.nic.in/ls/debates/vol7p2m.htm (accessed 29th December 2014).
[14] Austin (1966): p.157.
[15] Ibid: pp.156-157.
[16] Ibid.

fifteen members of both Houses of Parliament (and elected through proportional representation), that would advise him on appointments to the judiciary, Public Services Commission, Election Commission, and other bodies.[17] Along similar lines, B.N. Rau proposed a 'Council of State', which, like a Privy Council, would advise the President, if he so desires, on matters of national importance. While this proposal was not directly aimed at assuaging minority fears, it nonetheless envisioned a government with greater separation of powers, pitting a more powerful, independent, President against the Parliament.

In the end, the Constituent Assembly rejected all these proposals. Rau's Privy Council was opposed primarily on the grounds that it would lead to untrammelled, arbitrary executive power vested in the President. The two Instruments of Instructions were seen as less controversial, but were also were thought to be unnecessary. Ambedkar and the Drafting Committee eventually came around to the prevailing view among the framers that Westminster conventions should prevail. In other words, it was not necessary to set out "in detail in an article of the Constitution what the functions and incidence of responsible government would be."[18] This view rested on the very British assumption that a statesman-like President, advised by a Cabinet accountable to the people, would put country above sectarian interests and take minority perspectives into account when administering the government.

B. The Constitution and Early Presidential Practices

India adopted its Constitution in 1950 after more than three years of debate and deliberation in the Constituent Assembly. Unlike Sri Lanka's Soulbury Constitution, which followed the tradition of Westminster minimalism, the Indian Constitution is one of the longest in the world, comprising more than 300 articles and 12 schedules. Part V of the Constitution sets forth the structure of the central (Union) government, dedicating eighteen articles to detail the duties and responsibilities of the executive alone.

[17] Ibid: p.163.
[18] Kumarasingham (2013): p.37.

Thus, while the framers omitted the various Instruments of Instructions, they explicitly defined a number of executive powers. For instance, Article 53 vests the executive power of the Union in the President and gives him 'supreme command' of the Union Defence Forces. Article 72 grants the President authority to, *inter alia*, grant pardons and suspend or commute criminal sentences. Two other powers worth noting are not listed within the chapter on executive power. Article 123 permits the President to issue ordinances that have the force of law whenever he is "satisfied that circumstances exist which render it necessary for him to take immediate action." This is a broad power that can be exercised at any time, except when both Houses of Parliament are in session. A second substantial power conferred to the President in Part XVIII of the Constitution enables her to declare a state of emergency, which may result in the Union government taking over the administration of federal states, the suspension of fundamental rights, and the exercise of legislative powers by the President. The next section will return to these two powers to discuss how they have been implemented since the constitution came into force.

Of course, given that India adopted a parliamentary system of government, all the powers that are theoretically vested in the President are actually exercised by the cabinet. Article 74 established a 'Council of Ministers with the Prime Minister at the head to aid and advise the President.' On its face, this provision was ambiguous – it did not clarify whether the President is obliged to follow the advice of his ministers. Here, the framers relied on the Westminster tradition of leaving this to convention; it was widely accepted that the President would act only according to his cabinet's guidance, not his own judgment. Indeed, when a member of the Constituent Assembly asked if a President could be liable to impeachment if he does not act on the advice of his ministers, Ambedkar responded, "There is not the slightest doubt about it."[19]

India's first President, Rajendra Prasad, immediately challenged this conventional view. In fact, he had questioned it even before he took office as President. In 1948, just after the Draft

[19] Austin (1966): p.173.

Constitution had been published, Prasad wrote to B.N. Rau noting that he did not find a provision stating clearly that the President must follow the advice of his ministers. He specifically wanted to know whether Article 285 (1), which empowers the President to appoint the chairman of the Public Services Commission, allows for Presidential discretion.[20]

In 1951, Prasad raised this issue as President and it assumed much more than academic importance. He wrote to Prime Minister Nehru stating his intent to rely on his own judgment when approving of Parliamentary Bills or when returning Bills to Parliament for reconsideration. Prasad's motives were at least partly self-interested – as a conservative Hindu, he wished to withhold assent from the Hindu Code Bill, which was pending before Parliament and would modernise Hindu personal law.[21] Nehru referred Prasad's questions to Attorney General A.K. Ayaar for a legal opinion. Ayaar produced an opinion against Prasad, writing quite unequivocally that the Indian President is "analogous to the Constitutional monarch in England", meaning that the President was little more than a constitutional figurehead.[22]

But this view understates the President's powers. B.N. Rau, writing a few years later in *The Hindu*, detailed the arguments on both sides and concluded that it was a much more complex question with a more nuanced answer. He pointed out that unlike the British monarch, the Indian President is elected and is eligible for re-election. This means that he is responsible to his constituents and must have some freedom to act on his own, when, for instance, he believes his cabinet is advising him to act unconstitutionally.[23] Rau also showed that certain provisions of the constitution would be rendered meaningless if the President had no independent voice. Article 111 allows the President to withhold assent from any Bill, which then sends that Bill back to Parliament for reconsideration. Rau noted that it is very unlikely that cabinet members, who presumably support Bills passed by a

[20] Ibid: pp.168-169.
[21] Ibid: p.176; Kumarasingham (2013): p.79.
[22] Austin (1966): p.177.
[23] Rau (1960): p.377.

parliamentary majority from which the cabinet is drawn, would advise the President to return a Bill for reconsideration. He must therefore have some independent judgment in the matter. Summing up his article, Rau asked rhetorically whether the President under the Indian Constitution is reduced to a figurehead. His answer: "far from it."[24] While Rau conceded that the President must ultimately act on his cabinet's advice, he may still state all his objections and ask his ministers to reconsider any matter.

In the end, then, Prasad lost the constitutional battle and presidents ever since have exerted little influence on law-making and public policy.[25] Granville Austin, among others, has criticised Prasad's attempt to aggrandise the Presidency, accusing him of "endanger[ing] the Constitution in pursuit of his own point of view. But more surprising was the way he mis-read the Constitution…"[26] This position is too harsh on Prasad and too sanguine on the parliamentary-cabinet executive. Prasad clearly had a personal stake in this matter. However, he had first raised the question of presidential discretion in appointments prior to becoming President and, as Rau explained, he had valid arguments in favour of his position. As we will see, the concentration of executive power in the hands of the Prime Minister and a few others has not always served India well. An independent President may have provided a useful check on what would become an increasingly powerful and unaccountable parliamentary executive.

The Emergency, Ordinances and Executive Power in India Today

If Rajendra Prasad lost the constitutional battle over the presidency, then Jawaharlal Nehru was the clear victor. Nehru governed India as Prime Minister from 1947 until his death in 1964. With no serious challenge to his authority, Nehru fashioned

[24] Ibid: p.382.
[25] This issue was conclusively decided in 1977, when the 42nd Amendment to the Indian Constitution altered the language of Article 74 (2) to state that the President "shall…act in accordance" with the advice of his Council of Ministers.
[26] Austin (1966): p.176.

the Indian state in his own image over this period. Constitutional norms, including parliamentary democracy, were entrenched, and, as an ardent secularist, Nehru was able to steer India away from communalism and sectarian violence. India was therefore fortunate that Nehru was at the helm and entrusted with so much authority – his self-restraint and respect for democratic institutions are essentially all that prevented him from assuming dictatorial powers.

The only independent check on that authority was the Indian Supreme Court, which the framers designed to be a powerful institution largely insulated from political influence. Article 13 of the constitution declares that any law that violates fundamental rights is void. Article 32 empowers the Supreme Court to grant various writs (including habeas corpus, mandamus, and quo warranto) in order to enforce fundamental rights on behalf of Indian citizens. Read together, these provisions allow the court to hold both executive and legislative acts unconstitutional if they violate fundamental rights. Article 50 requires the state to 'take steps to separate the judiciary from the executive in the public services of the State', while Article 136 gives the court sole authority over its docket by empowering it to 'grant special leave to appeal from any judgment … made by any court or tribunal in the territory of India.' The power of judicial appointments is vested in the President under Article 124, but it also requires that the Chief Justice of India be consulted on all appointments other than his own.

A. Indira Gandhi and the Amendments Power

Despite this wide authority and independence, the Indian Supreme Court rarely struck down legislation or ordinances as unconstitutional in its early years. However, in a series of cases beginning in 1965, the court entwined itself in a protracted battle for supremacy with the executive.

The locus of this battle was the power to amend the constitution. Article 368 empowers Parliament to enact amendments if they are supported by a two-thirds majority in each house. In 1951, the Supreme Court in *Shankari Prasad v. Union of India* ruled that there

are no substantive limits on this amending power. Parliament could amend the constitution as it desired as long as it followed the procedural requirements set forth in Article 368.[27]

This judgment would be dramatically reversed in *Golaknath v. State of Punjab*.[28] This case concerned the 1953 Punjab Security of Land Tenures Act, which prevented landowners from bequeathing their property solely to their heirs – it required some of the land to be distributed to tenants, while the remainder would be 'surplus' to be claimed by the state.[29] The petitioners argued that this Act and three constitutional amendments violated certain fundamental rights under Chapter III of the Indian Constitution. Article 13 of the constitution provides, 'The State shall not make any law which takes away or abridges the rights conferred by [Chapter III].' While this provision clearly applies to laws enacted by Parliament or state governments, the issue before the Supreme Court was whether it could be extended to constitutional amendments.

An eleven-judge bench, by a narrow 6-5 margin, adopted the broader view of Article 13 and held that the First, Fourth and Seventeenth Amendments were unconstitutional. However, Justice Subba Rao's majority opinion was careful to limit the decision's scope. He made clear that Article 368 did not grant Parliament the power to amend the constitution, but simply set forth the procedures for amendment.[30] His opinion then held that amendments enacted under Article 368 were 'laws' under Article 13 and therefore subject to judicial review.[31] Justice Subba Rao also stipulated that this judgment did not actually affect the validity of the impugned constitutional amendments – under the doctrine of 'prospective overruling', the case's holding only applied to future cases.[32] It therefore left the First, Fourth and Seventeenth Amendments on the books, even though it declared them unconstitutional.

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[27] A.I.R. 1951 S.C. 458.
[28] (1967) 2 S.C.R. 762.
[29] G. Austin (1999) ***Working a Democratic Constitution*** (New Delhi: OUP): p.196-197.
[30] (1967) 2 S.C.R. 762, at p.763.
[31] Ibid: p.764.
[32] Ibid.

Despite its limited judicial impact, this case assumed great political significance. Its judgment set into motion a structural revolution: by limiting Parliament's amendment power, the court asserted its supremacy over constitutional interpretation to an unprecedented extent. As Granville Austin noted, *Golaknath* "began the great war, as distinct from earlier skirmishes, over parliamentary versus judicial supremacy."[33]

This battle for supremacy emerged not only from *Golaknath's* substantive content, but from its timing – it was released just after Indira Gandhi, the daughter of Jawaharlal Nehru, became Prime Minister. Mrs Gandhi was intent on furthering her father's socialist agenda, putting into place substantial redistributive and land reform policies. The Supreme Court represented the greatest obstacle to these objectives.

Mrs Gandhi was willing to use her position as Prime Minister to centralise power in the executive. Possessing little of her father's reverence for Westminster tradition, Mrs Gandhi reorganised important government ministries to exert more direct control over them. In the early 1970s, she transferred the Central Bureau of Investigations (CBI) and control of the civil service into a new Department of Personnel, which she personally headed. Revenue intelligence and the Directorate of Enforcement were moved to the Prime Minister's Secretariat, and a new Department of Justice, under the Home Secretary, was created to handle judicial appointments.[34] Thus, Mrs Gandhi took personal control over law enforcement, criminal investigations, and, perhaps most significantly, who to appoint to the High Court and Supreme Court benches.

With a strong parliamentary majority behind her, Mrs Gandhi's government also enacted some radical amendments to the constitution.[35] The 24th Amendment (1971) altered Articles 13 and 368 to reinstate parliamentary supremacy on constitutional amendments. The new Article 13(4) stated, 'Nothing in this article

[33] Austin (1999): p.198.
[34] Ibid: pp.190-191.
[35] Ibid: pp.234-257.

shall apply to any amendment of this Constitution made under article 368', while Article 368 (1) now read, 'Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.'

Two other significant constitutional amendments followed in 1972. The 25th Amendment removed the term 'compensation' in Article 31(2) to prevent courts from providing just compensation for land acquisitions by the state. It also added Article 31(c), which gave the 'Directive Principles of State Policy' in Article 39 precedence over various fundamental rights (Article 14, Article 19 and Article 31). Finally, it stated that laws enacted to give effect to the Directive Principles were not subject to judicial review. The 29th Amendment completed the shift towards insulating redistributive measures from the courts by placing two Kerala land reform laws in the Ninth Schedule.[36]

These amendments dramatically altered India's constitutional structure. The Directive Principles, which were non-justiciable guidelines towards greater social justice, were never intended to supersede core civil and political rights (such as free speech and the right to equality) that private citizens could enforce against the government in court.[37] Meanwhile, the amendments directed at land reform clearly sought to empower the government *vis-à-vis* landowners and the judiciary, who had thwarted previous measures towards land redistribution in *Golaknath*.

In sum, the amendments aimed to achieve the 'social revolution' contemplated by the framers, but through means they would have never approved. The emasculation of the judiciary was particularly alarming, since it remained the only viable check on Mrs Gandhi's authority. The Supreme Court, however, would not give up its power so easily. In 1970, His Holiness Swami

[36]Article 31(B) provides that laws in this Schedule cannot be voided on the grounds that they violate fundamental rights contained in Part III of the Constitution.

[37] For a detailed discussion of directive principles, see R. Abeyratne, '*Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*' (2014) ***Brooklyn Journal of International Law*** 39:1.

Keshavananda Bharati filed a writ petition under Article 32 against the state of Kerala for acquiring his Hindu Mutt (a place of religious worship) under state land reform laws. It also challenged the validity of the 24th, 25th, and 29th Amendments.[38] The Supreme Court issued one of its longest and most important judgments in this case.

In eleven separate opinions, totalling more than 1,000 pages, the court held that constitutional amendments are invalid if they violate the 'basic structure' of the constitution. Justice Khanna, who most commentators believe authored the 'majority' opinion, focused on the text of Article 368, including the phrases 'this Constitution' and 'the Constitution shall stand amended.'[39] In his view, these terms pointed towards a core constitutional identity that limited Parliament from altering certain aspects of the constitution or from abrogating the constitution altogether.[40] With respect to the constitutional amendments at issue, the court struck down a section of the 25th Amendment that, *inter alia*, made Directive Principles superior to certain fundamental rights.

The Supreme Court therefore did not back down; it reasserted its supremacy with respect to constitutional amendments. Mrs Gandhi then turned to the last resort: altering the composition of the bench. The day after *Keshavananda* was released, Mrs Gandhi disregarded the tradition of seniority, and recommended the pro-government Justice A.N. Ray ahead of three more senior justices who had formed part of the *Keshavananda* majority.[41] When Justice Ray retired a few years later, Mrs Gandhi passed over Justice Khanna, who had opposed a number of her initiatives, for the pro-government nominee, Justice Beg. In this period, the Gandhi administration also punitively transferred judges from one High Court to another for ruling against government programmes.[42]

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[38] *Kesavananda Bharati v. State of Kerala* (1973) S.C.C. 225.
[39] Ibid: p.768.
[40] S. Krishnaswamy (2009) ***Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*** (New Delhi: OUP): p.30.
[41] Austin (1999): pp.278-283.
[42] R. Dhavan, '*Law as Struggle: Public Interest Law in India*' (1994) ***Journal of the Indian Law Institute*** 36: p.302, at p.316.

B. The Emergency (1975-77)

Nehru's parliamentary democracy was all but extinguished at this point – the structure of the constitution had been upended, conventions were ignored, and government had been reorganised to centralise power in one person, the Prime Minister. However, the situation soon became even more dire. In 1975, the Allahabad High Court found Mrs Gandhi guilty of election fraud in the 1971 general elections. Facing widespread criticism and demands for her resignation, she declared a state of emergency in June 1975. Her regime then limited the freedom of press, suspended habeas corpus, and limited a number of other individual rights.[43] A number of constitutional amendments were passed in this period, including the controversial 42nd. It overturned the *Keshavananda* judgment and once again gave the Directive Principles of State Policy precedence over fundamental rights. Perhaps most cynically, it shielded Mrs Gandhi's controversial election result from judicial review. At the time, these measures were justified on the grounds of national security and public order, but it was evident that their real purpose was to suppress opposition, weaken the judiciary, and ensure the success of Mrs Gandhi's socialist agenda.

The Emergency finally concluded in March 1977. Interestingly, the judiciary, which was hitherto the principal counterweight to executive power, had little to do with ending it. In fact, when the Supreme Court was given the opportunity to limit the Emergency's excesses, it failed to do so. In *A.D.M. Jabalpur v. Shiv Kant Shukla*, the Court upheld the suspension of habeas corpus, allowing the Gandhi regime to detain political opponents without charge.[44]

The Emergency ended because, due to civil society and political pressure, Mrs Gandhi finally decided to call elections. She was defeated by the opposition Janata Party, who moved quickly to rescind the controversial constitutional amendments passed during the Emergency, restoring fundamental rights to their original place and reasserting judicial independence. It also

[43] Austin (1999): pp.309-313.
[44] A.I.R. 1976 S.C. 1207.

repealed laws that suppressed free speech and suspended habeas corpus.[45] Article 352 of the constitution, which was invoked by Mrs Gandhi in 1975 as it permitted the Emergency declarations in the case of 'internal disturbance', was amended to remove that phrase and replace it with 'armed rebellion.'

Overall, the pre-Emergency status quo was largely reinstated with this important constitutional safeguard to prevent future Prime Ministers from misusing emergency provisions. However, as the next section shows, executive power arguably remains too centralised in the cabinet, which has serious consequences for representative government.

C. The Post-Emergency Indian Executive

Thus far, we have focused on executive power in the traditional sense. Even in the Westminster system, there is some separation of powers where the President, advised by his cabinet *executes* laws, but does not legislate them. Legislation is the sole province of Parliament. However, as Shubhankar Dam argues in his excellent new book *Presidential Legislation in India*, the conventional wisdom is wrong, or at least incomplete. Dam's study focuses on the President's power to enact ordinances pursuant to Article 123 of the Indian Constitution, and demonstrates that ordinances have become the preferred method of legislation in India.[46]

Article 123 (1) provides that the President can enact ordinances 'at any time, except when both Houses of Parliament are in session' and 'circumstances exist which render it necessary for him to take immediate action.' Interestingly, this is not an emergency provision – the President must simply be satisfied that enacting an ordinance is necessary. Article 123 (2) makes clear that ordinances 'shall have the force and effect as an Act of Parliament', meaning that, in substance, they are no different from legislation. As Dam

[45]M. Mate, '*The Origins of Due Process of India*: *The Role of Borrowing in Personal Liberty and Preventative Detention Cases*' (2010) ***Berkeley Journal of International Law*** 28: p.244.
[46] S. Dam (2014) ***Presidential Legislation in India*** (New York: CUP): p.5.

points out, there is a deep irony underlying these provisions. They are drawn from the British Governor-General's Act of 1935, which Nehru and other independence movement leaders criticised for empowering the Governor-General to arbitrarily enact ordinances on important matters such as defence, taxes, and war activities.[47] However, once Nehru took office in independent India, he was reluctant to cede this power. B.N. Rau, supported by Nehru, included an ordinance power in the Draft Constitution and, despite some pushback from Ambedkar and other framers, it appeared without alterations as Article 123. The framers saw this as a necessary, discretionary power to enable the President to deal with unanticipated situations. And, once again relying on convention, they anticipated that future Presidents (and their cabinets) would only use ordinances when absolutely necessary.

In practice, ordinances have become a regular, alternative form of legislation. Indian presidents have issued 615 ordinances between 1952 and 2009, an average of more than ten per year.[48] The trend of using ordinances regularly began with Nehru, who issued 36 ordinances between 1950-52 and a further 52 between 1952-59. Indira Gandhi then increased the use of ordinances dramatically in the 1970s. 135 ordinances were enacted from 1970-79. The trend has continued since then, with 196 ordinances issued between 1990-99, and a further 72 between 2000-09.[49] In terms of subject matter, ordinances cover the gamut of legislative issues, but Dam highlights three areas of concentration: (1) to nationalise banks and industries (used by Nehru and particularly Indira Gandhi to further their socialist aims), (2) to uphold national security (anti-terror measures), and (3) to create new national bodies like the National Human Rights Commission.[50]

What does this high number of ordinances, promulgated on a range of issues, tell us about executive power in India today? On the one hand, it speaks to the need for efficiency in an otherwise flawed, perhaps even broken, parliamentary system. There is very

[47] Ibid: pp.44-51.
[48] Ibid: p.66.
[49] Ibid: p.70.
[50] Ibid: pp.73-83.

little debate in Parliament; only 15-20 per cent of the time in either House is spent debating legislative issues.[51] Moreover, the splintering of political parties and the rise of regional interests has led to fractured coalition governments. Prior to the 2014 election when Narendra Modi and the BJP won a majority of seats, no party had commanded a majority since 1989. Following the 2004 election, 39 parties were represented in the Lok Sabha (lower house); the ruling United Progressive Alliance (UPA) consisted of 14 parties, while the principal opposition, the National Democratic Alliance (NDA), comprised 11 parties.[52] All this coalition building has led to weak governments that are beholden to their allies, not their constituents. Conservative BJP politician and commentator Arun Shourie has explained in detail how Prime Minister Manmohan Singh's government was beholden to regional interests, who were able to effectively veto any legislation that they opposed, as the government would collapse if they left the ruling coalition.[53]

Seen in this light, ordinances have greater appeal. The constitution, after all, declares them equivalent to legislation (in substance, if not in form) and they can be issued swiftly, without having to achieve consensus from a hodgepodge coalition. These pragmatic arguments have also been made in the context of judicial activism. Supporters of the Supreme Court's recent jurisprudence, which has made socioeconomic rights (like the rights to food and education) justiciable and enforced them against the state, have justified the court's intrusion into these matters of state policy, on the grounds that Parliament has abdicated its responsibility to legislate on behalf of the poor and marginalised.[54]

On the other hand, the regular use of ordinances shows how powerful and unaccountable the cabinet remains. Since the President is now constitutionally required to act on the advice of his Council of Ministers, a few ministers are essentially legislating through ordinances without the deliberation and compromise that

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[51] A. Shourie (2007) ***The Parliamentary System*** (New Delhi: ASA Rup): p.26.
[52] Ibid: p.28.
[53] Ibid: pp.36-37.
[54] See, for e.g., U. Baxi, '*Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*' (1985) ***Third World Legal Studies*** 4: p.107.

ordinary legislation requires. This is undemocratic in the most fundamental sense – laws are being passed by a privileged few, who do not answer to the public-at-large. Article 123 (1) seeks to delimit the ordinance-making power by only permitting the President to enact ordinances when both Houses of Parliament are not in session. But as Dam points out, the cabinet decides when Parliament is in session, and the ordinance-making power incentivises them to prevent Parliament from functioning.[55]

This raises an interesting chicken-and-egg scenario: are ordinances necessitated by a failing legislature? Or is the legislature failing, at least in part, because cabinets are circumventing the usual legislative process in favour of ordinances? Dam's extensive research, showing that ordinances have been used regularly since 1947, suggests the latter explanation. In any event, India's executive, and its parliamentary government generally, are not functioning as they should. This has prompted Shourie, among others, to call for a presidential system of government, which would create a stronger government whose leader would be directly accountable to the public.[56] As Sri Lanka's 1978 Constitution shows, however, it is also a system that can turn quickly towards authoritarianism.

The Sri Lankan Executive in Comparative Context

Sri Lanka's first post-independence constitution resembled India's in some respects. The 1946 Soulbury Constitution instituted Westminster-style parliamentary democracy in Ceylon, with a bicameral legislature and vested executive power in a Governor-General, appointed by the British Monarch, who was empowered, *inter alia*, to dissolve Parliament, fill vacancies in the Senate, and appoint Supreme Court judges. As in India, the Governor-General would act on the advice of the Prime Minister and cabinet.

But these structural similarities obscure important differences between the two countries in their process of constitutional

[55] Dam (2014): p.221.
[56] Shourie (2007): pp.94-96.

formation. Unlike India, which put together a diverse Constituent Assembly to draft an independence constitution, the Soulbury Constitution was instituted in more top-down fashion and with a strong British imprimatur. Its architects were Sri Lanka's first Prime Minister, D.S. Senanayake, and his inner circle, including the eminent British constitutional scholar Sir Ivor Jennings.[57] Their work informed the recommendations of a British commission, headed by Lord Soulbury, which visited Sri Lanka in 1944-45 to consider constitutional reforms.

The Soulbury Constitution was replaced in 1972 with Sri Lanka's first republican constitution. Once again, the process of adoption left much to be desired. Eschewing an open and deliberative drafting process, Mrs Bandaranaike and the ruling United Front dominated the Constituent Assembly. It comprised of sitting members of the House of Representatives of which the SLFP controlled 116 out of 157 seats.

The 1978 Constitution suffered from similar defects, though it was marginally more inclusive in the drafting process. It was adopted following the UNP and Prime Minister J.R. Jayewardene's landslide election victory in 1977 in which it won approximately eighty per cent of National State Assembly seats. A Select Committee, which included members of the opposition and various minority groups, drafted the 1978 Constitution, but the existing constitution had already been amended to make Jayewardene President before the Committee even met.[58] This was a clear signal that the Committee was convened not to openly discuss and debate the merits of different forms of government, but to impose on Sri Lanka what Jayewardene desired: a 'Gaullist' system of government.[59]

The 1978 Constitution would take Sri Lanka away from the Westminster parliamentary system and institute a powerful executive President. The reasons for abandoning Westminster echo some of the concerns voiced about the Indian executive.

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[57] R. Coomaraswamy (1997) ***Ideology and the Constitution: Essays on Constitutional Jurisprudence*** (Colombo: ICES): p.19.
[58] Wilson (1980): pp.28-29.
[59] Ibid: p.42.

Jayewardene had long advocated a French 'Gaullist' executive to remedy two entrenched structural problems.[60] First, he desired greater executive stability. Since 1947, Sri Lanka was ruled by a series of precarious coalition governments that, like their Indian counterparts, were unable to govern effectively. The business of forming coalitions, managing coalition partner interests, and protecting against the threat of dissolution from coalition members, often prevented stable executive leadership.[61] This created a second problem: national development goals could not be executed, leaving Sri Lanka in an "economic morass" by the 1970s.[62]

The executive presidency was intended to overcome both these problems. Much like the American President, the Sri Lankan President under the 1978 Constitution is the Head of State, Head of Government, and the Commander-in-Chief of the Armed Forces.[63] The President is directly elected to office by the people and presides over a Cabinet of Ministers.[64] Following the French model, the Prime Minister and the Cabinet of Ministers are drawn from the majority party in the legislature (renamed the 'Parliament' in 1978). However, Sri Lankan Presidents enjoy far greater powers than their French counterparts.[65] The President has complete discretion in nominating the Prime Minister and Cabinet of Ministers, who serve at the President's pleasure.[66] Moreover, the President may assign him or herself any portfolio or function and may dissolve Parliament at any time except during the first year after a general election.[67] The President is also immune from suit in any court or tribunal for both professional and private acts.[68]

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[60] Ibid: p.1.
[61] Ibid: pp.3-6.
[62] Ibid: p.1.
[63] The Constitution of Sri Lanka (1978): Article 30.
[64] Ibid: Chs.VII-VIII.
[65] R. Edrisinha, '*Sri Lanka: Constitutions Without Constitutionalism: A Tale of Three and a Half Constitutions*' in R. Edrisinha & A. Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka*** (Colombo: CPA): p.31.
[66] The Constitution of Sri Lanka (1978): Articles 42-44.
[67] Ibid: Articles 44, 70. See also, in this volume, R. Hameed, '*Parliament in a Presidential System*'.
[68] Ibid: Article 35. See also, in this volume, N. Anketell, '*The Executive Presidency and Immunity from Suit: Article 35 as Outlier*'.

Judicial independence was a priority in drafting the 1978 Constitution. The President is authorised to appoint Supreme Court justices, who hold office during 'good behaviour' and may only be removed by a majority in Parliament.[69] The Supreme Court's jurisdiction includes constitutional matters and protecting fundamental rights, though it was only permitted to practice judicial review of bills in the abstract before they are enacted by Parliament.[70]

The President is freed of many of the constraints that occupied Prime Ministers under Sri Lanka's previous constitutions. He is directly elected to a six-year term that does not depend on the confidence of Parliament. This was intended to create not only a more stable executive, but also one that could respond swiftly to changing circumstances and did not have to spend time building and managing coalitions. Moreover, since the President is not a Member of Parliament, he could focus his time and energy on important matters of public policy. As A.J. Wilson put it, "He will not have to attend meetings of Parliament, make important speeches there … and respond to the needling criticisms of chastisers from the Opposition … He is now free to devote his time to the more pressing issues of the day."[71]

On this account, the 1978 Constitution was enacted in response to legitimate governance challenges and promised a more effective and accountable executive. The concern, of course, was that concentrating so much authority in a single figure would eventually erode democratic rule and lead to authoritarianism. Wilson anticipated this problem in 1980, presciently noting that, "if the President is in control of a majority in Parliament, he could transform his office into one that approximates to that of a constitutional dictator."[72]

Unfortunately, this is precisely what has come to pass. A full account of the developments leading to Sri Lanka's current

[69] The Constitution of Sri Lanka (1978): Article 107.
[70] Ibid: Articles 118, 180.
[71] Wilson (1980): p.56.
[72] Ibid: p.61.

situation is beyond the scope of this chapter, but two recent developments are worth noting: the passage of the Eighteenth Amendment and the impeachment of Chief Justice Bandaranayake. These events show the extent to which independent checks on executive authority have been removed and, disturbingly, recall some of Indira Gandhi's actions during the Emergency.

The Eighteenth Amendment to the Sri Lankan Constitution, enacted in 2010, vastly increased the scope of presidential authority. It abolished term limits for the President, who was previously limited to two six-year terms. The immediate consequence of this change is obvious: it allowed President Rajapaksa to contest elections (and perhaps remain in power) indefinitely. This amendment also repealed some of the constraints that the Seventeenth Amendment placed on executive power. The Seventeenth Amendment was passed in 2001 with multi-party support to depoliticise certain key areas of government. It created an independent Police Commission, Human Rights Commission and Election Commission, among others. The President was permitted to appoint members of these commissions only with the consent of an independent Constitutional Council.

The Eighteenth Amendment, however, replaces the Constitutional Council with a five-member Parliamentary Council that consists of the Prime Minister, the Speaker, the Leader of the Opposition, and two Members of Parliament nominated by the Prime Minister and Leader of the Opposition. This not only politicises the appointments process, but also guarantees that the President's appointees will be approved since three of the five Parliamentary Council members represent the majority party or coalition. In effect, the Eighteenth Amendment makes independent commissions 'independent' in name only. It allows the President to appoint the Chairman and members of the following commissions: the Police Commission, Human Rights Commission, Permanent Commission to Investigate Allegations of Bribery and Corruption, Finance Commission, and the

Delimitation Commission.[73]

If the Eighteenth Amendment undermined independent commissions as a check on executive authority, the impeachment of Chief Justice Bandaranayake demonstrates how the judiciary, too, has been weakened. It is instructive to spell out this episode in detail to reveal the utter lack of process afforded to the head of the judicial branch of government and how the tentacles of executive power have extended, through the President's brothers, to all areas of government.

The Chief Justice was removed from office soon after delivering a judgment that held the Divi Neguma ('Uplifting Lives') Bill unconstitutional. The Bill, a landmark piece of legislation promulgated by President Mahinda Rajapaksa, would have established a Department of Divi Neguma within the Ministry of Economic Development, centralising all development-related activities under the control of Basil Rajapaksa, the President's brother and Minister for Economic Development.

In August 2012, the Supreme Court, in a judgment written by Chief Justice Bandaranayake, held that the central government could not take over a matter that was constitutionally devolved on the provinces under the Thirteenth Amendment to the Constitution, unless all Provincial Councils agreed to that change.[74] Eight of the nine Provincial Councils were controlled by the ruling United People's Freedom Alliance (UPFA) alliance and consented to the changes set forth in the Bill. However, the Northern Province had not yet formed a Provincial Council. In lieu of a Council vote, the Governor of the Northern Province – who had been appointed by the President – assented to the Bill.[75] This was challenged in court and on 31st October 2012, the court ruled that the Bill was unconstitutional and temporarily blocked

[73] For a detailed discussion of the Eighteenth Amendment, see R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: CPA).
[74] *In re a Bill Titled Divineguma,* S.C. Special Determination 1-3/2012.
[75] N. Anketell & A. Welikala (2013) ***A Systemic Crisis in Context: the Impeachment of the Chief Justice, the Independence of the Judiciary and the Rule of Law in Sri Lanka,*** Centre for Policy Alternatives Policy Brief, April 2013: pp. 5-7.

the creation of a Divi Neguma Department. A three-judge bench, including the Chief Justice, held that one clause of the bill was unconstitutional and needed to be passed by a referendum; that 12 other clauses were inconsistent with the constitution and needed to be approved by a two-thirds majority in Parliament; and that the Governor of the Northern Province did not have the power to endorse the bill.[76]

One day after the court's judgment was issued, Members of Parliament from the ruling UPFA coalition presented a motion to impeach the Chief Justice before the Speaker of the Parliament, Chamal Rajapaksa – another one of the President's brothers.[77] The Speaker then appointed a Parliamentary Select Committee (PSC) to conduct an inquiry on this matter. The PSC comprised eleven members, seven members of the UPFA and 4 members of the opposition, and its inquiry was problematic in a number of ways.[78] First, since a majority of the PSC's members belonged to the same party that presented the motion for impeachment, their impartiality was suspect. Second, there were a number of procedural issues with the PSC inquiry. The four opposition members of the Committee eventually walked out of the hearings, calling it an 'inquisition' rather than an inquiry, and complaining that specific concerns they had raised were not addressed. These concerns included: a lack of clarity with regard to the PSC procedures and the standard of proof; whether documents were made available to the Chief Justice and her lawyers; whether her lawyers were given sufficient time to examine the evidence against her and prepare a defence; and whether the Chief Justice and her lawyers would be allowed to cross-examine the several complainants who filed charges against her.[79]

On 8th December 2012, the PSC submitted a report, within twenty-four hours of concluding the hearings, that found the Chief Justice guilty of various charges in the impeachment motion. The Chief Justice appealed the PSC ruling and, on 3rd January 2013, the Supreme Court ruled that the impeachment proceeding

[76] *In re a Bill Titled Divineguma*, S.C. Special Determination 4-14/2012.
[77] R. Hensman, '*Independent Judiciary and Rule of Law Demolished in Sri Lanka*' (2013) ***Economic & Political Weekly*** XLVIII: pp.9,17.
[78] Anketell & Welikala (2013): pp.7-12.
[79] Ibid: pp.9-10.

was unconstitutional. Nonetheless, the impeachment motion was debated in Parliament and passed with 155 MPs voting in favour, 49 against, and 11 abstaining.[80] On 13th January 2013, President Rajapaksa signed the papers to remove Chief Justice Bandaranayake from office. A few days earlier, Parliament enacted the Divi Neguma Bill – that the Chief Justice had ruled unconstitutional – by a two-thirds majority.[81] Her replacement was former Attorney General Mohan Peiris, who was a close associate of President Rajapaksa.[82]

Conclusion

In sum, the 1978 Constitution has today reached its logical extreme. But this is surely not what J.R. Jayewardene had in mind when he proposed a Gaullist system headed by an executive President designed to be more powerful, independent, and stable than cabinets under previous constitutions. While the Rajapaksa regime certainly fits all those characteristics, the systematic removal of independent checks on executive authority and weakening of the judiciary were not intended by the framers of the 1978 Constitution.

Returning to the hypothetical question I posed at the beginning of this chapter, would Sri Lanka have been better served by maintaining a Westminster-style executive? This route might have made it more difficult for power to become so concentrated; the 1978 Constitution enabled the President to control both the legislature and executive branches, by making him the head of cabinet and Commander-in-Chief. Yet, Mrs Gandhi was able to concentrate and aggrandise executive power as Prime Minister, much as President Rajapaksa has done today, and both did so through largely constitutional means. The fundamental difference was that the events in India during that era took place in an explicitly exceptional period, the Emergency (1975-77). Indian civil society, opposition political parties, and even Mrs Gandhi herself realised that the Emergency was a temporary arrangement

[80] Ibid: pp.10-12.
[81] Hensman (2013): p.17.
[82] Anketell & Welikala: pp.12-13.

that upended India's ordinary constitutional structure, which explains why she called for elections in 1977 and, more importantly, why she suffered a heavy defeat. India has never reverted to that emergency state, but its parliamentary democracy is far from ideal. Executive power remains too concentrated in the hands of a few cabinet ministers, who can issue ordinances and govern without much parliamentary deliberation.

In Sri Lanka, by contrast, there is a sense that the current state of affairs has assumed a state of normalcy, with President Rajapaksa until recently enjoying high approval ratings and no serious challenge to his authoritarian rule. There are endogenous reasons for this, which differentiate Sri Lanka from India, including the prevalence of ethno-nationalist politics, the 25-year civil war, and the triumphalism following the end of the civil war in 2009 that has reenergised those ethno-nationalist sentiments. But are there broader, constitutional factors underlying the divergent paths of the two executives?

The fact that both countries adopted post-independent constitutions setting forth Westminster parliamentary government belies significant differences in constitution-formation. India's protracted and turbulent struggle for independence led to the demand for a Constituent Assembly, with members elected from across India, to draft an indigenous, republican constitution. This would prove more durable than Sri Lanka's 1948 Soulbury Constitution, which was drafted by a privileged few, and never gained legitimacy in the eyes of either the Sinhala-Buddhist majority or minority groups.[83]

Moreover, while India had Nehru rule as Prime Minister almost unopposed for fifteen years following the adoption of its constitution, Sri Lanka's first Prime Minister, D.S. Senanayake died in 1952, merely four years after the Soulbury Constitution was adopted. Westminster parliamentary democracy, which depends so heavily on convention acquired over time, never

[83] See generally, A. Welikala, '*The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: CPA).

therefore became entrenched in Sri Lanka to the extent that it did in India. Sri Lanka's struggle to rein in executive power is therefore rooted not so much in the choice of presidential or parliamentary executive, but the degree to which that executive is situated in a democratic framework within a constitution that enjoys broad support and legitimacy.

23

Some Pillars for Lanka's Future

Michael Roberts[1]

[1] **Editor's Note**: This is a reproduction of an article published by the author in June 2009, in the immediate aftermath of the end of the Sri Lankan conflict in May 2009.

'One can win the War, but lose the Peace.' Cliché this may be, but it also a hoary truism that looms over the post-war scenario in Sri Lanka. The triumphant Sri Lankan government now has to address the human terrain rather than the fields of battle. In facing this challenge, both government and concerned people must attend to another truism: as Sinnappah Arasaratnam pointed out long ago, extremisms have been feeding off each other and undermining political compromise in Sri Lanka over a long period of time. Now, apart from the well-known Sinhala chauvinist forces outside and within the Rajapaksa government, we must attend to the Tamil chauvinist forces in the Tamil National Alliance (TNA) and elsewhere in Sri Lanka, in Tamil Nadu, and in the ranks of the vociferous Sri Lankan Tamil diaspora across the world. These forces have to be corralled and undermined.

This is not an easy task. It calls for a multi-stranded strategy involving many moderate forces. One element is already in place: under the initiatives taken by the Ministry of Constitutional Affairs under D.E.W Gunasekera, Tamil has been made a compulsory subject at school in the Sinhala-speaking areas since mid-2007, while proficiency exams have been introduced at various levels of the public service that give incentives to those with bi-lingual capacity. It remains to be seen whether these steps on paper reach deep and become implanted as effective practice.

Government's Will and Political Reform

As clearly, all observers are wondering if President Rajapaksa's sweet words will be matched by substantive reforms in the political dispensation, which institutionalise devolution and reach out to Sri Lankan Tamil hearts and minds. When some three lakhs of Tamils in the northern Vanni chose in the course of year 2008 to move east with the retreating LTTE forces, they did so because they distrusted the government and believed the Liberation Tigers of Tamil Eelam (LTTE) was their protector. So, President Rajapaksa's advisors have to ask two related questions. 'How was this so?' and 'Why are the Tamil peoples, including many in the Jaffna Peninsula and in Colombo District, so alienated and distrustful of the present regime (and past regimes)?'

In addressing this issue they must thank the Tigers for their parting 'gift'. By turning draconian around January 2009 and holding roughly three lakhs of Tamil people in 'bondage,' to use D.B.S. Jeyaraj's term, till they eased constraints on the remnant 50,000 on 10th May 2009, the LTTE alienated most of these people – sometimes to the point of virulent opposition. But note, too, that the feeling of bitterness extends beyond the LTTE. "I do not know the purpose of my life. I wonder why and for what the LTTE and military fought the battle and what was achieved in the end. We believe the Tigers, Sri Lanka government and Indian people with whom we share a special bond are all responsible for our fate today," said one 67-year old named Aryanathan when he was interviewed at Manik Farm Zone IV by a body of foreign journalists.[2] Aryanathan spoke in English and presented this view as a distilled statement embodying the views of some 21 internally displaced persons (IDPs) assembled at one spot.

Subject to the caveats encoded within Aryanathan's statement, the feelings of the Tamil refugees towards the LTTE represent a reality check to the Tamil communalists in Lanka and abroad who are marooned within their very own island of rage and fantasia. The sentiments of such Tamil IDPs are also a potential boon for the government of Sri Lanka. But will the government demolish this opportunity by being too draconian in its treatment of the IDPs in what are effectively internment camps rather than 'welfare centres'? Screening the IDPs is certainly called for and de-mining is an essential operation in the war-ravaged terrain of their old villages, but military adjutants who bark orders will undermine the political project of the government. The administrators, whether military or civilian, must be individuals with a humane touch. Their rule must also be transparent and marked by the registration of all IDPs.

While the Tamil IDPs are an immediate issue, the long-term question of constitutional reform cannot be postponed. This is not my field of expertise. The draft 2000 Constitution Bill is widely regarded as a good foundation which specialists in Sri Lanka can build on for this purpose. But from the outside I suggest that these specialists should be ready to: (a) think outside the box and go

[2] See M. Reddy article in ***The Hindu***, 27th May 2009.

beyond the Thirteenth Amendment in the constitutional reforms that are put in statutory place; and to (b) insert some measures of asymmetrical devolution within these plans.

On-going Obstacles: Authoritarian Big Men, Anti-Democratic Practices

Suppose, then, that by some work of genius a wonderful new constitutional scheme of power-sharing is worked out and put in place. Will it last? Can it work? I foresee two major problems that will undermine this project, problems that have in fact undermined the working of democratic institutions in Lanka for six decades. In a nutshell these are (a) the overwhelming concentration of power in the President's office in the Gaullist constitution set up by J. R. Jayewardene in 1978 with advice from Professor A. J. Wilson; and (b) anti-democratic practices in electoral processes and party organisation that are of endemic character. Both these facets are sustained by (c), a set of cultural practices that I have described as the 'Asokan Persona' in the course of four essays in my book, *Exploring Confrontation*.[3]

My path to this theory was accidental and began at Peradeniya University in 1970. I had placed an application for research funds in late 1969. Having no response by early 1970, I asked the deputy registrar why no decision had been taken. Answer: "we could not meet because Professor H.A. de S. Gunasekera is too busy" (he was electioneering for Mrs Bandaranaike's ULF alliance). I buttonholed H.A. de S. at the earliest opportunity when no one else was around. He said: "Yes, yes, yes, I will attend to it." Not easily fobbed off, I utilised his bosom-friendship with Dr A.J. Wilson within his own department to present an alternative pathway: "Why can't Willie attend in your place?" The immediate and instinctive reaction was "No, no, no. I have to be there." QED. I had to wait till the year never-ending.

[3] M. Roberts (1994) ***Exploring Confrontation: Sri Lanka: Politics, Culture and History*** (Chur: Harwood Academic Publishers).

That, in a nutshell, is what I conceptualise as the Asokan Persona. The Big Man (invariably male) has to control every fiddling little thing. My theory therefore highlights a deeply rooted cultural tendency towards the over-concentration of power at the head of organisations and a failure (if not an ingrained inability) to delegate power. Apart from generating administrative bottlenecks, such practices sustain a top-down flow of authority in ways that stifle initiative among higher-level and middle-level officers. This strand of interpersonal organisational practice, in turn, is shored up in Asia's hierarchical context by cultural practices that encourage subordinates to kowtow (significantly a Chinese word incorporated into English) to superiors in ways that encourage them to think themselves God Almighty. This tendency is accentuated by standard practices associated with ministers of state at public functions: the ministerial or presidential persona is always *pirivarāgena*, i.e., surrounded by an entourage (or preceded by beeping security cars on the road). The concept *pirivarāgena* is deeply etched within Sinhalese thinking: images of the Buddha are surrounded by disciples and followers in many temple wall paintings and it is known that chiefly journeys in Sinhalese kingdoms past were invariably *pirivarāgena*.

Where such practices pertain to the head of state, that is to President or Prime Minister, the Asokan Persona has one additional ingredient denied to, say, a head of department. At the apex the Persona not only embodies concentrated power with all the force of legitimised authority, but is also vested with the aura of sacredness. In brief, the position combines the roles of Pope and King (or Queen) with an Asian twist. Righteousness envelopes the person and his (her) acts. It follows that challenges from below are likely to be deemed to be unrighteous (or unpatriotic), a form of heresy.

One does not need to be a Newton to conclude that what the Sri Lankan President *gives* as constitutional gift, he can withdraw too. Or his successor can. Ergo, it follows that constitutional transformation must also curtail the existing presidential powers. Is this likely? The short answer is: rivers do not flow backwards. In effect, any scheme of reform is vulnerable and on shifting sand.

Add to this the character of the two main parties: the Sri Lanka Freedom Party and the United National Party. Neither have internal democracy. Worse still, whispers from around suggest that elections in the past decade or so have been widely marked by intimidation, vote rigging, denial of voting rights by clerical acts and all manner of chicanery. If these tales are valid, once we set them within the context of over-centralised organisational practices of the Asokan type, what we have in Sri Lanka is a form of democracy that is riddled with caverns and dungeons.

A Critical Issue: Part-Whole Relationships

Such concerns aside, many have welcomed the President's parliamentary address on Tuesday 19th May 2009. His symbolic deployment of a few sentences in Tamil was, indeed, as innovative as welcome. His dismissal of ethnic identity as irrelevant was also applauded widely. This assertion was concomitant with an emphasis on the overwhelming importance of two categories of being in Sri Lanka: those patriotic (*ratata ādharaya karana aya*) and those unpatriotic (*ratata ādharaya nokarana aya*). *Ratata ādhara nokarana aya* was used in the sense 'un-Sri Lankan' – that is, in the manner "un-American" in Yankee-speech. For this reason, it is feasible to interpret the argument in dark ways as a warning to critics of the government. I prefer, here, to dwell on the benign reading of this viewpoint as a rejection of the pertinence of ethnic identity and thus of ethnic differentiation. But I do so in order to argue that such a contention is beset with pitfalls and lacks substance.

For one, the President's stirring message was (and continues to be) contradicted by popular depictions of the triumphant war as a re-enactment of the Dutugemunu-Elāra episode in Sri Lanka's history, a trope now for indelible Sinhala-Tamil conflict. The President himself catered to this understanding by garlanding a statue of Dutugemunu a few days later. As problematically, at the celebration honouring the war heroes on Friday 22nd May 2009, the President spoke of the *jātika kodiya, sinha kodiya* (national flag, Sinha flag) in the same breadth. In this critical conceptualisation a part of Sri Lanka, the Sinhalese people, is equated with the whole

of Lanka. This ideological act of merger is presented in taken-for-granted manner, thus, insidiously and powerfully.

Let me clarify the relationship of part to whole via a comparative excursion that addresses the relationship between the concepts 'England' and 'Britain' and thus 'English' and 'British.' Let me focus on this issue over the long period 1688 to 1945, a period when the British Empire was built up and sustained. England was the central force in the regional and institutional complex that came to be known eventually as Great Britain. In the result it was common in the 19th and 20th centuries for English persons to use the terms 'English' and 'British' as synonyms. I have evidence of General Hay MacDowall (as Scottish a name as you can get) doing the same thing unthinkingly as he sat atop Kandy in 1803. Since the Scots and the Welsh benefited immensely from British strength and expansion it would seem that they went along with the taken-for-granted hegemony of England within Britain. Thus, while 'roaming in the imperial gloaming' some Scots accepted English dominance – till recent decades when their nationalism has sharpened and taught new generations of English persons not to equate 'England' with 'Britain.'

I shall return to this facet, the incorporation of whole by part, within the Sinhala mind-set at the concluding moment in my essay. But I must also explain why the President's benign emphasis is impractical and lacking in substance. This calls for an excursion into the foundations of ethnic identity and patriotism, a complex subject that can only be clarified incompletely in brief a comment.

Identity and Patriotism

Endowed with speech and memory, human beings classify the world around them. Vernacular language schemes develop in the course of human interactions with different others in contiguous space. These relationships are inter-subjective and self-referential. Labels define 'Us' in distinction from named 'Others.' Though boundaries are not watertight and few peoples are totally homogeneous, the transgression of boundaries, say, by boy-girl affairs, sometimes generates an emphasis on the sanctity or worth

of a group. Needless to say, the cluster of factors and practices that sustain the boundaries of named groups over an extended period of time can vary from place to place and, in any specific case, can alter over time.

Family and familiar locality is often of central significance in the nourishment of loyalty to group and its associated territorial space. Thus, in most instances a Sri Lankan's patriotism to his island entity is built upon local experiences and sentimentalities. I conjecture that President Rajapaksa's Lankan patriotism is founded upon his love for his *gama* (village) and his pride in being a Ruhunu *kollek* (a lad from the Ruhunu South). My own profound Sri-Lankan-ness is built upon deep sentiments around the Fort of Galle, my life-memories around my alma mater, St. Aloysius College, and such beautiful landscapes as Peradeniya Campus and its Hantane Range. To erase such pillars and familiar roots in any individual's memory bank is both impractical and silly. Likewise one must allow for the fact that among many individuals their Sri-Lankan-ness has been generated through their ethnic identity as Burgher, Malay, Sinhalese, Tamil, et cetera. In other words, a pyramid of ethnic and other identities can strengthen patriotism and nationalism.

The Sri Lankan cricket team in the 1940s onwards was bolstered by the likes of a Sathasivam, a Heyn or a Coomarawamy. When Sri Lanka faced Tamilnadu (or Madras CA) for the Gopalan Trophy from the early 1950s, the Tamils of Sri Lanka faced up to the 'Other' as sturdy 'Ceylonese' to a man. The tragedy of Lanka's history is that so many Sri Lankan Tamil patriots of yesteryear were led (for reasons I cannot tackle here) to discard their Lankan-ness and adopt a separatist Eelam identity, or to discard their island roots altogether.

On these solid grounds of sociological theory, therefore, I assert that Sri Lanka today has to recognise that its patriotic identity 'Sri Lankan' must be built upon a confederative principle that recognises the existence of several communities as well as three nations within the entity Lanka (Ceylon). The three nations are the Sinhalese, Tamils, and Muslims. The communities are the Malays, Burghers, indigenous Väddās, Colombo Chetties, Borahs, Sindhis, Parsees, and Memons. For this pyramid of

loyalties and sentiments to be sustained, it is imperative that the Sinhalese=Sri Lankan equation must be undermined and split asunder (witness the manner in which the English=British equation has disintegrated in the last 40 years). A scheme of constitutional devolution directed by goals of appeasement is obviously vital to such a process. But my argument here points to the vital need for ideological work that seeks to undermine the hegemonic swallowing of the Sri Lankan whole by its Sinhalese part.

This is not an easy task. Constitutional fiat cannot transform minds, especially entrenched mind-sets. Categorical subjectivity is a hard nut to crack. Multiple strategies are required. Let me suggest one that is designed to work over two generations. Briefly, my intent is to develop hyphenated categories of self-identity. By that I mean such labels as 'Italian-Australian' and 'Greek-Australian,' labels that are deployed in Australia both as self-referential terms and as pertinent descriptions of a third persons. Towards this end I would like to see the process of creating identity cards, driving licenses, and census enumeration organised in terms that have it as said that all citizens are 'Sri Lankan' and, within that premise, for the forms to have separate boxes with the following categories for each person to tick (or have ticked): Vädda Lankan, Sinhalese Lankan, Burgher Lankan, Borah Lankan, Sindhi Lankan, Tamil Lankan, Parsee Lankan, Malay Lankan, Colombo Chetty Lankan and, last but not least, Sankara Lankan (mixed descent).

The latter category is particularly important. For one, it is a step that gives equal place to matrilineal ancestry and thus enhances female rights. Thus it will be feasible for Marvan Atapattu, Jehan Mubarak, and Tillekeratne Dilshan, if they so wish, to define themselves as 'Sankara' when the opportunity arises. For another, it will register the important phenomenon of hybridity that is otherwise lost in the political weight carried by census enumeration. There are a significant number of Sinhalese-Tamil marriages even today, especially in the Colombo District and in the low-country plantations districts; taken together with the mixes between other communities, it would not surprise me if the category Sankara amounts to anything between 7 and 10 per cent of the total population of Sri Lanka. If this conjecture is valid,

then the Tamils, Muslims, Sankara, and other tiny communities will add up to almost thirty per cent of the total population.

But the point of this proposal is not primarily devoted towards marking and assessing relative demographic clout (the census is not politically-neutral). The goal is to reform and transform the categories of self-identity so that hyphenated thought takes root and destroys the insidious incorporation of the whole, Sri Lanka, by the majoritarian dominant part, Sinhalese. My suggestion is quite fundamental. It will call for political imagination for the rulers of the land to accept it.

24

A Reflection on National Unity, the Presidency, and the Institutional Form of the Sri Lankan State

Paikiasothy Saravanamuttu

This chapter is essentially a reflection on a paper of the above title and reproduced in full below, written in 1989 and published in *Ideas for Constitutional Reform* edited by Chanaka Amaratunga. Some twenty-six years later, not too much has changed in respect of constitutional reform that would accommodate the aspirations of all Sri Lankans and address their grievances. The ground reality today though is different. At that time, there was a bloody insurgency in the south of the country and a vicious counter-terror operation in force. In the north and the east there was the Indian Peacekeeping Force (IPKF) and the LTTE and all the suffering and trauma this entailed for the civilian population. National elections took place for the presidency in 1988 and for parliament after eleven years in 1989, and in a context of considerable violence.

Today, at the beginning of 2015, Sri Lanka is into the sixth year of a post-war situation following the military defeat of the LTTE. It is yet to arrive at a post-conflict one, defined in terms of the roots of conflict not being sustained or reproduced. In a lot of respects, this is what this chapter is about – a constitutional architecture for all of the peoples of the island that reflects its diversity and facilitates genuine national unity amongst them. The recently concluded presidential election of January 2015 constitutes an opportunity to address the glaring governance deficit in the country and by doing so satisfy a necessary condition though by no means a sufficient one, to arrive at a post-conflict situation, in particular through facilitating a political and constitutional settlement of the ethnic conflict or national question.

Addressing the governance deficit was the platform on which the historic January 2015 election was fought and won and the ostensible, overarching rationale for keeping under wraps the major, pivotal challenge confronting the polity – the ethnic conflict or national question – lest it jeopardise the unity of an opposition coalition which spanned Sinhala Buddhist nationalists at one end to Tamil nationalists at the other. This too is perhaps the underlying rationale for a 100-day programme that does not explicitly address this challenge, but postpones it to post-general election. What is clear though is that the victory secured by Maithripala Sirisena at the polls in January was achieved by votes

from across the country and the multiple identities of its peoples. It should not be forgotten, whatever is averred about the Tamil and Muslim vote in the main, Sirisena received, that Mahinda Rajapaksa's vote amongst his core Sinhala Buddhist constituency fell from its 2010 heights and accordingly, laid the foundation for his defeat.

The country awaits the constitutional and policy legacy of this victory. The disappointment, diatribe and demonstrations that have followed the decision to defer the publication of the Commission of Investigation report on war crimes conducted under the aegis of the Office of the UN High Commissioner for Human Rights, indicates the growing impatience and frustration, even anger, of those who voted in large numbers to defeat the Rajapaksa regime with the pace of progress in the demonstration of substantive *bona fides* for reconciliation and accountability – vital components of democratic governance and of a durable national unity. That they seek international redress is a measure of the enormity of the challenge in this respect and of the gulf that has to be bridged by the state if it is to be seen as protector rather than predator by some of its peoples.

The reflections that follow the 1989 paper, reproduced in full below, seek to identify what should be essential elements of the legacy of the January 2015 election, if indeed it is to be celebrated in times to come as ushering in and consolidating the coming of age of our polity and of the future we ceaselessly aver we deserve.

§§§

This paper is based on two assumptions, which need elaboration. They are that any contemplation of constitutional change in Sri Lanka at present must directly confront,

a) The issue of nation-building, especially the propagation and sustenance of a unifying concept of national identity, and
b) The stark realisation that any constitutional structure envisaged cannot be viewed as registering the accomplishment of liberal democracy in the polity, but rather be seen as a vital instrument in expanding such elements in the body politic.

Furthermore, in such deliberations it is always instructive to have a judicious awareness of the context in which one has to operate and of the need for relevance. Even if analogies were to be drawn between constitutions and divine commandments engraved in stone and handed down from on high, constitutions must be imbued with a vibrancy and vitality, which inculcate in the community, faith in their importance and protection. In short, the relationship between the polity and the constitution must be one in which the latter's attitude toward the former can be characterised as respect for the living, rather than reverence for the dead. The catalogue of misdeeds and tragedy in our recent past, underlines this point.

Commensurate with these themes, this paper will deal with the experience of nation-building and the institution of the state in the post-colonial societies and then go on to the question of the executive in Sri Lanka. In doing so, it will outline the tension and the promises generated by this process in the domestic as well as international contexts. Briefly, in the first section of this paper, I want to suggest that Sri Lanka is in the throes of a belated nation-building experience, some forty years after independence and that precisely because this process was circumvented by a liberal bourgeois consensus that underpinned successive regimes. Liberalism, though threatened, has an important role to play in the development of the polity.

To begin with, a truism, which though considered as somewhat jaded, informs the arguments presented here, particularly because it provides a crucial link with the international dimension of Sri Lanka's predicament.

Sri Lanka is a developing society, albeit with intrinsic features of its own that differentiate it from other polities similarly classified. What is meant by a developing society is often inferred or assumed. As a consequence, the term becomes a convenient label and catch-all phase, vacuously proffered as the cover for a plethora of shortcomings, of which the most obnoxious is the frequent statement of diminished responsibility by the government of the community. I want to investigate the term more closely and weave into it the exposition of the two assumptions mentioned at the outset. My understanding of the

term is not exclusively confined to economic indices, because I believe that its utility in debate, resides in its qualitative rather than quantitative connotations.

Admittedly, this places it amongst the 'essentially contested' concepts of political discourse, but this is unavoidable. Nevertheless, cognisant of this, the term 'developing society' in this paper, is taken to connote the particular socio-economic and political conditions that obtain in the post-colonial societies of Asia, Africa, and to a lesser extent, Latin America, and the particular tensions they generate within and between such communities in an inter-dependent world. In this respect, the international dimension cannot be ignored – the proverbial lessons of history apart, there is the colonial legacy which bequeathed the coercive and administrative apparatus of the modern state and at the same time, provided the conceptual baggage of contemporary political intercourse with which to define the nation.

Moreover, it has also been the international power configuration, characterised by the transformation of colonial rivalry into the ideological hostility of the Cold War, that has delineated the intellectual parameters of our debate about man and society. To this must be added a further element, the global reach of technology, international capitalism and socialism; the first shrinking the world so that the second may treat it as one market place that the third is committed to restructuring. Consequently we must be aware that these developments in the international environment of which we are a part of, are inherently subversive of the task we are faced with, of building a nation and institutionalising the state with all the connotations of national self-determination and territorial sovereignty. Indeed, in the Sri Lankan case, it is worth mentioning at this point that, external assistance for economic development from multinational agents who look upon us as a segment of the global market is guaranteed in the present constitution and the state is heavily reliant on regional policing for its survival.

In Europe, the birthplace of liberal democracy, the progression from fiefdoms to protection rackets and the modern industrialised state and from tribes and warring factions to nation took

centuries. It was both a bloody and relatively uninterrupted process in contrast to the experience of our post-colonial societies. Accordingly, there was more of a symbiotic relationship between nation and state, polity and economy. As a consequence, developed societies can be characterised as nation-states, because they were the pioneers in the modern era of this process and were able to effect its conclusion without external intervention and the existence of alternative loci of power and authority in the temporal realm on the scale developing societies are confronted with today. Myths of association forged by conquest and elevated thereafter as the *raison d'etre* for nationhood were consumed by the intellectual imagination of the 18th century Enlightenment and the 19th century Romantics and embodied in the doctrine of nationalism as a potent combination of reason and passion. Corresponding to this, as these myths succeeded through both brutality and persuasion in delimiting the territorial confines of collective political association, political discourse turned to the next stage in the provision of the 'good life' and facilitated the growth and refinement of the great modern ideologies of liberalism and socialism.

In both their inimical and entrancing manifestations, colonialism and capitalism, as the purveyors of a global culture, introduced us to the potency of such ideas culled essentially from a Eurocentric experience. In this respect, it is not that Europe discovered a world far greater in territorial scope than its predecessors, but more importantly as a consequence, Europe was able to define the world in terms of European needs and experience. This enabled Europe, regardless of the colonial fortunes of its members, to talk even today of an international society of nation-states.

Centuries of exposure to an intellectual vitality to which we could not directly contribute, but which nevertheless, decisively affected us, must serve as the starting point for our task of nation and state building. It is in this sense that the initial relevance of liberal democracy to our present concerns, is assured. It is a part of our history, our political inheritance and colonial legacy. Regardless of the insensitivity and brutality of our introduction to it, it should not be seen as a boil to be lanced or a bittersweet memory that only induces nostalgia. Especially since we have to pursue our task

in an international environment, compounded from our perspective, by the prevalent mass democratic and human rights ethos plus the dynamics of capitalism, liberal democracy with its emphasis on liberty, tolerance and diversity, is particularly relevant.

However, we must not treat it as a dogma, ossified in time, but must sustain its vitality and universality by adopting it to our own peculiar circumstances. Such a perspective, affords us the opportunity to contribute to this body of ideas, an opportunity that was denied us, at its inception.

Yet, at the same time, we must be acutely conscious of not overestimating the degree of liberalism embedded in the polity. To illustrate this one must turn to the political evolution of the post-colonial world and to an analysis of liberalism in Sri Lanka. This will facilitate classification of the relationship of state and nation.

I want to emphasise the point about the state and the colonial legacy – that the state was the principle institution bequeathed to us, prior to the consolidation of the nation. Indeed it is the state – the bureaucratic, administrative and coercive instruments and processes of centralised authority and power – that along with the 'dual economy' are the salient features of the colonial legacy.

Two consequences arise from this:

1) The state becomes the principal agency for creating a nation; and
2) The 'dual economy', symbolising incorporation in an international economic system, out of necessity and before choice was even possible, places structural constraints on the exercise of sovereignty.

The combined impact of these not unrelated factors is to make the task of nation and state building more difficult, but no less urgent, and expose the futility of predicating these tasks on appeals to cultural chauvinism and/or autarky. The body politic, civil and political society, will have to be founded on bases more positive and constructive than the dogmatic refusal to acknowledge the context in which we operate. Negative

nationalism, therefore, is no panacea; it is, if at all, necessary as a phase, but by no means a sufficient condition for our purpose.

Even in those post-colonial societies where nationalist movements were in the forefront of the independence struggle, anti-colonialism alone in the succeeding decades has proved to be an inadequate instrument of social cohesion, as well as a mischievous and miserable rationale for social economic development. Tensions that were sublimated in the national liberation struggle tend to be manifested once the foreign *bête noir* has been vanquished. Divisions that predate the colonial period and/or were sustained by it, inspire what has by and large been the dominant pre-occupation of political participation in post-colonial societies – the concerted attempt by a particular group claiming to be a distinct nation to 'hijack' the state and thereby institutionalise its dominance over the territorial unit. Since developing societies are 'penetrated', this process has serious ramifications; civil strife invariably results as putative nations within the territory demand statehood. Furthermore, as their demands in turn, are couched in the language of global ideological rivalry and correspond to super-power, geo-strategic imperatives, nation-state building in the developing world is transformed into a test case of international order.

Let us consider more closely, what happens when a particular group, albeit preponderant in numerical terms, hijacks the state. This will highlight parallels with our own experience.

The group that hijacks the state turns it into its very own protection racket and restrict access to state facilities for collective security and the 'good-life', to its members. Moreover, the key ingredients in this restriction of access, essentially to the largesse of the state and which serve the function of imposing homogeneity upon the wider community, are language, ethnicity and religion. Language as the medium of social intercourse and the passport for social mobility is especially significant. As the social philosopher Ernest Gellner has pointed out, this results in an education system that equips the population to become government clerks! That this is doubly restricting for a developing society in an interdependent world where the rapid growth of technology is communicated in an international language is

ignored. More importantly, such chauvinism only serves to institutionalise reliance upon external assistance and charity for economic development, highlighting the dilemma of nation-building in a context of global inter-dependence; the difficulties involved in isolating and consolidating, when intervention rather than non-intervention is the norm in international relations and the separation of domestic and international contexts is fast being relegated to the realms of political rhetoric or becoming a mere heuristic device for academics.

I referred earlier to the intrinsic features of Sri Lanka and our association with liberal democracy. The task remains of explicitly integrating this analysis into the preceding discussion.

Unlike many other post-colonial societies, independence in Sri Lanka was obtained in remarkably amicable circumstances and without a widespread and protracted national liberation struggle. Indeed the extension of universal franchise in 1931, serves as a significant indication of the colonial power's perception of us and of our receptivity to the bourgeois liberal ideology of parliamentary democracy. Accordingly, the transfer of power effected in 1948 was in the main to a bourgeois elite, distinguished not so much by ethnic homogeneity, preponderance or consciousness, but by a hybrid consensus, underpinned in turn by a class solidarity and semi- feudal social structure. This facilitated the espousal of liberal democratic institutions under elite custodianship, and ethnic tensions, although discernible, were contained within this consensus. So too was the most illiberal disenfranchisement of the Up-Country Tamils.

Accordingly, a traumatic nation-building process was held in abeyance and the subscribers to the consensus of class and semi-feudal solidarity were able to project an image of a developed polity along liberal democratic and parliamentary lines, in comparison to our post-colonial contemporaries. This is not to suggest that what it meant to be a citizen of Sri Lanka constructed in ethno-religious and linguistic terms was totally absent, but to emphasise that since the elite consensus dominated the political agenda, these ideas were demoted to the periphery by the structural constraints of the ostensible liberal polity.

For these ideas to be recognised, their proponents had to organise. However, given the elite bias in the polity, this could only happen once a split in the ranks of the elite released a segment of it to lead and facilitate the entrance and active participation of such groups in mainstream politics. Mr Bandaranaike's resignation from the UNP and the social transformation symbolised in the 1956 election victory, heralding the Age of the Common Man with its emphasis on Sinhala Only, directly relate to this and provide the Sri Lankan example of the Gellner thesis referred to earlier.

Not surprisingly, the forces released by this social transformation and mass democratisation of the Sri Lankan polity have grown in strength, whilst the liberal democratic parliamentary consensus has been gradually eroded. Consequently, the principal beneficiary of hijacking the state has changed from ethnic group to one party. The relative ease with which this was effected points to the narrow base of our immediate post independence liberalism. Certain problems inherent in it, exacerbated by the international factors, must also be conceded.

In order to retain their hold on power, the elites had to co-opt the populist sentiments of the new entrants into the political system; to have denied them entrance in the first place would have exposed the superficiality of elite pretentions. Furthermore, oscillations in the international economic climate precluded any comprehensive 'embourgeoisement' of these new entrants, which would have expanded the base of liberalism in the polity. It is therefore, instructive for its present proponents, to pursue the dissemination of liberal ideas, from the bottom up – to develop substantive economic policies and a constitutional framework that would facilitate this.

A corollary of the erosion of this elite consensus has been the politicisation of civil society and the blurring of the distinction between the civil and political realms. Indeed, in the present situation civil society has been politicised in partisan terms to a point approaching extinction and the political realm has been 'depoliticised' in the sense that both community and party that hijacked the state have effectively suppressed the opposition and neutralised dissent. If the political agenda and institutions of the

immediate post-colonial era were restricted to the bourgeois elite, the paradox today is that mass democratisation notwithstanding, power though ostensibly dispersed, in at the same time heavily concentrated in an increasingly autocratic and partisan state, endowed with an executive presidency.

At this point, I must declare my opposition to the executive presidency, especially in its present incarnation. The oft-quoted rationale for it – that strong government is necessary for economic development is a fallacy. Economic development requires stable government, which our experience of the executive presidency has not proved conclusively. Strong government has become a synonym for authoritarianism, which defines development in the narrow terms of its own interest in maintaining power. Stable government would be a self-conscious attempt to integrate and accommodate this diversity, as an essential element of the development process.

Furthermore, an executive presidency is not conducive for institutional consolidation in the polity, because of its over-reliance on charismatic leaders and personalities. Neither is it appropriate to the task of nation- building, which does not in turn require self-styled philosopher-kings for direction. If the presidential response to the 1983 riots is anything to go by, both democracy and nation-building were seriously undermined. In this connection, it is interesting to note, that of the two constitutions enshrining the executive presidency, with which the 1978 constitution is compared, the Gaullist Constitution of the Fifth French Republic and Nkrumah's 1960 Constitution of Ghana, the executive presidency tailor-made for charismatic leaders, only one, that of France, provided stable government and this too has only been demonstrated over a long period of time. Interestingly, in the developing post-colonial society of Ghana, the polity was constantly endangered and the charismatic leader himself overthrown.

The point that needs reiterating with regard not just to the executive, but to the state and the constitution in their entirety is the overarching need to share power; to create and sustain a framework that can accommodate pluralism and diversity without fostering anarchy. This is particularly pertinent to the Sri Lankan

case where the concentration of power has been accompanied by political violence and creeping anarchy and where too, vestiges of the liberal tradition survive and can therefore be employed in forging social cohesion on a non-partisan basis.

Accordingly, I want to advocate a return to the parliamentary tradition, but with a proportional representation election system. This would embody a social contract between state and nation, civil and political realms, ruler and ruled that opens access to the corridors of power, rather than slam them shut.

A return to the Prime Ministerial government which this entails within the context of an overall devolution of power, proportional representation and an Upper House would allow for a much needed de-mystification of the executive through the replacement of the philosopher-king by the *primus inter pares* – a politician among politicians rather than one ensconced above them. Furthermore, through parliamentary debate, the chief executive could be engaged in active and informed political discourse and the populist idiom of the executive presidency's personal conversations with people avoided.

Within these broad confines, it would be possible to expand the elements of liberalism in the polity and advance the task of nation-building as well. Only a liberal outlook can ensure that politics in Sri Lanka is not exclusively a zero-sum game and that rationale for collective political association be sought outside confines of sectarian interest.

§§§

In the preceding twenty-six years, Sri Lanka has borne the Premadasa, Kumaratunga and Rajapaksa presidencies with the brief interregnum of the Wijetunga presidency from 1993-94. In only two of these cases, arguably was there recognition of the pluralism and diversity inherent in the polity and ostensible attempts to forge unity in diversity – the Premadasa and Kumaratunga presidencies. Both failed, leaving open to contestation and debate as to whether the institution of the executive presidency was at the heart of the failure or whether it was the idiosyncratic qualities of the particular individuals set within an ingrained and inimical political culture of

majoritarianism and hierarchy. This also brings to the fore the culture versus institutions debate, with the position that each reinforces the other, informing this chapter. Consequently the issue is as to whether a political culture, and the stress here is on the political culture of majoritarianism, is better nourished by an executive presidency than any other constitutional form of executive and as to whether the executive presidency, in turn, nourishes the political culture of majoritarianism? My answer to both questions is in the affirmative.

There may well be the argument that the Kumaratunga presidency in particular, with its constitutional proposal for a Union of Regions and its *Saama Thavalama* and *Sudhu Nelum* public awareness programmes was the closest thing to an exception to this thesis. The convictions of the holder of the office of the executive presidency coupled with the resources of that office were used to reorient political culture away from the unitary state and towards a form of power sharing amongst the peoples of Sri Lanka. It came to grief though because of the insistence – at least in the perception of the opposition – on holding on to the powers of the office of the executive presidency in its transitional provisions, and illustrated more generally the problem of an over-mighty executive within a power-sharing framework. To be sure, the saga of the Draft Constitution Bill of 2000 met with institutionalised resistance from traditional stakeholders in the polity, and the shortcomings of the 'top down' galvanising of public opinion in its support was shown up. Constitutional reform underpinned by the wider subscription of a party as in a parliamentary system, as opposed to that intimately associated with the holder of executive office, may well have had a better chance at success because the reorientation of the facilitating political culture would have been both more widespread and deep-rooted.

In contrast the Rajapaksa presidency acquired unto itself, on the basis of military victory in 2009, the trappings of royalty for its essentially dynastic project and the license to loot the state. Consequently, the pursuit of an overarching identity was jettisoned in favour of the rhetoric of patriot and traitor – of those who loved the country and those who did not – the deliberate and distorted dichotomisation of public discourse that provided a thin

veil for loyalty and obedience to the ruling family. Reconciliation and national unity were not on the agenda – Mahinda Rajapaksa had probably the lowest minority support of any executive president of Sri Lanka. Sublimation of all to dynastic rule was.

The Rajapaksa regime exploited the powers of the executive presidency to the fullest and through the Eighteenth Amendment, abolishing term limits for the incumbent and the few checks and balances on the exercise of executive power represented by the independent commissions introduced by the Seventeenth Amendment, was bent on destroying Sri Lanka as a formally functioning albeit flawed democracy. His defeat is especially significant for saving the country in this respect and accordingly, the re-introduction and consolidation of democratic governance all the more important as both a bulwark against this and any other brand of authoritarianism and as the bedrock for unity and government in the future.

I hold to my thesis of twenty-six years ago that the propagation and consolidation of an overarching unity, without prejudice to other identities in the polity, can only be achieved through a power-sharing framework and in particular, a federal constitution. Furthermore, a power-sharing network will also facilitate and augment governance through the genuine spread of responsibility and accountability for it by all citizens as stakeholders. A unitary state with an over-mighty executive or even without one of the magnitude and scale of the executive presidency, as our history has demonstrated, is inherently susceptible to state capture – be it by one community or party or family – and enduring national unity cannot be built on state capture.

This begs the question as to how this is to come about – whether a political culture of power sharing needs to widely be subscribed to by most in order to produce the constitutional architecture reflecting and legitimising it. In any event, the imposition of this from above and without popular support is a recipe for disaster.

The reform of the executive and the abolition of the executive presidency it must entail, is part of a wider democracy project and as such, is a process and not one amenable to completion within a pre-ordained timeframe. Currently, the government is pursuing a 100-day programme of governance reforms including a

diminution of the powers of the executive president, the re-introduction of the oversight commissions of the Seventeenth Amendment, Right to Information (RTI) legislation, and electoral reform combining first-past-the-post and proportional representation systems. All no doubt are needed and all require nurturing to become embedded in the institutions and processes of democracy in the country. No single reform constitutes a panacea.

One thought though: all of the proposed reforms focus in the main on government and governing except for electoral reform and the RTI legislation. RTI legislation in particular, if it is to succeed requires an animating culture of disclosure and the jettisoning of the traditional one of secrecy. Its salutary effects on democracy relate to its opening up of government through the provision of information about the decisions and decision-making that affect our daily lives as citizens and therefore empowers citizens in making informed choices at elections – the basic mechanism for choice and change in a functioning democracy.

Could this be the game-changer for national unity too, through a constitutional architecture and complementary political culture of empowerment in the future, that today is considered as both dangerous and fanciful?

25

Unconventional Conventions: Power Partnerships in the Sri Lankan Executive

H. Kumarasingham[1]

[1] This chapter is an edited version of H. Kumarasingham (2013) ***A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka*** (London: I.B. Tauris): Ch.6.

Though the subject of this book covers the republican and presidential period this chapter goes further back to the first ten years of independence when Sri Lanka was a Realm with a Governor-General as Head of State and Prime Minister as Head of Government. Many of the constitutional and political issues that pervade this book such as tribulations with executive power, accountability, institutions, offices of state, conventions and many others did not, of course, arise with the establishment of the republic in 1972 nor the Executive Presidency six years later. Questionable executive practices that eroded democratic integration were already evident and prevalent from at least the end of British rule on 4 February 1948. Sri Lanka became an *Eastminster* [2] , which meant it crafted British Westminster institutions and conventions for its own needs and conditions, which differed significantly from the United Kingdom. This chapter therefore examines early patterns of executive tendencies that were forged well before the advent of either form of presidency. The *Eastminster* context with its emphasis on convention and ambiguity allowed the major constitutional practitioners to largely fashion the executive themselves. Despite the theoretical supreme power of parliament (which then included an upper house also) Sri Lanka's *Eastminster* heavy weights – the Prime Minster and Governor-General displayed autocratic propensities that were legal despite going against the maxims and intent of the Westminster system they wilfully adopted. This chapter examines these critical offices and relationship in the first decade after independence and their actions, which prefigured in a manner some of the important concerns that lie at the feet of contemporary Sri Lankan democracy and the legitimate anxiety over the powers that Sri Lankan citizens delegate knowingly or not to the Executive without sufficient safeguards.

The colonial legacy, the absence of institutionalised modern democratic institutions such as established parties, the lack of an activist civil society and a low level of political literacy in the population, meant that in Sri Lanka power was more often personalist and delegated. Executive power in its first decade

[2] For a detailed theoretical and analytical description of the term *Eastminster*, see Kumarasingham (2013): Ch.1.

centred on, and was delegated to, the Governor-General and Prime Minister rather than the Prime Minister and Cabinet as in the more traditional Westminster system. The first decade following independence produced a unique relationship between the head of state and head of government that dominated the deliberations of state like few other West minsters. These political actors exerted horizontal accountability on one another, but seldom in the traditional theoretical Westminster sense. A partnership arose between the Governor-General and prime minister and power oscillated between them depending on the holders and political circumstances, but their political partnership always impacted on Sri Lanka's *Eastminster* executive more than any other.

His Majesty's Government of Sri Lanka took almost ostentatious care to ensure and present to the world that it would be a Westminster system – and a British one at that. In fact along with all the ceremony, dress and panoply associated with royalty, the Governor-General was referred to, and not in jest, as *Rajjuruwo*[3] (Sinhala for King) while resident at Queen's House, the palatial seat of colonial rulers since Dutch times. This was in contrast to Nehru's India, which wanted to rapidly topple its Dominion status and embrace republicanism. Indeed, D.S. Senanayake would proudly claim to his fellow Prime Ministers that Sri Lanka was the oldest monarchy in the Commonwealth as George VI was the legitimate and constitutional successor of the Kandyan kings.[4] One senior Sri Lankan civil servant even suggested to the British High Commissioner 'with a twinkle in his eye' that unlike Britain, Sri Lanka had never been a republic.[5] No doubt the Sri Lankan elite, had they known about it, would have welcomed Churchill's suggestion of sending the Duke of Windsor, formerly Edward VIII, to be the King's Representative in Colombo in late 1944.[6] As the prime author and authority on the Sri Lankan constitution,

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[3] T. Vittachi (1958) ***Emergency '58 – The Story of the Ceylon Race Riots*** (London: Andre Deutsch): p.70.
[4] L.M. Jacob (1973) ***Sri Lanka – From Dominion to Republic*** (Delhi: National Publishing House): p.33.
[5] High Commissioner to Secretary of State for Commonwealth Relations, 3rd April 1952, DO 35/3127, British National Archives (henceforth BNA).
[6] P. Ziegler (1990) ***King Edward VIII – The Official Biography*** (London: Collins): p.493.

Jennings himself stated of the new constitutional structures, 'what is provided, in short, is constitutional monarchy of the British type'.[7] However, the constitution, unlike Britain's, specified in great detail the expectations and powers of the Governor-General as the King's Representative and constitutional Head of State. How much could the 'British type' headed by the Governor-General function successfully in Sri Lanka and act, as in Britain, as the constitutional arbiter and guardian? The expectation was that the Governor-General would follow the precedents in Britain of the Monarch. Lest there be any doubt of that intention, the constitution explicitly stated in Section 4(2) of the Ceylon (Independence) Order in Council, 1947 that

> "All powers, authorities and functions vested in … the Governor-General shall…be exercised as far as may be in accordance with the constitutional conventions, applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty."[8]

During the period analysed there were three Governors-General – Sir Henry Monck-Mason Moore (1948–49), Viscount Soulbury (1949–54) and Sir Oliver Goonetilleke (1954–62). Moore had been the last Governor and had a long career in the Colonial Service; Soulbury headed the Commission that bears his name and had been a British Conservative Minister before and during the War; while Goonetilleke was deeply involved in the transfer to power, and was the first High Commissioner to the United Kingdom, later President of the Senate and Minister of Home Affairs amongst other high positions – they were thus all men with considerable experience who knew the country and its constitution well. The constitutional provision cited above sought to mitigate the nascent nature of the constitutional apparatus and the lack of familiarity and history of the conventions, which Britain, and not Sri Lanka, had evolved. However, as one legal scholar noted, though the Governor-General of Sri Lanka was legally required to act in accordance with the constitutional conventions in the United Kingdom, he was still 'the ultimate authority in a particular situation of what the convention is, and

[7] I. Jennings (1953) ***The Constitution of Ceylon*** (3rd Ed.) (Oxford: OUP): p.50.
[8] Ibid: p.169.

the manner of its application'. The Governor-General had the power to adapt to local situations since he only needed to follow British conventions 'as far as may be', and his actions could not be held to account by any court of law.[9]

In many respects the powers, prerogatives and expectations of the Sri Lankan Governor-General would be greater than the nominal ruler they represented at Buckingham Palace. The High Commissioner, though discussing Sir Oliver Goonetilleke in 1955, could have been describing all the Governors-General:

> "There is in the background, very active behind the arras of Queen's House, an able, intelligent and energetic Governor-General – one of the few very capable men in the Island – who interests himself in all the political problems of the day, and is more than ready to assist in the direction of affairs. In a country where constitutional forms are little understood, he plays a far more active role than we normally associate with the Queen's Representative. If the Government were to run into difficulties he would be prepared to give it the support of the powers of his office."[10]

Even Dr N.M. Perera, the erudite radical Marxist member for Ruwanwella, who opposed the 'sham independence', recognised in the House of Representatives that the Governor-General 'must … be a sort of beacon light that will shed lustre and light in our social and political life'.[11] The Soulbury Constitution gave *on paper* substantial powers to the head of state vis-à-vis the executive and legislature. Along with customary powers of a Westminster head of state, the majority of which are exercised on the advice of the prime minister, such as being Commander-in-Chief, summoning, proroguing and dissolving Parliament and the appointment of the prime minister and cabinet as well as senior judicial, military and

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[9] L.J.M. Cooray, '*Operation of Conventions in the Constitutional History of Ceylon, 1948 to 1965*' (1973) ***Modern Ceylon Studies*** 1(1): pp.7-9; Jennings (1953): p.169.

[10] High Commissioner to Secretary of State for Commonwealth Relations, 27th May 1955, DO 35/5362, BNA.

[11] S. Namasivayam (1959) ***Parliamentary Government in Ceylon 1948–1958*** (Colombo: K.V.G. de Silva & Sons): p.24.

civil service officers, the Sri Lankan Governor-General had certain *unique* powers.

The Governor-General was given the power through the constitution to appoint half the Senate and, most importantly, six members to the House of Representatives. Such provisions of selection were seen from certain angles as an opportunity to include in parliament some of the country's many ethnic, linguistic, regional, social and religious groups, since the traditional Westminster-derived electoral system could not otherwise deliver to the legislature representation of the many interests on the island. Sir Henry Moore, while still Governor, wrote to the Colonial Secretary on the proposed Soulbury Constitution, saying he believed that his future powers as Governor-General could mitigate minority qualms since there would be 'much less … communal feeling if we could secure a reasonable representation of community interests in the Upper House and in the Cabinet'. In view of this, Moore suggested that he should be sent 'Royal Instructions on the subject in making his nominations to the Upper House, even if [the Governor-General] is to exercise no discretion in the appointment of Ministers'.[12] Moore even proposed that a future Governor-General be given the benefit of active guidance in the use of the Royal Prerogatives, which he believed might need to be exercised in Sri Lanka if the communal and political tension he foresaw came to pass. The last Governor thought that the new office of Governor-General 'will have no body … to turn to in the exercise of the few functions left to him. I suppose there is no sort of Dominion or West Indian precedent for some form of Privy Council, who could advise … on the exercise of the Royal Prerogative.'[13] This showed the veteran proconsul's thinking in regard to the Governor-General's future powers.

Officials like Moore hoped that giving the Senate and the Governor-General discretion over appointments to that House

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[12] '*Letter from Sir Henry Moore to Mr Stanley, 25 July 1945*' in K.M. de Silva (Ed.) (1997) ***British Documents on the End of Empire, Series B – Sri Lanka, Part II, Towards Independence 1945–48*** (London: Her Majesty's Stationary Office): p.23.
[13] '*Letter from Sir Henry Moore to Mr Stanley, 26 July 1945*' in de Silva (1997): p.30.

and nominations for the lower house would appease the eloquent, but aggressive demands from the Tamil leader, G.G. Ponnambalam, for protected representation of minorities. Ponnambalam was arguing in reaction to the Westminsteresque Soulbury Constitution for 'fifty-fifty'; the equal division of representation in the legislature between the Sinhalese and other communities.[14] A previous Governor, Sir Andrew Caldecott, had argued that they should have Royal Instructions, as in British India after 1935, which would allow the head of state in appointing the cabinet 'to use his best endeavours, in consultation with the person likely to command a majority in the Legislature, to select those, including so far as practicable members of important minority communities, who would inspire confidence'.[15] However, no such 'Instructions' ever materialised and the constitution did not provide such interpretations of emphasis with regard to the theoretical and practical employment of the Governor-General's powers of appointment.

Unlike most Westminster nations, but like India, the Constitution of *Eastminster* Sri Lanka explicitly mentioned the office of prime minister. Part V of the constitution expressly mentions members of the Cabinet and Parliamentary Secretaries, the Head of the Cabinet to be the Prime Minister, the observance of the principle of collective responsibility to Parliament, and for such members and Secretaries to hold office during His Majesty's Pleasure. It even stipulates that there must be a Minister of Finance and a Minister of Justice. Other than the stipulation that at least two ministers, one of whom shall be the Minister of Justice, must come from the Senate, the Prime Minister's power of appointment and patronage is unencumbered constitutionally in the assignment of portfolios and personalities from parliament.[16] Uncommonly, and most likely to do with Senanayake's pledge to maintain Sri Lanka's strategic and defence capabilities for British and Commonwealth interests, the Constitution also specifies that the

[14] See Kumarasingham (2013): Ch.7.
[15] F. Rees, '*The Soulbury Commission 1944–45*' (October 1955, January & April 1956) ***The Ceylon Historical Journal***, D.S. Senanayake Memorial Number 1(4): p.28.
[16] Jennings (1953): pp.216–224.

Prime Minister is in charge of the Ministry of Defence and the Ministry of External Affairs.[17]

If one can call this stipulation an adaptation to local conditions, there were no other formal constitutional allowances for Sri Lankan circumstances such as communal seats at the cabinet table. Though the first prime minister and most of his successors were very much in favour of the British system, the Sri Lankan prime minister was certainly 'not under the same express legal obligations to follow British conventions, as the Governor-General is',[18] and thus not subject to such high constitutional horizontal accountability. The constitution established formally responsible cabinet government very much in the Westminster mould. However, this did change the crucial detail that the prime minister and cabinet were institutions of government; a situation that 'was alien to Ceylon in October 1947', when D.S. Senanayake formed his first Cabinet.[19] As discussed in the previous chapter, in addition to the fact that there was no cultural tradition whereby the electorate embraced and understood such theories and bodies, the whole experience of British rule had not adequately prepared the colony to encompass Westminster cabinet government. The previous, quixotic Donoughmore Constitution, as discussed above, did not provide for such political institutions, but had individualist ministries with key powers still held by colonial officials and the Governor himself, rather than a proto-executive or cabinet-in-waiting. Even Jennings weakly admitted that 'it is not possible to change a tradition by Order in Council, but the new Constitution did its best'.[20] In fact it was observed not long after independence that members of the cabinet, rather than acting as a collective, were instead 'concentrating on building [their] own empire without much

[17] Jennings (1953): p. 216. The Soulbury Report pushed for this unique inclusion, arguing that a Prime Minister 'as Head of Government, would be the most suitable repository for the information on Imperial Defence policy…the Minister of Defence, on instructions when necessary from the Imperial Authorities received through the Governor-General would be the instrument through which Imperial policies would be carried out'. See Soulbury Report, Cmd. 6677, p.95.
[18] Cooray (1973): p.13.
[19] Namasivayam (1959): p.34.
[20] Jennings (1953): p.101.

reference to [their] colleagues'.[21] If anything, this practice was a continuation from the colonial era.

In many ways Sri Lanka's independence was a personal transaction between the British and D.S. Senanayake. After the marginalisation of Sir Baron Jayatillike in the late 1930s, Senanayake became the premier politician on the island and with O.E. (later Sir Oliver) Goonetilleke and Jennings as his able assistants, cannily negotiated the terms of independence. The British decided that with Senanayake at the helm they had a safe assurance that Sri Lanka would remain in the Commonwealth and they would retain access to the Royal Navy base at Trincomalee and Royal Air Force station at Katunayake, which were viewed by senior British military and political sources as highly integral to Britain's defence planning in the uncertain post-war era.[22] The British saw that without Senanayake's cooperation, power could fall into the hands of extremists and all that His Majesty's Government and Sri Lanka stood to gain by symbiotic negotiation would be lost. Senanayake's sponsor Soulbury wrote to the Colonial Secretary asking for further concessions for Senanayake. He argued that there was a danger of power leaving the pro-Britain, moderate, but ageing Senanayake. Instead, power would find a home with the nationalist, leftist exponent of non-alignment that Bandaranaike represented. Soulbury warned starkly that 'it would not be wise to exclude the possibility of finding him [Senanayake] in the same camp as Mr Bandaranaike, being driven there in an effort to preserve his own leadership'.[23]

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[21] High Commissioner to Secretary of State for Commonwealth Relations, 12th April 1951, DO 35/3127.

[22] An example of this view came from the redoubtable Admiral Sir Geoffrey Layton, who advocated that their importance was so great that he hoped that Britain's 'object must be to see that the Imperial Government have, through the Governor-General, an effective voice in policy in such matters'. Layton optimistically thought the Governor-General should in the 'interests of Imperial defence' have a 'second set of advisors [from HMG in London] in addition to responsible Ministers', since it 'would not be a practicable proposition in such a case to rely wholly on the impartiality of a "non-political" Ceylonese [official]' ('*Defence policy for Ceylon': Memorandum by Admiral Layton for Sir H. Markham (Permanent Secretary, Admiralty)*' in de Silva (1997): pp.132–133. For further information on the Defence Agreements see Jacob (1973): pp.23–27, 195–196.

[23] '*Letter from Lord Soulbury to Mr Hall, 5th October 1945*' in de Silva (1997): pp.106–109.

Senanayake seemed to echo this fear when, on the same day, he wrote that he could lose his majority to the leftist nationalists, since 'I am already being accused of having offered too much and asked too little'.[24] In the end, as in India, Pakistan and many of the future African states such as Ghana, the British effectively entrusted the sovereignty to one man – D.S. Senanayake. Gordon Walker, representing the British Government at the Independence Day celebrations, recorded approvingly that the new Prime Minister was 'a bluff and hearty old boy' and, importantly for the former Colonial power, 'is in the genuine tradition of Dominion Prime Ministers: deeply committed to the British connexion'.[25]

Senanayake, who had gained enormous kudos for achieving independence, was undoubtedly a powerful prime minister. The attainment of independence was one of the main sources of Senanayake's political powers – rather than being the leader of a political party as in most comparable situations in the Commonwealth. This was because his party, the UNP, unlike Congress in India, for example, was not a well established or well organised hegemonic political force with grass roots support. But Senanayake, as he was to the British, was a reassuring politician to the masses and to parliament. British officialdom apparently liked him because Senanayake, unlike most of the Eastern elite he belonged to, was not English-trained; instead 'Jungle John' was a landed Sinhalese squire who 'surprised them by the strength of his character and the strength of his purpose'. Jennings believed it was 'perhaps an advantage that Mr Senanayake had not the facility of language of the English-trained Ceylonese graduate or the slick self-assurance of the professional advocate. A Ceylonese prototype of the English official would not have made such an impression.' The homespun but capable Senanayake, in Jennings' view, 'completely captured the Colonial Office and the Secretary

[24] '*Letter from Mr Senanayake to Lord Soulbury, 5th October 1945*' in de Silva (1997): p.113.
[25] Gordon Walker diary, 6th February 1948 in DO 35/2195, BNA; '*'Report on Ceylon': Cabinet Memorandum by Mr Gordon Walker, 17 March 1948*' in de Silva (1997): p.365.

of State. If he had been able to meet the Cabinet I am sure that he would have obtained independence in 1945.'[26]

Irrespective of his constitutional status as Prime Minister, Senanayake was 'Father of the Nation' and drew a confidence from that image that his successors could not, since they, more than he, required the powers of office derived from the constitution. But more importantly Senanayake was the first man invested with the powers over the new Dominion and thus he had the political ascendancy and delegated democracy from which he derived the institutional security that his successors lacked to such a degree. Senanayake was able to act effectively, in most cases, because he was the dominant personality. '[H]e did not so much dictate as he arbitrated between the wings', but with his 'popular support and an appeal approaching charismatic … in the end he could always impose his will'.[27] The studious scholar Jennings explained admiringly that Senanayake 'could take a decision on a most complicated and difficult issue at a moment's notice. He rarely asked for memoranda. He liked to have a problem explained orally, and even then he needed no lengthy lecture. He was concerned with principles and not with detail.' Though Jennings saw this as a good quality, and applauded the Prime Minister's wise judgement, the fact that Senanayake's genuine high principles of governance and civic responsibly to all Sri Lankans scarcely outlived him showed the importance of details and legitimate memoranda, which could have perpetuated his principles and prevented the constitutional and civil discord that followed. Instead, typically for an *Eastminster*, the system's successful governance of the island was determined not by institutions, but 'reliance upon his [Senanayake's] judgment', which naturally 'became too heavy'.[28]

In the period of analysis Sri Lanka had four prime ministers – D.S. Senanayake (1947–52), Dudley Senanayake (1952–53), Sir John Kotelawala (1953–56) and S.W.R.D. Bandaranaike (1956–

[26] I. Jennings, '*Donoughmore to Independence, Sir Ivor Jennings Papers*' (Institute of Commonwealth Studies, University of London).
[27] C.A. Woodward (1969) ***The Growth of a Party System in Ceylon*** (Rhode Island: Brown University Press): p.75.
[28] I. Jennings, '*Donoughmore to Independence, Sir Ivor Jennings Papers*' (Institute of Commonwealth Studies, University of London).

59). The personalities of these holders of the premiership and their relationship with party and cabinet are key to understanding the powers of their office in the institutionally nascent years after independence – and they also demonstrate certain cultural characteristics that distinguish Sri Lanka from India and other Commonwealth countries at the Executive level.

As discussed above, the vast majority of the Governor-General's powers are subject to the advice of the Prime Minister, which is stipulated in the Constitution under Section 4(2). However, there are some areas that allow certain manoeuvrability – the most important of which is the exercise of his personal prerogative in the appointment of the prime minister. In the traditional Westminster system it is the two-party system that transacts the business of parliament. The Queen's role is to offer the premiership to the person who holds the confidence of the lower house. In transplanted countries this is invariably the leader of the party that controls a numerical majority of seats over the opposition. With two parties this is a relatively automatic decision of simple arithmetic, leaving little discretion or difficulty for the head of state to decide on who to bestow a commission to form a government. In implanted and *Eastminster* countries the party system at the time of independence was relatively embryonic and far from two established parties there was generally a plethora of factions masquerading as parties lacking the cohesion and discipline that is expected from their cousins in the settler Dominions. Even India had at least the security of the Congress Party's dominance until the present day, which meant that the President had a simple choice. Sri Lanka's party system, as analysed above, was characterised by the novelty, incidence and irregular nature of parties during the period of analysis. Under these circumstances the Governor-General's disbursement of the seals of office is not so straight forward. It did not help that none of the major parties, including the UNP, had any reliable or formal machinery of electing leaders. This added to the political ambiguity and uncertainty that surrounded the succession to D.S. Senanayake.

Indeed, Sri Lanka's very first commission to become Prime Minister was offered by Sir Henry Moore to D.S. Senanayake, despite the blatant psephological fact that his party, the United

National Party, after the General Election of August–September 1947 did not hold an absolute majority in the House of Representatives. The anti-UNP factions in the newly elected chamber tried at the Yamuna Conference to converge to attempt to form a non-UNP government.[29] However, Senanayake's appointment to form a ministry was largely without controversy; Moore had commissioned the person best able to command the confidence of the House, because the new Prime Minister had persuaded enough Independents to sit on the government benches. Such constitutional conduct from the Governor-General was, despite the divergence from the usual British experience, in line with Westminster conventions, which the Sri Lankan Governor-General was constitutionally bound to honour. This was perhaps made easier because not appointing Senanayake to form a ministry would have meant calling on the Leader of the Opposition, Trostkyist Leader Dr N.M. Perera, to form His Majesty's first Communist government in the Commonwealth. It is important to bear in mind that in respect of constitutional conventions Sri Lanka was something of a legal abnormality compared with the other realms. Jennings contends that though it is 'entirely satisfactory … to have established the formal law as in Australia and to leave the conventions to be implied', in Sri Lanka it 'had to be established by law' and thus the country was peerless at the time, since its Constitution 'specifically provides for the application of the constitutional conventions of the United Kingdom'.[30] For all the implicit and explicit emphasis on Westminster conventions the Governors-General and prime ministers of the period had difficulties in interpreting, and more important, applying them. Those two offices had three crucial partnerships that demonstrated the flexibility and difficulty of Westminster conventions as well as the complexity and fluctuation of horizontal accountability in Sri Lanka.

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[29] N. Wickramasinghe, '*Sri Lanka's Independence – Shadows over a Colonial Graft*' in P.R. Brass (Ed.) (2010) ***The Routledge Handbook of South Asian Politics*** (London: Routledge): p.47.

[30] I. Jennings, '*Donoughmore to Independence, Sir Ivor Jennings Papers*' (Institute of Commonwealth Studies, University of London).

The First Partnership: The Soulbury Compact with the Senanayakes 1949–53

Lord Soulbury, with his old friend 'D.S.' safely ensconced at Temple Trees, the Prime Minister's official residence, with meagre prospects of office under a Labour Government back home, must have relished the vice regal opportunity to return to Ceylon and succeed Sir Henry Moore, who stayed on for just a year, as Governor-General in 1949. Soulbury back in Sri Lanka could indulge once more in his aesthetic savouring of the island's renowned 'traditions of art and architecture and literature and thought that in bygone centuries made her people famous'.[31] However, if the masses and the political elite thought that this bemonocled English aristocrat, with his impeccable credentials for the post, would spend his years on the island quietly poking around the ancient ruins of Polonnaruwa and act from Queen's House with the impartiality and correctness that is the convention of that high office and, as Soulbury himself stated, 'keep out of politics and refrain from any activities which may give rise to the suspicion of political influence…', they were to be greatly mistaken.[32]

Senanayake and Soulbury had been very close since the days when the former Conservative minister visited as head of the commission to deliberate on Sri Lanka's constitutional future in 1944–45. As early as October 1948 Buckingham Palace and Whitehall had 'known for some time that Mr Senanayake has in mind to submit Lord Soulbury's name as Governor-General of Ceylon'.[33] They bargained well with each other during the Soulbury Commission's time and understood the importance of their political relationship as trusted allies, enjoying their weekly

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[31] Department of Information (1949) ***Independence Day Souvenir, Independent Ceylon – The First Year*** (Colombo: Government of Ceylon).
[32] Lord Soulbury, '*I Remember Ceylon*' in ***Times of Ceylon Annual 1963***, cited in A.J. Wilson, '*The Role of the Governor-General in Ceylon*' (1968) ***Modern Asian Studies*** 2(3): p.195.
[33] Proposed Appointment of Lord Soulbury as Governor-General of Ceylon, 1948–1949, DO 35/3222, BNA.

informal meetings as Prime Minister and Governor-General.[34] They had an intimate relationship and though Soulbury was very much the junior in this partnership he was not an ignorant or insignificant partner. As he himself stated of their political partnership:

> "It was my duty in accordance with constitutional usage to accept and act upon his advice, but he was always ready to listen to advice from me, though of course he did not always take it nor did I expect him to … sometimes however I used to tell him that the only advice he really ought to accept was the advice that his doctor and I gave him…"[35]

Whatever the advice, Soulbury did not need to impinge upon the Prime Minister too much as Senanayake was undoubtedly the power in the country. In this *Eastminster* the Prime Minister lacked the traditional tools of power, such as that of leader over a whipped party or well established conventions of *primus inter pares* in cabinet, as these two concepts had not developed sufficiently. Senanayake was, however, able to keep his power partly through his status as the man referred to by the Americans as the 'George Washington of Ceylon';[36] the man that brought freedom to Sri Lanka. He also kept his power, however, by using the *Eastminster* tools of kith and kin. The British High Commissioner explained to London that the 'Prime Minister has numerous ties of kinship with other members of his Government and a large element in his personal position derives from the fact that he is able to depend on many personal contacts over a wide field in a way that is not often found in European politics'.[37] With these ties and contacts Senanayake was able to control his Cabinet of cousins and barons

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[34] Lord Soulbury, '*Senanayake the Man- Appendix 1*' in H.A J. Hulugalle (2000) ***Don Stephen Senanayake: First Prime Minister of Sri Lanka*** (2nd Ed) (Colombo: Arjuna Hulugalle Dictionaries): pp.286–292.
[35] Ibid: p.291.
[36] E.L. Watson, '*America in Asia: Vice President Nixon's Forgotten Trip to Ceylon*', ***(Online) Foreign Policy Journal***, May 2009 < http://www.foreignpolicyjournal.com/2009/05/01/america-in-asia-vice-president-nixons-forgotten-trip-to-ceylon/>.
[37] High Commissioner to Secretary of State for Commonwealth Relations, 18th April 1952, DO 35/3127, BNA.

in such a manner that there 'could never be any question of ganging up against him'.[38] Senanayake in short dominated the Westminster institutions and the conventions required to run them. The first Prime Minister established the precedent where Executive dominated the Legislature in a style known in both West- and *Eastminsters*.

> "Most of the important decisions affecting the life of the nation, particularly in defence and foreign affairs, are still taken by the Prime Minister. He never seriously consults Parliament through the normal process of debate. Legislation is for the most part stampeded through Parliament and the Opposition are given little time to formulate any criticism they might have to offer. The House of Representatives … are in the main left to debate in a detached and often irresponsible fashion the matters of purely local interest which are put before them. The House sat for just sixty-one days in 1950. No doubt the members of the House have failed to grasp the full significance of power now bestowed upon them and this results in the House of Representatives being regarded by Government and Opposition alike as little more than a talking shop."[39]

Unquestionably the most important event of Soulbury's tenure was the death of Senanayake and his role in the appointment of his successor to the premiership. Soulbury had a good relationship with the anglophile elite that dominated Sri Lanka at the time, especially due to his previous role in heading the Commission that bore his name and his advocacy in the House of Lords and Whitehall for Sri Lanka's independence. In Soulbury they saw a true custodian of the constitution and a 'dignified' upholder of the 'British way', which they so readily empathised with and mimicked. Many also saw that at this stage only an Englishman, above the petty differences of the locals, could maintain standards and order. And yet as Manor argues, 'the first major violation of

[38] High Commissioner to Secretary of State for Commonwealth Relations, 17th May 1949, DO 35/3127, BNA.
[39] High Commissioner to Secretary of State for Commonwealth Relations, 16th April 1951, DO 35/3127, BNA.

the conventions of Westminster to occur in the island was the work of an Englishman', [40] none other than Herwald Ramsbotham, GCMG, GCVO, OBE, MC, PC, first Baron, later Viscount, Soulbury in the County of Buckinghamshire.

On 21st March 1952 Prime Minister D.S. Senanayake suffered a stroke and fell from his horse during an early morning ride on Galle Face Green and, after being taken to hospital, died the next afternoon. [41] Only the day before this fatal fall the highly competent and reliable Cabinet Secretary B.P. Peiris recorded that after cabinet the Prime Minister entertained the ministers and some officials to lunch in the Senate restaurant. Peiris observed, with a characteristic Eastern eye for such details, that since there were some absences, thirteen were sitting for lunch: 'I was sent out to bring somebody, some extra person, but everyone I met appeared to have had his lunch. And so, thirteen of us sat down to lunch', to the great unease of superstitious Ceylonese.[42] The death of D.S. Senanayake began what the British High Commission described as the 'Drama of the Succession'. Even before his death British officials believed though the 'outward appearance is still that of a stable, peaceful and prosperous country' it would 'swiftly be shattered if Mr Senanayake was removed from the scene'.[43] Soulbury had only recently arrived in Britain, but hastened to return to Colombo, where the Chief Justice Sir Alan Rose was Acting Governor-General. The High Commissioner reported after subsequent confidential conversations with Soulbury, Rose and other 'well-informed people' that when Soulbury saw Senanayake before he left, the Governor-General 'asked him whom he would choose as his successor; Mr Senanayake replied "Dudley". The Governor-General told this to the Officer Administering the Government, Sir Alan Rose, before he left.' Syers states in his report to London

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[40] J. Manor, '*Setting a Precedent by Breaking a Precedent: Lord Soulbury in Ceylon, 1952*' in D.A. Low (Ed.) (1988) ***Constitutional Heads and Political Crises: Commonwealth Episodes, 1945–85*** (London: Macmillan): p.28.
[41] Winston Churchill offered to send brain specialist Sir Hugh Cairns to Colombo, but Senanayake's demise was swift.
[42] B.P. Peiris (2007) ***Memoirs of a Cabinet Secretary*** (Nugegoda: Sarasavi Publishers): p.156.
[43] High Commissioner to Secretary of State for Commonwealth Relations, 16th April 1951, DO 35/3127, BNA.

that Rose 'therefore had one vital piece of information before the death took place', and then notes ambiguously that Rose 'used it wisely to give himself the opportunity to play for time and to give the forces let loose in the country time to meet each other'.[44] Is this an indication that Queen's House (with the knowledge of Westminster House in Colombo) wanted time to gather support in the UNP for the dead man's son, who had shown no appetite for this piece of political primogeniture? On his return the principal choices that lay before Soulbury for the office of prime minister were Dudley Senanayake, the late Prime Minister's 41-year-old son and Minister of Agriculture and Lands, and Sir John Kotelawala, Leader of the House of Representatives (a position locally regarded as *de facto* deputy prime minister – though constitutionally, like Britain, there was no *official* post of deputy prime minister), Senior Vice-President of the ruling UNP and nephew of D.S. Senanayake.According to certain sources Kotelawala, the most experienced member of the cabinet after the late Prime Minister and who deputised for him in his absence, commanded the support of the majority of MPs of the UNP.[45] While Dudley Senanayake seemed to have a 'melancholy aversion to politics' and was relatively inexperienced, critically he had the active support of his kinsman's powerful Lake House press.[46] Soulbury wasted no time on his arrival in carrying out his duty – as he saw it. Manor describes the controversial and rapid events:

> "Lord Soulbury's plane landed at 12.35 pm on 26 March and he drove straight to Queen's House … He held no consultation of any substance with any Member of Parliament, and at 1.55 pm, less than an hour after the Governor-General had reached the residence, Dudley Senanayake arrived. After a 45-minute interview, the latter proceeded to the Cabinet room nearby where he met for ten minutes with ministerial colleagues [Kotelawala was not present]. He then returned to Queen's House to accept formally the summons to be Prime Minister … By calling a man other than the one

[44] High Commissioner to Secretary of State for Commonwealth Relations, 18th April 1952, DO 35/3127, BNA.
[45] Manor (1988): p.30.
[46] Ibid; K.M. de Silva & H. Wriggins (1988) ***J.R. Jayewardene of Sri Lanka: A Political Biography***, Vol.I (London: Anthony Blonde/Quartet): pp.254–260.

> who could command the majority of the ruling party's MPs, he [Soulbury] had breached one of the most fundamental conventions of Westminster."[47]

Even a British Governor-General did not apply Westminster conventions. Why had Soulbury acted in this way? Various sources believe that he was 'completing his great transaction with D.S. Senanayake', whom he greatly admired and was beholden to for his present post, which was offered over a 'long talk on the lake at Bolgoda'.[48] The Prime Minister advised Soulbury that, should anything happen to him, he should send for his son to lead the government rather than Kotelawala.[49] Senanayake said this despite publicly stating that the question of his successor was not a matter for him to determine. This statement was prompted in 1951 when Bandaranaike, realising the Old Man intended to bypass his obvious premiership ambitions, crossed the floor in pique to found his own party.[50] Soulbury had often noted that his old friend 'D.S.' was almost 'irreplaceable',[51] and perhaps the son was as good a substitute as possible. To many it seemed that Soulbury 'had paid off his debt' to D.S. Senanayake.[52] Whatever the reason, the events were highly extraordinary and the massive controversy they generated was warranted. The action, with its lack of formal consultation, disregard for precedence and dereliction of the constitution itself was utterly against the Westminster system. Amazingly, though the cabinet, the responsible executive body of the country was not consulted, it appears the Governor-General did consult – both personally and through officials at Queen's House – the British High Commission in Colombo, Whitehall and the King's Private Secretary. He told these officials 'in the strictest confidence' within hours of Senanayake's death that the 'late Prime Minister

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[47] Manor (1988): p.30.
[48] Soulbury in Hulugalle (2000): p.290.
[49] Manor (1988): p.32; de Silva & Wriggins (1988): p.253; J.L. Fernando (1963) ***Three Prime Ministers of Ceylon: An Inside Story*** (Colombo: M.D. Gunasena): pp.39–40.
[50] J. Kotelawala (1956) ***An Asian Prime Minister's Story*** (London: George G. Harrap & Co): p.79.
[51] Soulbury's radio broadcast on Senanayake's death quoted in Hulugalle (2000): pp.272–273.
[52] B. Weerakoon (2004) ***Rendering Unto Caesar*** (Colombo: Vijitha Yapa): p.8.

nominated orally to Governor-General his son Mr Dudley Senanayake to succeed him'. He added, notwithstanding the huge importance of this verbal testament, that there 'was nothing in writing'. [53] As Kotelawala threateningly reminded his constitutional head, the Governor-General, his constitutional duty was to appoint the leader who could command the widest support in the House – meaning, of course, himself. Before the appointment of the younger Senanayake but with rumours of the prospect gaining credence, Kotelawala on 24th March wrote unequivocally to Soulbury:

> "If you should now contemplate to act on any other basis, it is my painful duty to have to point out that such an act would constitute a serious breach of convention, besides setting up an utterly unacceptable constitutional precedent, that the Governor-General can make or break an established political Party by exercising his discretion in any method other than the conventional practice referred to … [After listing his senior positions as Leader of the House in which capacity he had presided over the Cabinet in the Prime Minister's absence, and as Deputy Leader] … I claim that there should be no delay whatever in my being summoned to form a Government."
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> "That this obvious step was not taken would appear to be due to some oral suggestion, which you had personally made before your departure on leave to the Officer Administering the Government [Rose] which you appear to have informed him [of D.S. Senanayake's wish for Dudley to be his successor]. The result is that a great campaign of political mischief has been set afoot during the past few days which is likely to have grave repercussion not merely on the U.N.P., but on the entire country for which the blame will have to be placed in the [sic] appropriated quarters."[54]

[53] Telegrams and letters 22nd–25th March 1952, DO 35/3127, BNA.
[54] Kotelawala to Soulbury, 24th March 1952, DO 35/3127, BNA.

Soulbury, by ignoring the arguments above and appointing Dudley Senanayake, who at 41 was the youngest prime minister in the Commonwealth at the time, left Kotelawala with few options. He could have forced a caucus vote of confidence on the new prime minister, but such an action would cause undeniable rupture to the UNP, which on its own lacked an absolute majority as the party would be facing a General Election very shortly. Open revolt was unquestionably difficult in the midst of visible and genuine peasant and parliamentary panegyrics in honour of the 'Father of Independence', whose son now carried the mantle. Soulbury had also delivered the initiative to Dudley Senanayake. There was one other option. Kotelawala, a seasoned member of the national legislature, who had held ministerial rank since 1936, may have contemplated appealing to Section 4 of the Constitution – which, as stated above, clearly commanded the Head of State to exercise power 'in accordance with the constitutional conventions, applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty'. The unprecedented contention surrounding the appointment of Dudley Senanayake was clearly not in congruence with the conventions of the Crown and confirmed the lack of Westminster culture.[55]

However, despite the potential case Kotelawala could have raised, there was no recourse to bring into question Soulbury's actions since the same constitution 'provided that no act or omission on the part of the Governor-General shall be called in question on any court of law or otherwise'.[56] Therefore the very hopes of the constitution on such questions could not be utilised, despite the understanding that what were conventional practices in other Westminster countries, were in Sri Lanka 'laws and not conventions' since, as two eminent constitutional scholars wrote (before the incident), the country 'had never known conventions so there was much to be said for giving the additional moral authority of legal enactment'.[57] Kotelawala had no ability to legally challenge the Governor-General's astonishing use of legalised convention. The injured politician eventually agreed to

[55] Namasivayam (1959): pp.35–36.
[56] Jennings (1953): p.169.
[57] Manor (1988): p.33.

return to and serve in his relative's Cabinet, but not before threatening to withhold the UNP's funds (which he controlled as Treasurer) and to leave the country and then, amazingly, demanding to become Governor-General himself.[58] Incredibly, for all their patronising preaching against the 'Eastern standards' of the Sri Lankans and their basking in 'the sunshine of political irresponsibility',[59] British officials did not level such charges against Soulbury's standards or irresponsibility. Syers did, however, indirectly question the last British Governor-General's judgement when speculating to the Secretary of State for Commonwealth Relations 'what might have happened if the Governor-General had been in the Island at the time of Mr D.S. Senanayake's death. Although he knew the late Prime Minister's wishes it would surely have been difficult for him not to summon Sir John Kotelawala as the senior Minister.' The High Commissioner, regardless of the constitutional propriety, thought this action 'would have been dangerous, possibly disastrous'; he was presumably alluding to Kotelawala's brash personality and chaotic attitudes. Rose as Acting Governor-General 'played it long' on Soulbury's instructions and this allowed the argument to gain 'slowly, but surely behind' Dudley Senanayake as the 'right choice'. This subtle campaign and delay thereby avoided 'open criticism that the Premiership was a family affair', which would likely have arisen if the appointment had been made immediately following the death.[60]

Soulbury himself seems to have tried retrospectively to find constitutional support for his remarkable actions. While in London he reportedly said publicly that if son followed father to form a government directly it would be 'the first time in the history of Parliament that it has happened'. Even the Pitts had not managed such a feat.[61] Less openly, and just two days after appointing Dudley Senanayake as Prime Minister, Soulbury requested and received the same day advice from a fellow friend of D.S. Senanayake, the famous jurist and scholar Sir Ivor

[58] Fernando (1963): pp.46–47.
[59] High Commissioner to Secretary of State for Commonwealth Relations, 3rd April 1952, DO 35/3127, BNA.
[60] High Commissioner to Secretary of State for Commonwealth Relations, 18th April 1952, DO 35/3127, TNA.
[61] ibid.

Jennings, then Vice-Chancellor of the University of Ceylon. Jennings, the shadow author of the constitution, had defended Soulbury's actions by both phoning and writing privately to the Governor-General's office that 'there is no obligation on the Governor-General to consult the Leader of the House or anyone else'. Jennings went on to point out that there was no compulsion to act on any advice except the prime minister's, and he further justified the delay in Soulbury's duty to appoint a prime minister or even an acting prime minister. Jennings continued (alluding to Kotelawala) that Soulbury did not have to consult ministers or party leaders and that 'the Leader of the House has no claim whatever to the office of Prime Minister'. He then made a courageous, but highly contentious, offer: 'if the Prime Minister thinks it would help' Jennings was 'very willing to write an article for the Ceylon Daily News' to advocate the Soulbury–Senanayake position.[62] Jennings arguably was colluding with or at least absolving Soulbury from his legally and politically unaccountable position.

Such actions of all the main players evidenced degrees of constitutional inappropriateness and an inability to commend the system to the country by blurring the constitutional responsibilities and roles of the executive actors. The entire incident demonstrated the formidable difficulty in applying the legal and theoretical intricacies of Westminster to a foreign land and culture without judicial review of constitutionally defined duties of the executive.[63] Dudley Senanayake's first Government only lasted from March 1952 to October 1953, when he was succeeded by Sir John Kotelawala.

[62] Jennings to Mr Hingley (Secretary to the Governor-General), 28th March 1952, ***Jennings Papers***, Ceylon B3, ICS125, ICS.

[63] Whatever the constitutional irregularities of the appointment the fact that Senanayake requested and was granted a dissolution of Parliament and was returned as Prime Minister and Leader of the UNP as a result of the General Election did much to mitigate the controversy surrounding Soulbury's decision.

The Brief Second Partnership – The Fall of Soulbury and the Ceylonese friends Sir John and Sir Oliver 1954–56

Though Kotelawala never publicly stated it, he was the author (with the help of a private secretary) of a highly controversial document called the 'Premier Stakes 1952', which baldly attacked Lord Soulbury as Governor-General over the appointment of Dudley Senanayake as Prime Minister. Though they never admitted it, the British not only knew about the offending document, but possessed a copy and knew for a fact that Kotelawala had written it. This strange document, which left Sir Cecil Syers wondering if he 'had made an excursion into Looking-glass Land', offended all and sundry and was 'clearly written up after the event' with 'vilification' in mind.[64] Political rivals (and Cabinet colleagues) were variously described with disdain: Freddie Jayewardene, 'who hadn't the brains of a louse'; 'Dirty Dickie' J.R. Jayewardene, who was one of 'my self-chosen grave diggers'; G.G. Ponnambalam, 'who would sell his own mother-in-law to gain his end'; and Justice Minister Senator Sir Lalitha Rajapakse with his 'kindergarten manner'. The Indian Tamil Estate workers' leader S. Thondaman apparently had a disagreement with Sir John Kotelawala on one occasion, after which the latter told him: 'I'd have beaten you to within an inch of your life'. However, Sir John's most bilious barb was reserved for the man who had denied him the premiership. The writer of the 'Premier Stakes' claimed that Sir John's enemies, on hearing of the death of Senanayake, had been on the phone to 'the ever-subservient and self-aggrandising Lord Soulbury in London. They were to queer the pitch for me for the underhand bowling, while His Satanic Lordship as umpire was to give me "Out" when they appealed' and thus he was dealt 'the deadly or Dudley blow'.[65] Soulbury tried, again contrary to convention, to persuade the Prime Minister to sack Kotelawala from the short-lived cabinet. When the younger Senanayake resigned a short time later over food riots, Soulbury even asked Jennings whether there was any

[64] High Commissioner to Secretary of State for Commonwealth Relations, 24th September 1952, DO 35/3127, BNA.
[65] '*The Premier Stakes 1952*', Diary for March 21st–27th 1952, DO 35/3127, BNA.

constitutional way of denying the premiership to Kotelawala by arguing that the stressed Senanayake was potentially 'unable to perform any of the functions of his office', including giving the crucial advice on his successor.[66] The Governor-General was naturally concerned with his own job security, faced by the spectre of a new Prime Minister who reputedly believed that his meek kinsman Senanayake was 'be[ing] misled by that b… Soulbury'.[67]

Aside from the supposed oral testament and loyalty to it, why did Soulbury deviate from convention? Apart from the personal distaste that Soulbury and the British felt for the 'megalomaniac' and 'Rabelaisian' Kotelawala, they seem to have had another reason for wanting Dudley Senanayake to attain and continue in office. They feared that Sir John was 'the type of man who might one day make a bid for control of the country by distinctively undemocratic methods'.[68] The British believed that Dudley Senanayake was more likely to maintain his father's policies towards Britain and keep the country within the Commonwealth as a reliable Realm, strategic base and trading partner. The High Commission were probably not mollified by Kotelawala's assurance that if a motion were put to parliament for a Republic 'he would say that he would himself be a candidate for Presidency and would claim powers [more] akin to United States President than to Governor-General', which would scare those in favour of such a constitutional change. To British diplomats the prospect of a Kotelawala-led *autogolpe* (self-coup) was not entirely implausible, since 'Parliamentary democracy is not an institution in Ceylon whose roots have struck deep as yet and in the rural areas the tradition of feudalism still holds sway. A political coup might, therefore, stand a chance of being carried through without arousing widespread antagonism.'[69]

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[66] Soulbury to Jennings, 5th October 1953, ***Jennings Papers***, Ceylon B3, ICS125, ICS.
[67] Fernando (1963): p.61.
[68] High Commissioner to Secretary of State for Commonwealth Relations, 16th April 1951, DO 35/3127, BNA.
[69] High Commissioner to Secretary of State for Commonwealth Relations, 16th April 1951 & 17th January 1955, DO 35/3127 and PREM 11/1223, BNA.

However, the mechanics of the previous change in premiership and of course the recent colonial past allowed Sri Lankan political leaders to wonder whether the British could themselves still manipulate power on the island. The Secretary of the Tamil Federal Party, a supposedly 'anti-Jayewardene' party, requested that 'the High Commissioner should urge the Governor-General not to let his personal antipathy stand in the way of the nomination of Sir John Kotelawala'. An unnamed British diplomat replied bashfully to this plea for political intervention that 'this Office did not play any part in the politics of Ceylon and … it would be both constitutionally and contrary to our practice to advise the Governor-General on this or any other matter'.[70]

Soulbury was compelled to invite Kotelawala to become Prime Minister in October 1953.The new Prime Minister could now satisfy his enduring animus against Lord Soulbury. As he lacks the democratic sanction of being elected, the local Head of State has ultimately little practical recourse to defend and decide his powers over the wishes of a determined Prime Minister. The Prime Minister can dissipate horizontal accountability from the office of Governor-General. Despite being a royalist, Kotelawala demonstrated this relationship when, after just a month as Prime Minister, he commanded that 'God Save the Queen' should no longer be played and the Union Jack should cease being flown on official occasions. Lord Soulbury, Kotelawala's old nemesis, wrote that 'he was very much peeved'[71] at this, to which the Prime Minister responded:

> "Although Ceylon is an independent country now, there are three points that the people of Ceylon are unable to understand.
>
> 1. Why in this free land should there be a foreign Governor-General?
> 2. and 3. Why should there be an English flag and an English national anthem in free Ceylon?

[70] Acting High Commissioner to Secretary of State for Commonwealth Relations, 22nd October 1953, DO 35/5361, BNA.
[71] Manor (1988): p.34.

> Of these three points the second and third have been suitably dealt with, which may kindly be taken note of."[72]

Though Kotelawala even tried to tell Winston Churchill that he had been misinterpreted,[73] the message was plain. Soulbury thought so and, unsurprisingly, did 'take note' and left the island not long after. As Kotelawala had bluntly reminded the Head of State, it was the Prime Minister's sole prerogative to advise the Queen on the appointment *and* dismissal of her Representative.

Sir John Kotelawala, now Prime Minister, wasted no time in informing the Queen on her first visit to Ceylon in 1954 of his wish to have his old friend Sir Oliver Goonetilleke as her Representative. This was despite some reservations about Goonetilleke's financial affairs among certain public figures, including a member of the Cabinet. The High Commission noted that there 'are few people in Ceylon, Ceylonese or European, who do not believe that Sir Oliver Goonetilleke has not in fact at some time made more or less illegitimate profit out of his various public offices'.[74] Regardless of this, Kotelawala had his way and Goonetilleke received the Queen's Warrant. The two were close socially and had served together under D.S. Senanayake for many years. Kotelawala, the former pugilist, told Goonetilleke that 'you are going to Queen's House even if I have to carry you there'.[75] Goonetilleke was another Governor-General who had high credentials to commend his appointment as the Queen's representative. He had served his country and the Empire with distinction. This Sinhalese Episcopalian (which, according to

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[72] Cited in Acting High Commissioner to Secretary of State for Commonwealth Relations, 7th December 1953, DO 35/5179, BNA.
[73] Kotelawala to Churchill, 13th November 1953, DO 35/5179, BNA.
[74] At the time of his appointment members of the Opposition were concerned about Sir Oliver's alleged involvement in a financial inquiry on the Governor of the Central Bank, and R.G. Senanayake, Minister of Commerce and Trade, resigned over Sir John's pro-West foreign policy. Senanayake indicated his disapproval of Sir Oliver's appointment as one which would not 'inspire confidence in the Government'. See Wilson (1968): p.198; J. Manor (1989) ***The Expedient Utopian: Bandaranaike and Ceylon*** (Cambridge: CUP): p.245; Kotelawala (1956): pp.129–130; High Commissioner to Secretary of State for Commonwealth Relations, 20th December 1954, LCO 2/4927, BNA.
[75] C. Jeffries (1969) ***'O.E.G.' A Biography of Sir Oliver Ernest Goonetilleke*** (London: Pall Mall Press): p.117.

Gordon Walker accounted for his 'cunning'),[76] rare for his middle class origins, rose at a time of upper caste dominance to the top of the Colonial Service on the island and helped negotiate independence. His influence was enough for Jennings to point out how much 'Ceylon owes to Mr. [D.S.] Senanayake and to Sir Oliver Goonetilleke. But for them Ceylon would still be a colony.'[77] After the grant of independence, Goonetilleke, always fearful of the electorate, was sent to the Senate as its President and served as Minister of Home Affairs in the first Cabinet. He later returned to the Cabinet table as Finance Minister after an influential interregnum as the country's first High Commissioner to Britain. A Knight four times over, who maintained the colonial livery, ceremonial sword and cocked hat of his English predecessors as well as the magnificence of Queen's House, the first Sri Lankan Governor-General was confidentially predicted to be '*plus royalisteque la Reine*'.[78]

Kotelawala, perhaps conscious of his sticky relationship with Soulbury, wanted a Governor-General who was completely on his side, supporting him personally and politically. Goonetilleke, as one of the wiliest survivors in Sri Lankan history, knew exactly what was expected of him. Not only was he seen to be the government's 'principal propagandist'; he was also a chameleon, as can be indicated by the view that, despite his anglophile ways, 'if the Government found it politically expedient to create a republic Sir Oliver would find it expedient to become President'.[79] Notwithstanding his long service to the state he was not a popular figure with the masses and his appointment was not greeted with the popular acclaim that might have been expected for the first Sri Lankan Governor-General. In the beginning Kotelawala was commanded by his nominal superior to attend any public ceremony with the Governor-General, 'as some kind of insulation against catcalls from the crowds'. The British believed that 'Sir Oliver's strength is that he has more brains than the rest of the Ceylon Cabinet, including the Prime Minister, put together, and Sir John Kotelawala probably realises that he cannot do without

[76] Extracts from Gordon Walker's diary, 6th February 1948 in DO 35/2195, BNA.
[77] Jennings (1953): p.x.
[78] '*The Royal Visit to Ceylon, 1954*', ***Jennings Papers***, Ceylon B3, ICS125, ICS.
[79] Ibid.

him'.[80] Kotelawala did rely openly and readily on the advice of someone whose long public (and party) service equipped him to discuss public and political matters of great sensitivity. Astute observers noted that Goonetilleke 'on his part could deny nothing to Prime Minister Kotelawala because Sir Oliver's elevation to the post of Governor-General was due entirely to Sir John'.[81] Such was the closeness of their relationship that Dudley Senanayake, not long after resigning, was rumoured to see 'himself as the victim of an intrigue between Sir John Kotelawala and Sir Oliver Goonetilleke, for which he would like his revenge'.[82]

Kotelawala, with his effective dismissal of Soulbury and conspicuous selection of Goonetilleke, was complying with the modern *New Westminster* practice of making sure there was a sympathetic and beholden figure as Head of State. The Governor-General, however, could not prevent a crushing electoral defeat in 1956 though there were many rumours that 'he would find some ingenious way of keeping Sir John in office'.[83] Despite the constitutionally correct transfer of power, Sri Lanka had further and even more exceptional contributions to make to the annals of Westminster Governors-General.

The Third Partnership – Commander-in-Chief and the Patrician Populist 1956–59

Sir Alan Rose, in his retirement speech as Sri Lankan Chief Justice in June 1955, said that arguably the greatest deficiency in Sri Lankan politics was a the lack of strong democratic opposition: 'It is no criticism of the present Government at all, but every five years the public should have the opportunity for a change of bowling'.[84] A change of bowling came a year later, but the wicket was unpredictable as ever. S.W.R.D. Bandaranaike came to power in a crushing defeat of the UNP, of which he had been a

[80] Acting High Commissioner to Secretary of State for Commonwealth Relations, 11th March 1954, DO 35/5362, BNA.
[81] Fernando (1963): pp. 79–83.
[82] High Commissioner to Secretary of State for Commonwealth Relations, 27th May 1955, DO 35/5362, BNA.
[83] Jeffries (1969): p.121.
[84] ***Times of Ceylon***, 18th June 1955 in DO 35/5428, BNA.

prominent member and cabinet minister until his resignation in 1951. He resigned because he believed that the Senanayake clan would not give up the premiership he thought his due. Goonetilleke, like Soulbury during the previous change of government, believed his association with the previous tenant of Temple Trees would mean he was on notice. This Sri Lankan panjandrum enjoyed power and politics too much to leave Queen's House so easily. Goonetilleke's biographer, a senior Colonial Office official, Sir Charles Jeffries, recorded the Governor-General's candid view of the assertiveness of his role.

> "Sir Oliver frankly admits that he did not feel it his duty to sit in an ivory tower and let the Prime Minister of the day take all the risks of governing a country that had just emerged from colonial status to independence and was the scene of many unresolved political and economic conflicts."[85]

Under the Public Security Ordinance, No. 25 of 1947, and the Army, Navy and Air Force Acts, the Sri Lankan Governor-General 'is empowered, if he considers it necessary in the interests of public security and preservation of public order for the maintenance of supplies and services essential to the life of the community, to bring into operation, by Proclamation' to deal with emergencies, such immense potential power is exercised as usual are 'on the recommendation of the Prime Minister' and require communication and continuance with and from Parliament.[86] Most Westminster countries have similar provisions, but they are seldom activated. If ever such dramatic circumstances arise it is usually the prime minister who assumes the necessary powers – such as Churchill during World War II. The Governor-General, like the King, is Commander-in-Chief – but in Sri Lanka, as in Britain, this had been inferred as a nominal role and a symbolic title. At the very end of this analysis of Sri Lanka – a decade after independence – a state of emergency was proclaimed in 1958 due to serious communal rioting between Sinhalese and Tamils which engulfed the island. Rather than a Churchillian prime minister coming to the fore to handle the crisis, it was the Governor-

[85] Jeffries (1969): p.118.
[86] Namasivayam (1959): pp.27–28.

General, Sir Oliver Goonetilleke, who effectively led the government in dealing with the unrest. As Wilson describes the dramatic period, the Governor-General

> "Sir Oliver Goonetilleke functioned as Commander-in-Chief, giving directions to the armed forces and civilian officials, shifting troops to troubled areas, using ships and aircraft to transport refugees, and acting as the national censor with regard to the publication of news in the daily press. Evidence indicates that in the first few weeks of the emergency, the cabinet system broke down, ministries were unable to function, conferences even of ministers and the Prime Minister were summoned by the Governor-General at Queen's House … Sir Oliver Goonetilleke had not only become supreme commander of the country's armed forces but its sole administrative head."[87]

In 1956, with the UNP having been heavily defeated, many expected that the radical and populist coalition under Bandaranaike would establish a new and more sympathetic resident at Queen's House to replace the former UNP minister. The character and significance of the Bandaranaike Government and its impact on Sri Lankan history will be discussed in the next chapter. The focus in this chapter is on Bandaranaike and Goonetilleke's political relationship. The new Prime Minister, for all his intellectual talents and verbal skill, was described as 'being just a little too clever' and at the 'head of a variegated team with no cohesion of policy or personal loyalty, and of unproven administrative abilities'. Local wits commented that in 1948 the Sri Lankan elite had made a present of independence to an unprepared people while in 1956 the people had presented the country with an unprepared leadership.[88] With the 'honeymoon period of the "People's Government" … over', not long after victory the prime minister, 'tied by his vote-catching electoral programme, can show little more than a series of diversions,

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[87] Wilson (1968): p.203; also see A.J. Wilson '*The Governor-General and the State of Emergency, May 1958 – March 1959*' (1959) ***The Ceylon Journal of Historical and Social Studies*** 2(2): pp.160–181.

[88] High Commissioner to Secretary of State for Commonwealth Relations, 18th June 1956, DO 35/5363, BNA.

stunts and palliatives'. The situation was not helped by some of his colleagues, who 'by their irresponsible utterances and abuse of their novel positions of authority become a serious liability'.[89] Though it is highly unlikely that Bandaranaike would have agreed with this assessment his team did lack administrative experience and, with the major exception of the Sinhala Only Act (see below), no policy cohesion. Perhaps because of this the nationalist republican Bandaranaike kept the sly and experienced Goonetilleke on. The Head of Government and Head of State carried on the tradition set by the first constitutional duo of lunching every Wednesday, and would go on to forge a new partnership.

The Governor-General often lacked constitutional propriety with state secrets and policies. Showing his independence of action and political mischief, Goonetilleke personally told British diplomats only a month after the election that the new Prime Minister's 'mind was still malleable' and even briefed them on how they 'should be wise to play … long' on the potential change to a Republic and removal of British bases from the island, which the new Government wanted, but the British did not. [90] Bandaranaike's belief in the Governor-General's loyalty to the new regime is likely to have been boosted by the extraordinary fact that the Queen's Representative in Sri Lanka was actively fundraising, with the knowledge of the British, for the new Prime Minister. If ever there was evidence of the incredible influence and political interference by an *Eastminster* Governor-General (or any constitutional head of state for that matter) this demonstrates it. The British Cabinet Secretary, Sir Norman Brook, visiting the island with Harold Macmillan in 1958 noted a conversation he had with Sir Oliver where he was told directly

> "Business people had previously supported Sir John Kotelawala were now beginning to realise that it would be in their interest to support Mr Bandaranaike. The Governor-General said he had already had some success in obtaining from this source contributions to a political

[89] Acting High Commissioner to the Secretary of State for Commonwealth Relations, 31st December 1956, DO 35/5363, BNA.
[90] High Commissioner, *Telegram*, 20st June 1956, DO 35/8902, BNA.

> fund to back Mr Bandaranaike – and he was confident that he could do more on these lines."[91]

The constitutional chameleon Goonetilleke quickly ingratiated himself with the new regime and in the process further banished the Westminster convention of a politically neutral and constitutionally responsible Governor-General in this *Eastminster*. The new High Commissioner, Sir Alexander Morley, explained the situation: 'He [Goonetilleke] evidently sees himself as a kind of *guru* manipulating Mr Bandaranaike from behind the scenes and coaching him in his duties. I do not know how far Mr Bandaranaike would accept this description of their relationship!'[92] The new Prime Minister, nonetheless, generously explained to the House of Representatives in August 1956:

> "I think it is a mistaken idea to imagine that the Governor-General's post is purely a decorative post. It all depends, of course, upon the individual who happens to be holding that post. I think it is only fair on my part to say that the present Governor-General works pretty hard, and that he has placed his knowledge, experience and powers which he constitutionally uses at the full disposal – as indeed constitutionally should – of the present Government. His Excellency has been most helpful on almost every occasion in assisting the Government, in so far as his functions are concerned, in carrying on the government of the country. I think I would be less than fair if I did not express my appreciation and that of the Government of the very correct constitutional manner in which the Governor-General conducts his functions and for the great assistance the Government has received from him on many occasions in dealing with many problems…"[93]

Though he was not to know it at the time, the events of 1958 were to prove Bandaranaike correct when he mentioned that the office

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[91] Note by Sir Norman Brook, 18th January 1958, DO 35/8902, BNA.
[92] High Commissioner to Commonwealth Relations Office, 31st January 1958, DO 35/8902, BNA.
[93] Wilson (1968): p.200.

of Governor-General was not a 'purely decorative post'. It is often considered as such in *New Westminsters*, especially the transplanted countries, but not always in the *Eastminsters*. The Bandaranaike Government had brought in controversial legislation, which affected the country economically and socially. The energetic and experienced Goonetilleke was useful in such a climate because the new government 'was short of gifted ministers and needed Sir Oliver's talents and personal intervention with civil servants, high military and police officers and press barons to win acceptance for the new government. Sir Oliver obligingly played this role.'[94] The most controversial and powerful piece of legislation was the Sinhala Only Act, which made Sinhala the official language of the country – and legalised its ascendance over English and Tamil in government and education. This had caused disturbances in the Tamil areas and Tamil people, which prompted Bandaranaike to make a pact with leaders of the Tamil Federal Party allowing reasonable use of the Tamil language and other regional concessions. This in turn angered Sinhala nationalists and led to the bloody and chaotic riots that hit the country just ten years after it had peacefully gained independence, which will be discussed in detail in the next chapter. The British High Commission had commented in late 1956 that Bandaranaike 'continues like a skilful juggler to keep all the balls in the air and might, in the absence of a jolt, continue to do so'.[95] The 'jolt' came all too quickly for the new government and its leader in the harsh form of ethnic rioting. The events unleashed on the country a whirlwind of violence and disruption, but would also lead to an unprecedented activist role for the Governor-General.

Goonetilleke himself described the events as 'a cataract of looting, hysterical public killings and rapings which ruined the fair name of Ceylon, known till then as the model country in Asia where the Queen's highway was safe for anybody and where law and order prevailed'.[96] There was very real tension. The Bandaranaike government was concerned about maintaining order and even more worried about containing and appeasing its constituents,

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[94] Manor (1989): pp.296–297.
[95] Acting High Commissioner to the Secretary of State for Commonwealth Relations, 31st December 1956, DO 35/5363, BNA.
[96] Jeffries (1969): pp.127–128.

who were predominantly the Sinhala Buddhist masses. The Governor-General was closely involved in these efforts and, extraordinarily, there is at least one recorded instance of him attending a cabinet meeting at which he believed it was his 'constitutional duty to advise' – and telling the Cabinet Secretary not to record his presence or his one-hour monologue to *his* ministers on how to 'frustrate the Federal Party's [civil disobedience] campaign'.[97]

As Wickramasinghe stated, 'the 1958 riots were the first major outbreak against the Tamils and in many ways a point of no return'.[98] The country's politicians and the country's constitution were not prepared for such chaos. Bandaranaike seemed politically paralysed and weary of further raising the ire of his followers, many of whom were gripped by a bloodthirsty madness. Bandaranaike's 'wait and see' policy and continued inactivity in the face of the mobs prompted the Head of State to summon the Prime Minister and Cabinet and convinced them to *advise him formally* to proclaim a State of Emergency. The Governor-General already had the documents waiting to be signed on the spot, which would create him formally and practically as the senior partner. Sir Charles Jeffries, a seasoned and consummate Whitehall and Colonial Office mandarin commented as follows on the exceptional circumstances surrounding the proclamation:

> "Normally, in such circumstances, the declaration of a state of emergency, vesting executive powers in the Crown, as represented by the Governor-General, is made on the advice of ministers, and the ministers then proceed to manage the situation under the special powers delegated back to them by the Governor-General. But, in this case, the Prime Minister did not, either on the afternoon of May 27 or during the next few days, raise the question as to who should handle the emergency or give any sign of being ready to do anything about it … [H]e never gave his reasons for creating a situation in

[97] Wilson (1968): p.200.
[98] N. Wickramasinghe (2006) ***Sri Lanka in the Modern Age: A History of Contested Identities*** (London: Hurst): p.273.

> which the Governor-General became the virtual ruler of Ceylon…"[99]

Bandaranaike was perhaps remembering the State of Emergency during the *hartal* strikes of 1953, with its mass violence and arson, which compelled Dudley Senanayake to resign on account of his inability to cope with the riots and the resulting personal opprobrium that stuck to him. Whatever the political machinations, the self-deceiving champion of Sinhala nationalism, Bandaranaike, consciously abdicated his powers and prerogatives as Prime Minister. As Goonetilleke put it: '[Bandaranaike], who owed his position to a majority of Sinhalese votes cast at a general election ran the risk of losing his place in public life'; a risk the unelected resident of Queen's House did not face.[100]

In his excellent biography of the man, James Manor argues that Bandaranaike was greatly responsible for the crisis, as he had been

> "seeking to manipulate parochial sentiments for personal gain since the late 1930s, and his actions since becoming Prime Minister had betrayed a particularly dangerous *naïveté*. He was naïve in thinking that his communalist election campaign would not generate invidious expectations among extremists and, when they then arose, in assuming that hesitation and inaction would not inflame them.He was naïve in squandering his authority and above all, in his 'kid gloves' response to dangerous provocations."[101]

The Prime Minister had always believed he could master the situation with cunning and intellect, but instead of strength and leadership he gave the 'impression of superficiality and shallowness' and, most dangerously, was perceived even before the riots as 'thinking that important issues can be solved by ingenious verbal formulae' that would result in 'little or no

[99] Jeffries (1969): pp. 128–129.
[100] Ibid: p.130.
[101] Manor (1989): p.294.

practical action'.[102] In short, Bandaranaike was hoist by his own petard. The burden or opportunity had fallen on the Governor-General to provide Executive leadership. Goonetilleke wasted no time in assuming direct management of the crisis and invoked the powers of what had been thought to be the honorific 'Commander-in-Chief' aspect of his office. The Commonwealth Relations Office in London scrambled through the history books to give evidence to Westminster House in Colombo in their quest to slap down any suggestion that the title Commander-in-Chief, as the Governor-General saw it, conferred any military or executive power. The CRO replied that the title was purely 'honorific' and it was 'positively misleading and in certain circumstances indeed dangerous'. The office of Commander-in-Chief 'gives him no legal or constitutional grounds for exercising any authority even in times of emergency', unless on Ministerial advice, which in this case was lacking since the Governor-General was giving the advice and taking the action.[103] The *Eastminster* case of Sri Lanka was proving to be more difficult to conform to Westminster norms than earlier expected. The Governor-General in particular during the Emergency was appropriating Executive power to a level unthinkable in most Commonwealth countries. As Morley reported to London during the crisis:

> "There appears to be widespread misunderstanding in Ceylon as to the constitutional limitations, even in conditions of Emergency, on the Governor-General's individual power of action. Moreover, Sir O. Goonetilleke seems to have persuaded himself that he is entitled to derive all manner of powers from his ceremonial title of Commander-in-Chief. Nevertheless … [h]is assistance in translating policy into action is invaluable and when, for one reason or another, clear guidance is not available from his political chief, he does not hesitate to 'act in anticipation'. I am, however, convinced that the main political decisions are never his and that there have been many occasions when his advice, though offered, has failed to prevail. Be that as it

[102] Acting High Commissioner to Secretary of State for Commonwealth Relations, 1st October 1956, DO 35/5363, BNA.
[103] CRO to High Commission, 23rd June – 1st July 1958, DO 35/7905, BNA.

> may, the Services are so accustomed to his intervention in an executive capacity that they could find themselves, while scarcely noticing it, automatically carrying out instructions which for once had not the expressed or tacit consent of Ministers and in effect the instrument of a coup d'état engineered by the Governor-General. I do not regard such a contingency in circumstances at present foreseeable as at all likely, the more so as Sir Oliver Goonetilleke seems now to be assured of remaining in office until Mr Bandaranaike gives place to another Prime Minister or the Republic is introduced … At the same time, his conversation suggests both an acute awareness of Mr Bandaranaike's limitations and a distaste for certain of his policies and if there were a dangerous deterioration in law and order, whether through ineffective administration or the removal of Mr Bandaranaike for one reason or another from the scene, and he felt that the assumption of direct control by himself, probably through some perverted application of Emergency regulations, were needed, I would not put it wholly past him to act."[104]

Morley's assessment of Goonetilleke was somewhat prescient as in 1962 Goonetilleke was forced from office in an attempted coup d'état against Bandaranaike's widow's government. Though it is unclear whether the military and police officers who led the failed exercise informed Sir Oliver, they did admit that they wanted him to take over the Government.[105] This in itself indicates the real or at least perceived clout of the Governor-General in this *Eastminster*.

Returning to the 1958 Emergency, two other accounts give a more detailed picture of Sir Oliver as Governor-General in action. The respected and dogged journalist Tarzie Vittachi records him:

> "sitting at a desk with six telephones and papers on it. He held a telephone to each ear. He did not even look up as

[104] High Commissioner to Secretary of State for Commonwealth Relations, 5th May 1959, DO 35/8903, BNA.
[105] Wilson (1968): p.202.

> we [the press] entered. We stood inside the door as he told the mouthpiece of one telephone – 'sh-sh-sh-shoot them.' That settled, he cradled that telephone and said into the mouthpiece of the other: 'O.E.G. here. Clear them out even if you have to sh-sh-sh-shoot them.' [Goonetilleke then answered the journalist's questions on the severity of the censorship and explained that such measures as detention without trial, suspension of habeas corpus and no bail were part of the Emergency Regulations.] By this time not even the most obtuse among us needed a diagram to know which way things were going. But Sir Oliver couldn't resist making the point clear by telling us: 'Gentlemen. One favour. One personal request. When you report the news in future please don't say that I am running the sh-sh-show. I don't want all kinds of jealousies to come up you know … That made it official. Sir Oliver *was* running the show."[106]

This also seems to have been corroborated by someone who had intimate involvement with the major figures in the Executive Branch: the respected Cabinet Secretary B.P. Peiris, who diligently served six prime ministers, including Bandaranaike. Peiris noted that

> Sir Oliver Goonetilleke … took complete control of the country, obviously with the consent of his weak-kneed Government. He was an excellent man for the job and was, "I believe, virtual Dictator. Emergency Regulations were pouncing out of the Government Press. Ministers were meeting almost daily, not to transact business, but to be kept informed of what the situation, changing day to day, was."[107]

Bandaranaike, like his predecessors, acquiesced to this politically distinctive relationship with the local Head of State that gave the latter increased influence with the sufferance or support of the former. Regardless of personalities and domestic circumstances,

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[106] Vittachi (1958): pp.70–72. This book itself was initially banned in Ceylon at the time of the 'Emergency', which led to its publication in London.
[107] Peiris (2007): p.202.

the reality was that constitutionally the locus of power during Bandaranaike's time had moved from Temple Trees to Queen's House. This position was contrary to Westminster practice and precedents and the prime minister's abnegation of responsibility represented 'a complete misunderstanding of the constitutional situation … [being] without precedent in the recent history of constitutional government of this country or of the United Kingdom'. [108] When Bandaranaike's death occurred at the assassin's hand in 1959 his old partner Goonetilleke almost reflexively conformed to this Sri Lankan *Eastminster* norm to 'act in anticipation'. Within a few hours of the assassination he called a State of Emergency, giving immediate instructions to the Armed Forces to maintain order in the event of rioting.[109]

In this era much blame can be allocated to the political personalities that dominated Sri Lanka and some of the decisions they took or neglected to. However, as De Votta argues in light of the ethnic quagmire, 'to vilify the country's maestro ethnic entrepreneurs without paying due regard to the institutional structure that incited their actions is to misunderstand' the context and legacy that made such conditions possible.[110] In this critical period Soulbury and Goonetilleke were able to use, and did use, the discretion and powers available to them in the constitution to a much greater extent than envisaged by Westminster and British standards. Arguably they harked back to the colonial era, when as one nineteenth-century crown servant commented at the time, the 'powers of the Governor constitute a "paternal despotism", modified only by the distant authority of the Queen'.[111] As one South Asian expert has argued, such actions from the Governor-Generalship were shaped by the activist 'autocratic traditions of the colonial governorship out of which it had evolved',[112] while other specialist scholars have noted that it had become an 'established principle that under the Ceylon Constitution, the

[108] Wilson (1959): pp. 166–167.
[109] High Commissioner to Secretary of State for Commonwealth Relations, 15th October 1959, DO 35/8914, TNA.
[110] N. DeVotta (2004) ***Blowback: Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka*** (Stanford: Stanford UP): p.72.
[111] J.E. Tennent ([1859] 1977) ***Ceylon: An Account of the Island Physical, Historical and Topographical***, Vol.II (6th Ed.) (Colombo: Tisara Press): p.680.
[112] Manor (1989): p.297.

Governor-General is the authority in command of the armed forces at least in emergency. His position here is unlike that of his counterparts in other Commonwealth countries', due to the latitude allowed to the holder in the constitution.[113]

However, the Prime Minister ultimately has the power over the Governor-General's powers. Lord Soulbury remarked long after retiring as the Queen's Representative in Ceylon that

> "under a constitutional monarchy the Prime Minister of a Commonwealth nation is more powerful than he would be in a Republic under a President. If for any reason he wishes the Governor-General to be removed he has only to request the British Sovereign to recall him, and his request must be granted [showing the insecurity of the office and lack of horizontal accountability].A President however, is usually elected for a term of years, and though he may be uncongenial or uncooperative cannot be removed speedily or without a possible political upheaval."[114]

This was not solely his interpretation – other prime ministers have believed it to be the case as well. Even Dudley Senanayake who, as we have seen, had reason to be well disposed to Soulbury, argued in the House of Representatives that one Prime Minister could not 'tie down a future Prime Minister to the same Governor-General'. However, he believed that a Governor-General could carry on for 50 years or a day if the prime ministers in office thought fit.[115] Sri Lanka's flux and instability at the executive level and the blurred levels of accountability would prove disastrous in dealing with the country's extreme ethnic tensions.

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[113] Wilson (1968): p.205; S.A. de Smith (1964) ***The New Commonwealth and its Constitutions*** (London: Stevens & Sons): pp.81–82.
[114] Soulbury, '*I Remember Ceylon*' in Wilson (1968): p.195.
[115] Wilson (1968): p.196.

26

The Overmighty Executive Reconsidered

Chandra R. De Silva

Introduction[1]

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."[2] 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

[1] 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-June1989*** (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.

[2] 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,[3] 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).[4] 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 21st century.[5]

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]"[6] Duverger claimed that it had "become the most effective means of transition from dictatorship towards democracy in Eastern Europe and the former Soviet Union."[7] 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.[8] The argument that such systems provide more 'institutional flexibility' is also supported for the same reason by Gianfranco Pasquino,[9] while

[3] M. Duverger (1970) ***Institutions Politiques et Droit Constitutionnel*** (Paris: Universitaires de France)
[4] M. Duverger (1974) ***La Monarchie Republicaine*** (Paris: Laffont)
[5] 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.
[6] A. Lipjhart (1994) ***Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990*** (Oxford: OUP): p. 104, fn.7.
[7] M. Duverger, '*Reflections: The Political System of the European Union*' (1997) ***European Journal of Political Research*** 31: p.137.
[8] G. Sartori (1997) ***Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes*** (Basingstoke: Palgrave Macmillan): p.125.
[9] 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.[10]

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."[11]Bernhard Bayerlein suggests that semi-presidential systems often experience both Bonapartist and populist phases.[12] 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.[13]

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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[10]**J. Blondel**, '*Dual Leadership in the Contemporary World*' in A. Lijphart (Ed.) (1992) ***Parliamentary versus Presidential Government*** (Oxford: Oxford University Press): p.167.

[11] 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. Mostrup & 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.

[12] B. H. Bayerlein, '*Sobre a origem bonapartista do regime politico semi-presidencialem Portugal*' (1996) ***Analise Social*** 31(4): pp.803-830.

[13] 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[14]

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.

[14] R. Kothari (1970) ***Politics in India*** (Boston: Little Brown): p.150.

Moreover, there was no significant development of local government. [15]

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."[16] 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

[15] C. Clapham (1985) ***Third World Politics: An Introduction*** (London: Croom Helm): pp.18-19.
[16] 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.[17] 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.[18] In effect, despite the legitimation 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

[17] 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.

[18] 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.[19]

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.[20] 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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[19] 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/**mahinda**ChintanaVision-2010full-eng.pdf (accessed 22nd Decmber 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***, 20th May 2010, available at: http://www.economist.com/node/16167748 (accessed 22d December 2014).

[20] 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."[21] 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."[22]

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[21] 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.

[22] 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."[23] 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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[23] 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.[24] In essence, most of these ideas were enunciated by Pye in an earlier article he wrote over fifty years ago.[25] 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.[26] 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).[27] Edward Shils has pointed out that "Tradition often possesses ambiguity and hence flexibility to allow innovation to

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[24] L.W. Pye (1985) ***Asian Power and Politics: The Cultural Dimensions of Authority*** (Cambridge: Harvard University Press).
[25] L.W. Pye, '*The Non-Western Political Process*' (1958) ***The Journal of Politics*** XX: 3, 409-486.
[26] Clapham (1985)*:* pp.47-48.
[27]Review of L. W, Pye's ***Asian Power and Politics, New York Review of Books***, 9th February 1986.

enter without severely disruptive consequences."[28] 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 Veser 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.[29] 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."[30] Increased powers have been accompanied by soaring expectations. Thomas E. Cronin[31] 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.[32] 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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[28] E. Shils (1950) ***Political Development in the New States*** (The Hague: Mouton): p.32.

[29] H. Bahro, B.H. Bayerlein & E. Veser, '*Duverger's Concept: Semi-presidential Government Revisited*' (1998) ***European Journal of Political Research*** 34: p.209.

[30] 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).

[31] T.E. Cronin (1980) ***The State of the Presidency*** (Boston: Little Brown): pp. 4-19.

[32] 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[33]

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.[34] 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.[35] 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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[33]Cronin (1980): p. 22.

[34] 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. Rajepakse (2008) ***A Guide to Current Constitutional Issues in Sri Lanka*** (Colombo: Citizens' Trust).

[35] 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.[36] 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.[37] 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. [38] 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

[36] The prime minister was not consulted on this step. At that time, the Defence Minister, Tilak Marapana was also in Washington, DC.
[37] 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*'.
[38] 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.[39] 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.[40] 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.[41] 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.[42] 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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[39] 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: Koninklije): pp.373-385.

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

[41] de Silva (2011): pp. 377-379.

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

Chief Justice was seen as a consequence of her refusal to provide a pro-government ruling on the Divinaguma Bill.[43] 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."[44]

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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[43] 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*'.

[44] 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.[45] 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.[46] The Eighteenth Amendment also, in effect, gave the president the right to nominate the Chief Justice

[45] Clapham (1985): pp.41-43.

[46] 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 am 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.[47] 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."[48]

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 areentitled 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[49]

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[47] For a detailed discussion see A. Jayakody, '*The 18th Amendment and the Consolidation of Executive Power*' in Edirisinha & Jayakody(2011):p.23-59.
[48] T.J. Lowi (1985) ***The Personal President: Power Invested, Promise Unfulfilled*** (Ithaca: Cornell UP): p.174.
[49] 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.[50] 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 that his British counterpart because in office he becomes far more indispensable to his party and can exercise great power."[51] 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 considerable according to context.[52] 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.[53] 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 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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[50] A. Benn, '*The Case of a Constitutional Premiership*' (1980) ***Parliamentary Affairs*** XXXVII: pp.7-22.
[51] J.A.L. Cooray (1973) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Hansa Publishers): p.237.
[52] P. Weller (1985) ***First Among Equals: Prime Ministers in Westminster Systems*** (Sydney: Allen & Unwin).
[53] 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.[54] 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.[55] 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.[56] 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.[57] 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

[54] 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*'.
[55] USAID (2002) ***Guidance for Promoting Judicial Independence and Impartiality*** (Washington DC: USAID).
[56] C.R. de Silva, '*The Role of Law in Developing Societies*' in Shetreet & Forsyth (2011): pp.451-462.
[57] 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,[58] 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.[59] 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).[60] 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.[61] 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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[58] 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.

[59] 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.

[60] L. Baum (1998) ***American Courts: Process and Policy*** (Boston: Houghton Mifflin): pp.114-131.

[61]International Crisis Group, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights*, Asia Report N°172, 30th 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.[62] 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."[63] We need to support and strengthen independent

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[62] 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 23rd 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 Edirisinha (2008): pp.36-37. See also Edrisinha & Welikala (2008) *passim.*

[63] J. Nedelsky, '*Reconceiving Rights as Relationship*' (1993) ***Review of Constitutional Studies/ Revue d'étudesConstitutionnelles*** 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".[64]

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.

[64] R. Thakur, '*Liberation, Democracy and Development: Philosophical Dilemmas in Third World Politics*' (1982) ***Political Studies*** XXX (3): p.335.

27

The Executive Presidency: A Left Perspective

Jayampathy Wickramaratne

The Sri Lankan Left spearheaded the campaign against the introduction of the executive presidency in 1978 though the opposition had been weakened by the massive victory of the United National Party (UNP) at the 1977 parliamentary elections. The UNP won an unprecedented five-sixths majority. The Sri Lanka Freedom Party (SLFP), down from 75 seats to just 07, was weak and demoralised. It was the Left parties – now without representation in Parliament – that took the lead in opposing it from outside. Since then, Left parties have been at the forefront of the agitation for the abolition of the executive presidency. The purpose of this chapter is not merely to recount that opposition but to show that such opposition was based on established democratic principles. The chapter also discusses the campaign to abolish the executive presidency, and conversely, actions to strengthen it.

If there is one statement that epitomises the Sri Lankan Left's unswerving opposition to the executive presidency and its preference for the parliamentary form of government, it is the one made by Dr Colvin R. de Silva, then Minister of Constitutional Affairs, in the Constituent Assembly on 2nd July 1971:

> "There is undoubtedly one virtue in this system of Parliament […] and that is that the chief executive of the day in answerable directly to the representatives of the people *continuously* by reason of the fact that the Prime Minister can remain Prime Minister only so long as he can command the confidence of that assembly. […] We do not want either Presidents or Prime Ministers who can ride roughshod over the people and, therefore, first of all, over the people's representatives. There is no virtue in having a strong man against the people."[1]

The Debate in the Constituent Assembly

Dr de Silva was responding to the proposal made by J.R. Jayewardene, the deputy leader of the UNP, to the Constituent

[1] Constituent Assembly Debates, Vol.1, 2nd July 1971: Col.2710 (emphasis added).

Assembly that executive power be vested in a President directly elected by the people for a term of seven years. Jayewardene also proposed that the President be empowered to dissolve Parliament after consultations with the Prime Minister.

Jayewardene conceded that the parliamentary form of government has worked well in the United Kingdom and other developed countries but questioned its suitability for developing countries. He cited countries in the South American continent and the United Arab Republic as examples of developing countries that had achieved economic development and retained "all the forms of democracy."[2] Jayewardene made it clear that he preferred a government immune to public pressure: "Under the present type of constitution a government is always thinking of public pressure and the membership of the House."[3]

The UNP was divided on the issue. A.C.S. Hameed explained that the matter was discussed at length within the party but there was no unanimity.[4] Apparently Jayewardene was permitted to present his own resolution to the Constituent Assembly, which was seconded by R. Premadasa. Both the proposer and the seconder were to become executive presidents later and both were authoritarian, using presidential powers to do exactly what the Left warned the country against.

Hameed stated that he was not in favour of Jayewardene's amendment, as he did not wish to see another individual, institution, or body usurping the powers of the legislature, which it holds as a sacred trust. Whoever holds the reins of office must be sensitive to public opinion. Unlike many leaders of numerically smaller communities who regarded the executive presidency as a safeguard for them after it was established in 1978, Hameed thought it would be otherwise. "A system by which the whole country elects the President can be harmful to the minorities", he opined.[5]

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[2] Ibid: Col.2662.
[3] Ibid: Col.2661.
[4] Ibid: Col.2684.
[5] Ibid: Col.2696.

Dudley Senanayake, the leader of the UNP, warned in a statement made outside the Constituent Assembly that a presidential system would spell disaster for Sri Lanka. He stated:

> "The presidential system has worked in the United States where it was the result of a special historic situation. It worked in France for similar reasons. But for Ceylon it would be disastrous. It would create as tradition of Caesarism. It would concentrate power in a leader and undermine parliament and the structure of the political parties. In America and France it has worked but generally it is a system for a Nkrumah or a Nasser, not for a free democracy."[6]

Dr de Silva was for the people to exercise their sovereignty by and through Parliament, the mandate of which they periodically renewed. The Prime Minister would need to command the confidence of the House at all times. He warned against the danger of counterposing the Prime Minister, chosen by the people who are sovereign, against a President who is directly elected. That would result in two powers at the apex of the state counterposed to each other, each drawing its power from the same source: "No Constitution will be able to define adequately and satisfactorily the relationship between the two and the United States of America is precisely the best example of that."[7] The American system of presidential power, counterposed to and independent of the elected legislature, had resulted in enabling the President to conduct a war which he had never declared. Dr de Silva was referring to decade-old American military intervention in Vietnam.

Dr de Silva took the view that with the capitalist system itself threatened, what the capitalist class required was not parliamentary democracy but autocracy, to the extent that the people can be made to tolerate it.

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[6] ***Daily Mirror***, 8th October1971, cited in R. Edrisinha & N. Selvakkumaran '*Constitutional Change in Sri Lanka since Independence*' (1990) ***Sri Lanka Journal of Social Sciences*** 13 (1 & 2): pp.79, 95. See also the chapter by Rohan Edrisinha in this book.

[7] Constituent Assembly Debates, Vol.1, 2nd July 1971: Col.2708.

> "It is not an accident that the views of the United National Party have undergone this evolution. It reflects the evolution of the increasing peril to the capitalist class in the social system of Ceylon. Therefore they want a constitution […] where they are sure of one thing: get away from the common man, and thus the repository of wisdom known as the capitalist class can rule in stability!"[8]

Jayewardene thus saw the need for authoritarian rule way back in 1971, and institutionalised it in 1978, even before Thatcher and Reagan came to the scene and boosted neo-liberalism with their policies.[9] Dr de Silva correctly saw Jayewardene's move not just as his own, but of the capitalist class itself. When Dudley Senanayake passed away in 1973, Dr de Silva called it the end of an era. Dr de Silva considered a presidential system. "We want an evolving society, and therefore we want a constitutional system that permits the evolution, that facilitates the evolution, that propels the evolution, and that itself evolves with the evolution. Nothing less would do", he explained. [10]

Jayewardene's proposal was defeated and the parliamentary system survived, at least until 1978. But one is entitled to ask: did not the various unsatisfactory features of the 1972 Constitution also lead to a degree of authoritarianism? The unitary state, the special place of Buddhism, Sinhala as the only official language, the lack of post-enactment ~~of~~ judicial review, the politicisation of the public service, and the executive's power over the lower judiciary, all contributed to a rise of authoritarianism under the United Front government. The Left itself was forced out of the coalition in 1975.

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[8] Ibid: Col.2715.
[9] Margaret Thatcher became Prime Minister of the United Kingdom in 1979 while Ronald Regan became U.S. President in 1981.
[10] Constituent Assembly Debates, Vol.1, 2nd July 1971: Col.2715.

Enthroning the Executive Presidency

At the general elections of 1977, Jayewardene led the UNP on the promise that if elected he would install an executive presidency. The executive presidency was first introduced by way of an amendment to the 1972 Constitution. By that time, a Select Committee of Parliament had been appointed to go into the issue of constitutional reform. Jayewardene did not wait for the Select Committee to deliberate and present its report. The Second Amendment Bill was rushed to the Constitutional Court seeking an opinion within 24 hours, but the debate in the National State Assembly was taken up only two weeks later. The Bill was certified on 20th October 1977 but was brought into operation only on 4th February 1978, for the new President to take office on Independence Day.

Jayewardene had been appointed Prime Minister on 23rd July 1977 and would have been entitled to continue in that office for six years from that date. The Second Amendment provided for the incumbent Prime Minister to become President and to be in office for six years from the date on which he assumed the Presidency, which would be until 4th February 1984. The Second Republican Constitution came into force on 7th September 1978.

Dr de Silva was scathing of Jayewardene:

> "But here is Mr. Jayawardena, by the simple device of postponing the operation of some amendments to the Constitution which, among other things, appoint him as President with powers that already cause him to be greeted at Dalada Veediya with a *thorana* [i.e., pandal] which was a large replica of the crown worn by the last King of Kandy, not only extending his own term of office from six years to over six and a half years but also making himself irremovable from office till February 4th 1984. As Prime Minister he could not have remained beyond July 23rd, 1983; and could also have fallen before that if defeated in the N.S.A. Now, the Government he heads can be defeated and the N.S.A. can be dissolved, but he remains. Even when the N.S.A. stands dissolved by effluxion of time, he remains. He remains – to choose the

> new Government, to be its Head and to preside over the Cabinet, although the U.N.P. may have lost the general election.
>
> The man who denounced Mrs. Bandaranaike then should be denouncing himself now; but that is a righteousness that does not fit his needs, his party's needs and, indeed, the needs of the capitalist class. There must indeed be those among them who would have him irremovable for life. And that, as the U.N.P. M.P. who asked Mr. Jayawardena to crown himself no doubt realized, can certainly be achieved in that way. The example of Emperor Bokassa of somewhere in Africa is now available. And Africa seems to be the source of the new-style President ideal."[11]

Dr de Silva, who warned in 1955 of the dangers of making Sinhala the only official language ('one language, two nations; two languages, one nation') was again at his prophetic best:

> "We confess to a new worry amidst it all. 'I am the leader of 14 million people.' Ominous words which stir still frightening memories. Was it not Hitler who said: 'I am the leader of the German people, of all Germans where ever they are!'? And all the world knows where he led them and into what hell he plunged the world. The slogan of the U.N.P. today is 'One party, One policy, One Leader – and Leader is always with a capital 'L.' Are we heading for one party, one policy, one Leader, for the nation too? […] It is a grim Presidential beginning […] The hour may have been auspicious for the President. But was it auspicious for the nation?"[12]

It was Dr N. M. Perera, leader of the Trotskyite Lanka Sama Samaja Party (LSSP) who made the most penetrating analysis of the 1978 Constitution that almost entrenched the executive presidency. This was by way of a series of articles he wrote to the

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[11] C.R. de Silva (1988) ***Sri Lanka's New Capitalism and the Erosion of Democracy*** (Colombo: Ceylon Federation of Labour): p.30.
[12] Ibid: p.34.

Socialist Nation (later published as a booklet),[13] which has become the Bible for those who wish a return to a parliamentary form of government. Justice cannot be done to Dr Perera by briefly summarising his writings on the subject. Instead, readers are encouraged to read and re-read them. However, a few critical issues raised by Dr Perera merit special mention.

Dr Perera, like Dr de Silva, was unhesitatingly for a parliamentary form of government – not surprising given that he was one of Sri Lanka's best-known parliamentarians, who was awarded a D.Sc. degree by the University of London for his comparative study of the parliamentary procedures of the United Kingdom, United States, France, and Germany. Dr Perera pointed out that the parliamentary form of government had worked for thirty years in Sri Lanka with a degree of success that had surprised many western observers. Writing a few weeks before the Second Amendment to the 1972 Constitution was to come into effect, he said:

> "We look in vain in the speeches of the Prime Minister for a clear and concise enumeration of the defects of the present Constitution which make the wholesale rejection of the present structure desirable. His lame contention that the present system of Government makes for instability and lack of continuity scarcely bear examination. He mentions the case where Prime Minister Dudley Senanayake was compelled to resign and call for fresh elections in July 1960, after his defeat on the Throne Speech following the March elections. Similarly he cites the case of Mrs. Bandaranaike, who was defeated on the Throne Speech debate in Parliament in December, 1964. One would have thought that these, the only two examples he cited, strengthened the case for the present Parliamentary system. They neatly reinforce the power of democracy. In both cases the elections that ensued registered a change in the complexion of the Government that existed. Surely, it is in crucial moments like this that the true worth of democracy is manifested. Judged by any

[13] N.M. Perera (2013) ***A Critical Analysis of the 1978 Constitution of Sri Lanka*** (2nd Ed.) (Colombo: Dr N.M. Perera Memorial Trust).

standards, the examples he cites only prove that the present Parliamentary system has been tested and found not wanting."[14]

A Presidency Unparalleled

The presidency that Jayewardene created for Sri Lanka has very few parallels in the democratic world. The President is head of state, head of government and head of the armed forces. He appoints Ministers but is not required by the constitution to consult the Prime Minister; he may consult the latter only if he considers it necessary. The President can also remove any Minister at will, even when the Prime Minister is from a party different to that of the President.

The President's powers over Parliament too have no parallel. The President may, from time to time, summon, prorogue, and dissolve Parliament. When a general election has been held consequent upon a dissolution of Parliament by the President, the President shall not thereafter dissolve Parliament until the expiration of a period of one year from the date of such general election, unless Parliament by resolution so requests. This means that if a Parliament ran its full course of six years without being prematurely dissolved, the next Parliament could be dissolved by the President at any time, even a day after the new Parliament meets. If the earlier Parliament had been prematurely dissolved by the President, the new Parliament can be dissolved at any time after one year unless Parliament requests dissolution.[15]

The powerful position of the President was amply demonstrated during the so-called cohabitation period of 2001-2004. While Chandrika Bandaranaike Kumaratunga was President, the UNP-led opposition won the general election held in December 2001 and Ranil Wickremasinghe became Prime Minister. Initially, President Kumaratunga gave into Wickremasinghe and appointed Ministers nominated by him, giving up even the

[14] Ibid: p.xvii.
[15] Article 70 (1).

Ministry of Defence. Wickremasinghe appears to have underestimated the powers of the executive presidency under the constitution that his uncle and mentor J.R. Jayewardene had imposed on the country. He side-lined Kumaratunga from the peace process that he revived. His Ministers embarrassed the President, forcing her to keep away from meetings of the Cabinet of Ministers of which she was constitutionally the head.

In May 2003, President Kumaratunga sought to take over the Development Lotteries Board but was humiliated when she could not even get the Gazette notification printed at the Government Press. But President Kumaratunga bided her time and moved swiftly in November 2003 to remove the Ministers of Defence, Foreign Affairs, and Media when Prime Minister Wickremasinghe was abroad. She took over the Ministry of Defence and appointed members of her party as Ministers of Foreign Affairs and Media. In February 2004, she dissolved Parliament and dismissed 39 non-cabinet ministers and deputy ministers while Wickremasinghe commanded the support of a majority in Parliament. At the elections that followed, Wickremasinghe's coalition was defeated. The events show how pernicious and anti-democratic the executive presidency in Sri Lanka is.

In the United States and France, members of the Cabinet are not members of the legislature although in France they can be present in the legislature. But in Sri Lanka, Ministers must necessarily be Members of Parliament. This makes it possible for the President to exert control over Ministers and also entice members of the opposition to cross the floor to become Ministers or Deputy Ministers as both Presidents Kumaratunga and Rajapaksa did, in the latter case to obtain a two-thirds majority in Parliament which the people did not give him.

The President also appoints judges of superior courts, secretaries of ministries and members of important commissions that are expected to be independent. His position is unassailable in practice. The President has total immunity from suit and this extends even to executive action. Not even a fundamental rights application can be filed and maintained against the President.

For an impeachment motion against the President to be placed on the Order Paper of Parliament, it must either be signed by two-thirds of the Members of Parliament or if signed by one-half of the members the Speaker must be satisfied that the allegations merit inquiry and report by the Supreme Court. The motion must be passed by Parliament by a two-thirds majority to be referred to the Supreme Court for inquiry and report. Even if the Supreme Court holds thereafter that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that he is guilty of any of the other allegations contained in such motion, Parliament must again pass a resolution for his removal by a two-thirds majority.[16] Dr Perera prophesied: "Can the President be removed from office before the expiration of his allotted time-span? Yes, certainly but the process is so complicated and will entail such delay that one can safety predict that such an eventuality will never arise."[17]

That impeachment is actually impossible is manifest from the attempt to impeach President Premadasa in 1991. An impeachment motion signed by around 120 members was presented by the opposition. It was said to have been signed by at least 40 members of the ruling party. However, before the Speaker could decide whether the allegations in the motion merit inquiry and report by the Supreme Court, the President moved swiftly and prorogued Parliament. Members of the ruling party were paraded before the Speaker to show that the President enjoyed enough support. The President met the Speaker and it was rumoured that the latter was put under severe pressure. Finally, the Speaker rejected the motion. Several Members of Parliament, including three Ministers, were expelled from the ruling party and consequently lost their seats in Parliament. It was never revealed who had signed the motion. In characteristic style, Dr de Silva observed how it would be difficult to even remove a President who had lost his mental capacities.

> "An incumbent President will in practice be irremovable. The procedure provided for removal of a President by Parliament is so cumbrous and prolix that one cannot see

[16] Article 38 (2).
[17] Perera (2013): p.30.

> it ever being resorted to in respect of intentional violation of the Constitution, treason, bribery, misconduct or corruption involving the abuse of the powers of his office or any offence under any written law, involving moral turpitude. Even in the case of the President being permanently incapable of performing the functions of his office by reason of mental or physical infirmity, the same procedure has to be resorted to; so that we can be ruled by a mad President for quite a time."[18]

Regarding the United States, which Jayewardene held up as a model, Dr Perera had the following to say:

> "The presidential system of Government has endured for over 200 years in the United States of America. Its founding fathers devised a political system that was meant to function without the hated party system. The experience of the American colonies under the British Monarch with his party system was tragic and the very word was anathema to them. Yet most constitutionalists now agree that the constitutional structure based on the mistaken theory of the separation of powers propounded by Montesquieu owes its success to the very growth of the party system in the United States. Two centuries of experience have generated precedents and practices which have enabled the legislature, the executive and the judiciary to function with forbearance and understanding. The creaking and the groaning of the whole governmental machine was loudest when the President belonged to a different political party from the majority in the Congress.
>
> Even when the same party held sway both at the White House and at the Capitol, the passage of the presidential legislative programme was not easy. A sense of independence has always pervaded the Congress. This is part of the conceptual traditions of the separation of powers. Only the astutest Presidents have been able to manipulate and manage both the Houses of Congress.

[18] de Silva (1988): p.66.

> The recent experiences of President Carter must be an eye opener to those who would like to imitate the American political system. The Democratic Party holds complete sways in both Houses, but yet the Democratic President finds himself virtually stymied in some of the important legislation that he has sponsored. Neither threats nor cajoles seem to be effective in getting his energy proposals or his tax concessions. One is therefore, justified in warning those who so light-heartedly embark on constitutional experiments and would like to imitate the American model."[19]

He warned against going the American way, citing examples of countries that followed it to periods of dictatorship:

> "It is not surprising, therefore, that countries of the South American continent that were fascinated by the American political system have an unenviable record. In most cases, their Constitutions have given way to dictatorships. Sometimes they have alternated between democratic interludes and dictatorships. This is also the experience of the Philippines which because of its close association in the past with the United States embraced the presidential system. If power corrupts and absolute power corrupts absolutely, then the deterioration of the American Republics into dictatorships is easily understood. The presidential system offers unlimited scope for wielding absolute powers albeit for a limited period. But the taste of unlimited power grows with the feeding and the lust cannot be easily satiated. It is a matter of regret that Sri Lanka that has amassed considerable experience in Parliamentary Government and has successfully overcome the teething troubles of the early period should now be thrown down the slope of constitutional confusion in the end jeopardizing democracy itself."[20]

None of the safeguards found in the American and French constitutions were incorporated into the 1978 Constitution.[21] In

[19] Perera (2013): p.xxiii.
[20] ibid.: p.xxiv.
[21] See also the chapters by Suri Ratnapala and Kamaya Jayatissa in this book.

the United States, the Senate and the House of Representatives cannot be dissolved by the President. Congressional committees deal with various fields of government activity and are quite powerful. Ministers are not members of either House and so have to work with these committees as legislation is initiated by members of the Congress. Congressional committees have investigative powers and supervise the executive and administration and conduct public sittings.

In France, executive power is diffused between President, Prime Minister, and the Council of Ministers. While the President appoints the Prime Minister, the other ministers are appointed on the proposal of the Prime Minister.[22] While the President presides over the Council of Ministers,[23] it is the Prime Minister who is the head of the government and who directs the conduct of government affairs.[24] He is also responsible for national defence.[25] The government is responsible to Parliament.[26] The government determines and conducts the policy of the nation and has at its disposal the administration and the armed forces.[27] The President can dissolve the National Assembly only after consulting the Prime Minister and the Presidents of the two Assemblies.[28]If the National Assembly adopts a motion of censure, or rejects the Government's programme or a general policy statement by the latter, the Prime Minister must tender the government's resignation to the President of the Republic.[29]

Strengthening the Presidency: Third and Fourth Amendments

The term of office of the Sri Lankan President is six years. The Third Amendment to the Constitution introduced in 1982 by President Jayewardene strengthened the presidency further by

[22] The Constitution of France (1958): Article 8.
[23] Ibid: Article 9.
[24] Ibid: Article 21.
[25] Ibid.
[26] Ibid: Article 20 (3).
[27] Ibid: Article 20 (1), (2).
[28] Ibid: Article 12 (1).
[29] Ibid: Article 50.

permitting a President in his first term of office to seek another term at any time after completing four years. The President can thus choose the date of election most advantageous to him. While most parliamentary democracies permit such snap elections, they are very rare in presidential systems, the Philippines Constitution of Marcos being one of them – not a good example to follow. The Sri Lankan Constitution now permits the President to call early parliamentary elections as well as early presidential elections. With the two-term limit on the presidency removed by the Eighteenth Amendment, the position of the President has become near dictatorial.

Jayewardene not only gave himself the power to decide when to call the next presidential election, but followed his victory in the election that he called and won in 1982, with the extension of the term of the first Parliament to twelve years through another constitutional amendment. The first Parliament's term, which was to expire on 4th August 1983, was extended by the Fourth Amendment to 4th August 1989. The first Parliament was in fact a continuation of the National State Assembly elected under the 1972 Constitution under the first-past-the post (FPP) system. Elections to Parliament under the 1978 Constitution are held according to proportional representation (PR). An election held in 1983 or earlier would certainly not have given the UNP a two-thirds majority. Jayewardene had polled 3.4 million out of 6.5 million votes at the presidential election and on that basis the UNP would not have come anywhere near the five-sixths majority in enjoyed. But Jayewardene used the five-sixths majority he obtained under the previous system to retain the majority for another six years. He argued that holding parliamentary election would increase the power of 'Naxalites'. Several opposition politicians, prominent among them Vijaya Kumaratunga, were incarcerated in preventive detention allegedly to prevent 'a Naxalite-type coup'. They were released only after the completion of the referendum.

The Fourth Amendment Bill for the extension of the life of the first Parliament by six years was considered by a seven-member Bench of the Supreme Court. The Court only stated that as the Bill was intended to be passed by a two-thirds majority and placed before the people at a referendum, the Court had no jurisdiction

in terms of proviso (b) of Article 120.[30] Interestingly, three of the seven judges did not agree with this view but reasons for their disagreement were not stated. The names of the dissenting judges too were not disclosed, giving rise to various versions in rumour-prone Hulftsdorp.

Dr de Silva, writing during the referendum campaign, emphasised that what was sought to be secured by the referendum was the abolition of the parliamentary general election that was due:

> "Now that the objective of President Jayewardene's constitutional manoeuvre is clear, its far-reaching nature is not difficult to demonstrate. Its anti-democratic nature will strike anyone. What is being interfered with, although the manoeuvre takes the form of a consultation of the people, is precisely the right of the people in a democratic country to choose their government through known electoral processes for a pre-determined period."[31]

The notorious referendum was the worst blot in the history of elections in Sri Lanka. Election laws were violated with impunity and there were many reports that Opposition supporters were forced to vote 'yes' and show the ballot paper to the UNP polling agents. Opposition leaders such as Hector Kobbekaduwa and Pieter Keuneman found out at the polling booth that their votes had already been cast!

Reform or Abolition?

Can the executive presidency be 'reformed' by introducing safeguards that are found in developed countries? This is a legitimate question.

In the United States, legislators are very independent, whether they belong to the President's party or not. One-third of the

[30] (1978-1983) I ***Decisions of the Supreme Court on Public Bills*** 155.
[31] de Silva (1988): p.133.

Senate is elected every two years and the whole House of Representatives – 435 members – are elected every two years. The President's inability to dissolve either House also gives legislators substantial independence. The legislative records of legislators – the bills they presented, how they voted, what positions they took, etc. – come under scrutiny at election. The political culture is different where the voters consider the voting records of their future representatives. Legislators therefore need to act very independently. Excesses on the part of the executive are pointed out, curbed, resisted, and criticised by members of the President's own party itself. When President Nixon was to be impeached, his own Republican Party members went against him and when President Clinton was impeached, some Republicans opposed it.

The complete separation of the executive from the legislature also contributes to the independence of legislators. A Senator or member of the House of Representatives cannot be a member of the Cabinet. On the other hand, Cabinet appointments need the confirmation of the Senate. John Kerry, and Hilary Clinton before him, came before the Senate to have their nominations as Secretary of State confirmed and resigned from the Senate to take up appointment. As legislators cannot hold office in the executive, the President cannot lure them by offers of office.

Unlike in developed countries, people in developing countries prefer legislators to hold ministerial positions so that they can pressurise their representatives to attend to their needs. This is probably why Jayewardene provided for the Cabinet of Ministers, non-Cabinet Ministers and Deputy Ministers to be drawn from Parliament even under an executive presidency. A proposal to appoint Ministers from outside Parliament is very unlikely to garner popular support.

Candidates for office in the United States, from the President down to the local level, are not appointed by the party hierarchy; rather they are elected by party members through primary elections. Elected representatives can therefore afford to be independent. The political culture in Sri Lanka is quite different. Not only the presidential candidates but even candidates for legislative positions at both national and state level and state

governors, as well as for many local positions such as city councillors and county commissioners are selected through primaries. Barak Obama, an African-American and Washington outsider, was able to become the Democratic nominee for President only because of such a system. Can our system produce an 'Obama'? This difference in political culture needs to be taken into account when attempting to import 'reforms'.

An argument against the abolition of the executive presidency is that the presidency leads to stability. Proponents of the presidency say that in view of the political and economic challenges faced by a developing country such as Sri Lanka, a strong government freed from the whims and fancies of the legislators and which can take tough, unpopular decisions that are in the long-term interest of the country is needed. Dealing with the 'stability' argument, which Jayewardene too put forward – and which is echoed even today by apologists of the executive presidency – Dr de Silva stated:

> "I am very anxious to make this clear; this is an effort. This word 'stability' covers a multitude of wrong propositions. Stability! What kind of stability are we talking of? A stability that comes from the withdrawal of the central power from the influence of the masses? In other words, the people shall be kept outside, with only one function: as Marx said so long ago, 'They choose once in five years who shall oppress them for the next five years'! That is not my concept of democracy, parliamentary or otherwise."[32]

It is also argued that the Sri Lankan state would not have defeated the separatist threat but for the executive presidency. In a parliamentary form of government too, the government has complete control over the armed forces. Executive power is exercised in the name of the President who must act on the advice of the Prime Minister. The executive presidency brings in no 'magic'. What a Prime Minister cannot do to the extent that an executive president can is to manipulate the political process. India, which has a parliamentary form, affords a good example.

[32] Constituent Assembly Debates, Vol.1, 2nd July 1971: Col.2714.

India is a multi-cultural society with numerous complex problems. It has issues with some of its neighbours, fought wars with China and Pakistan, and faces terrorism from both outside and inside its borders. There are several separatist movements, some violent. Maoist insurgencies are active in several parts of the country. It has had to deal with religious strife, language issues, caste issues, etc. Poverty and social backwardness are serious problems plaguing India. Yet, there is no serious demand for an executive presidency. Vikram Raghavan explains why India opted for a parliamentary form of government.

> "[W]hy did our founders establish a parliamentary system? Did they blindly copy the prevailing British model without seriously considering other alternatives? Fortunately, for us, they were not as complacent as it may seem on this question. Just as the American Constitutional Convention of 1787 detested the oppressive English monarchy, our Constitutional Assembly was deeply concerned about concentrating political power in a single office. With no shortage of despotic regimes wherever they turned, Assembly members wanted desperately to avoid paving the way for a future dictator.
>
> In a November 1948 speech, Ambedkar described our founders' dilemma with trademark eloquence. An ideal executive, he argued, must be both stable as well as responsible to the people who elected it. There was no political system in vogue that satisfied both objectives equally. The American and Swiss presidencies offered greater stability, while British cabinet governments seemed more accountable to the people. The Assembly ultimately settled for accountability over stability by establishing a structure, which more closely resembled the latter than the former. As Justice Krishna Iyer colourfully

put it: 'Not the Potomac, but the Thames, fertilises the flow of the Yamuna.'"[33]

Israel has been at war with its neighbours from the time the Jewish state was established. To say that Israel has been rough and arrogant in its dealings with the world is a gross understatement. It has been strong in its own peculiar way with a parliamentary form of government, even though most governments have not served a full term and early elections have been frequent. Israel experimented with a directly elected 'executive Prime Minister' briefly between 1996 and 2001 but abandoned it.

1994 and After: A Golden Opportunity Missed

During the nearly 17 years of UNP rule under the executive presidency, the Left unwaveringly raised the need to totally abolish it and return to a parliamentary form. The issue was raised at every May Day meeting, every N.M. Perera commemoration event since he passed away in 1979, every Republic Day event on 22nd May, and every other possible occasion. The Left's post-1978 literature is replete with references to the issue. The country was now saddled with the 1978 Constitution, but with the proportional representation that Jayewardene introduced (having secured his own five-sixths majority under the first-past-the-post system), a two-thirds parliamentary majority necessary for change was impossible to get.

By 1994, many parties in the opposition had come together to form the People's Alliance (PA). The SLFP was now virtually led by Chandrika Bandaranaike Kumaratunga, an ally of the Left. At the general elections held that year, the PA entered into an electoral pact with the Sri Lanka Muslim Congress (SLMC). It also had friendly relations with the Tamil United Liberation Front

[33] V. Raghavan. '*All the President's Men*', ***The Hindu***, 27th May 2012: www.thehindu.com/todays-paper/tp-features/tp-sundaymagazine/all-the-presidents-mien/article3460891.ece (accessed 18th October 2014).

(TULF), former militant groups such as the People's Liberation Organisation of Tamil Eelam (PLOTE), the Eelam People's Revolutionary Liberation Front (EPRLF), and the Tamil Eelam Liberation Organization (TELO), as well as the Upcountry People's Front (UPF), a party with a base among Indian Tamil plantation workers. The PA stated in its election manifesto that it would set up a Constituent Assembly to do away with the existing constitution and adopt a new constitution that would, *inter alia*, abolish the executive presidency and provide a solution to the ethnic crisis by way of extensive and meaningful devolution. It sought a mandate to set up such an assembly in the parliamentary elections of August 1994.

The PA became the largest party in Parliament with 105 seats out of 225 and the SLMC, its ally, got seven seats. The UNP won 94. With the UPF's lone member joining it, the PA just crossed the halfway mark to form a government with Kumaratunga as Prime Minister. It also had the support of the Tamil parties mentioned, who sat in the opposition. With such a slender majority, setting up a Constituent Assembly was certainly not viable but what is difficult to understand is why the PA did not ask for a similar mandate at the presidential election that immediately followed. By this time, the Eelam People's Democratic Party (EPDP), which had nine members, had become an ally of the PA, and the Ceylon Workers' Congress (CWC), which had seven members elected on the UNP ticket, had decided not to support the UNP candidate. Kumaratunga's victory was a foregone conclusion. She obtained 63% of the votes cast and won all electoral divisions barring Mahiyangana. The highest percentages were received in the north and east, with over 96% in Jaffna district.

Constitutional revolutions are not possible after every electoral victory and the PA did not get a clear mandate for such a move at the parliamentary elections. But a clear mandate was there for the asking at the presidential elections. However, Kumaratunga's constitutional advisors faltered, not surprising given what followed. But what is surprising is that the Left, which was so involved with the earlier constitutional revolution of 1972, also did not push the issue.

The nationalist Janatha Vimukthi Peramuna (JVP) put forward a candidate at the presidential elections but after Kumaratunga gave an assurance that the executive presidency would be abolished within a year, the JVP withdrew its candidate. Looking back, this was an assurance given without much foresight. Abolishing the executive presidency was one of the two main issues before the country, the other being a political solution to the ethnic conflict. Parties with a base among the Tamil, Muslim, and Indian Tamil communities, who supported the PA either from within the government or the opposition, considered the executive presidency a safeguard for their communities and Kumaratunga being President an additional safeguard. They were willing to support the abolition of the presidency only on the condition that devolution would also be introduced at the same time. The UNP would have supported an amendment for abolition in the first year of the Kumaratunga presidency with glee. But it would not have been supported by the PA's allies as there was no agreement on a political solution between the PA and UNP.

Instead of opting for a constituent assembly process, Kumaratunga was advised to set up a Parliamentary Select Committee (PSC) without waiting even for the presidential election and this was done. The UNP skilfully manoeuvred the process and the PSC dragged on. After three years and 77 meetings, the PA government, in frustration, placed its own proposals before Parliament in October 1997. They were mostly based on the consensus achieved in respect of the many issues discussed. The whole process was badly managed for which the entire PA including the President, the Minister of Constitutional Affairs, and others involved must take collective blame. Amateurishness, astrology, malefic periods, auspicious times, and other such lunacy played their part. The PA was unable to force the UNP take up clear positions. But to the credit of the PA, it had a clear position on almost all the issues. Whenever an issue was discussed in the PSC, the Minister would make state the PA's position on the same. On some issues, a note would be circulated and sometimes even a legal draft. It was only after the presidential elections of 1999, which Kumaratunga won, that the UNP again came aboard the process. Discussions were first held within the PA and then with the Tamil parties and finally with the UNP,

which was again able to drag the discussions from February to July 2000.

On 7th July 2000, it was announced that the PA and the UNP had reached agreement on the Constitution Bill, although there were a few outstanding issues. The main outstanding issue related to the transitional provision relating to the abolition of the executive presidency. There was general agreement that there had to be a transitional period. The government's draft provided for abolition at the end of President Kumaratunga's term of office of six years counted from December 1999, but the UNP was for a much shorter period.

A major flaw in the process was that the issue of the transitional period was never seriously discussed within the PA. This writer was involved with the process and explained to several leading PA personalities that the UNP was not going to 'buy' a six-year waiting period but they were all reluctant to take up the issue with Kumaratunga.[34] 'Let *us* not raise the issue' appeared to be their common position. At initial discussions within the PA, no one suggested a shorter period and almost all, not excluding leaders from the Left, said: 'Madam, you have a mandate to go on for six years'.

Finally, after 7th July, a date was fixed to discuss the outstanding issue of the date of abolition with the UNP. A few days earlier, leaders of the PA met and discussed the issue seriously for the first time. They decided to propose that the executive presidency be abolished at the end of three years counted from President Kumaratunga's re-election and to agree to two years if the UNP insisted on a shorter period. The writer is aware that President Kumaratunga rang up senior minister Ratnasiri Wickramanayake to ask him to begin the meeting with the UNP as she was held up, and instructed him to agree to even a period of one year, meaning December 2000. As the meeting began, UNP deputy leader Karu Jayasuriya rose, said that the UNP now wished the proposals be

[34] The writer, as Consultant to the Ministry of Constitutional Affairs, officiated as secretary to the talks the PA had within it and with other parties. He was also a member of the team that drafted the 1997 proposals and the 2000 Constitution Bill.

placed before the Buddhist clergy and left. The following day, Kumaratunga called Jayasuriya and through him conveyed to the UNP leadership her offer to end the transitional period in December 2000. But there was no response. The UNP's gyrations are unfathomable; perhaps it feared that the PA would get much credit for the measure at the general elections, which were three to four months away. As is well known, the PA's Constitution Bill of 2000 that was presented to Parliament on 3rd August provided for the abolition of the executive presidency at the end of the second term of Kumaratunga. Here too, a mistake was made. The Bill should have provided for the transitional period to end in December 2000, as proposed to the UNP. The UNP not only did not support the Bill; some UNP members burnt copies inside the House. A golden opportunity to abolish the executive presidency was thus missed. Both the PA and the UNP must take the blame – the PA for a badly managed process and its inability to 'rein in' the UNP, and the UNP for playing dishonest and crafty politics with the issue.

The lessons from the failed exercise are many. The country was desperate to find a way out of the Jayewardene constitution and would have accepted a Constituent Assembly if a mandate was asked for at the presidential elections in 1994. Such a mandate should immediately have been followed through with the establishment of a Constituent Assembly. There are, of course, the lessons from the 1970-72 process too, namely that the ruling party should not have dominated the process and made its proposals a *fait accompli*. Instead, a device similar to the 'sufficient consensus' formula used in South Africa in 1994 could have been agreed upon. With Tamil, Muslim, and Indian Tamil parties too supporting, the UNP could have been pressurised into a consensus. Revolutionary constitutional changes cannot be made in the last year of a Parliament. They should be initiated 'while the iron is hot' and the process not allowed to drag.

Restrictions through the Seventeenth Amendment

The Kumaratunga administration agreed to the Seventeenth Amendment to the Constitution at a time when it found its

majority in Parliament threatened in 2001. The JVP offered to provide the majority but on several conditions, including the introduction of the Seventeenth Amendment. It must however be said in fairness to the Kumaratunga administration that it first proposed a Constitutional Council in 1995 and the Constitution Bill of 2000 also had provisions relating to such a Council but with less powers than under the Seventeenth Amendment. Some restrictions were imposed by the Seventeenth Amendment on the executive presidency. The sovereignty of the people was strengthened by the restriction of the powers of the all-powerful President. The Supreme Court held that the Seventeenth Amendment, while restricting the powers of the President to some extent, did not amount to an effective removal of the President's executive power.[35]

The Seventeenth Amendment set up a Constitutional Council which would consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons nominated jointly by the Prime Minister and the Leader of the Opposition, and one person nominated by a majority of MPs belonging to parties and independent groups other than those to which the Prime Minister and the Leader of the Opposition belong. Of the five persons jointly nominated by the Prime Minister and the Leader of the Opposition, three would be appointed in consultation with the MPs belonging to the respective minority groups to represent their interests.

The appointment of judges of the Supreme Court and Court of Appeal, members of the Judicial Service Commission, the Attorney General, the Auditor General, the Inspector General of Police, the ombudsman, and the Secretary General of Parliament would need the approval of the Constitutional Council. On the other hand, no person could be appointed as chairman or member of the Elections Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission, the Bribery or Corruption Commission, the Finance Commission, and the Delimitation Commission except on the recommendation of the Council.

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[35] (1991-2003) VII ***Decisions of the Supreme Court on Public Bills*** 247.

The Seventeenth Amendment was never fully implemented. The first Constitutional Council functioned fairly well, but an Elections Commission was not appointed as President Kumaratunga did not agree with the Council's nominee as Chairman, and the Council was not prepared to nominate another. The second Constitutional Council was not appointed ostensibly due to a dispute as to what 'parties and independent groups other than those to which the Prime Minister and the Leader of the Opposition belong' meant. The Seventeenth Amendment did have some deficiencies as it was hastily passed in Parliament and it is true that some of its provisions needed change. These issues were gone into in detail by a Parliamentary Select Committee headed by D.E.W. Gunasekera, the Communist Party Minister. The draft report of the Committee is in the public domain.[36] The report could not be finalised as two members of the UNP who were nominated to the committee joined the government and the UNP did not recognise them as its nominees. However, after the dissolution of Parliament in 2010, the UNP publicly stated that it accepted the recommendations contained in the draft report.

Strengthening the Presidency to the Utmost: The Eighteenth Amendment[37]

The Eighteenth Amendment was introduced in 2010 by President Rajapaksa, ironically the leader of a party (SLFP) that had been opposed to the executive presidency throughout. It is pertinent to remind ourselves of what Mrs Srimavo Bandaranaike, the former Prime Minister, stated for the SLFP in the National State Assembly when the executive presidency was first introduced by way of an amendment to the 1972 Constitution. She stated:

> "The effect of this amendment is to place the President above the National State Assembly, above the law and above the courts, thereby creating a concentration of

[36] '*Interim Report of the Select Committee of Parliament on the 17th Amendment to the Constitution*' (2007) ***LST Review*** 18(238): p.1.

[37] Some of the material under this sub-heading also appears in the Epilogue that the writer was privileged to contribute to the second edition of Dr N.M. Perera's booklet: J. Wickramaratne, '*Epilogue*' in Perera (2013): p.109.

> State power in one person, whoever he might be. This has happened in other countries before, and history is full of examples of the disastrous consequences that came upon such nations that changed their Constitutions by giving one man too much power. […] We oppose this Bill firmly and unequivocally. It will set our country on the road to dictatorship and there will be no turning back. This Bill will mark the end of democracy in Sri Lanka, as the late Mr Dudley Senanayake realized when these same ideas were put to him in the United National Party."[38]

At the 2005 presidential elections, Rajapaksa promised to abolish the executive presidency. He stated in *Mahinda Chintana*, his election manifesto:

> "With the consensus of all, I expect to present a Constitution that will propose the abolition of the Executive Presidency and to provide solutions to other issues confronting the country. In the interim, I propose to present a Constitutional amendment through with the Executive President will be made answerable to Parliament by virtue of holding such office."[39]

At the presidential elections held in 2010, President Rajapaksa spoke about changing the character of the executive presidency. He stated in *Mahinda Chintana Idiri Dekma*, his manifesto, as follows:

> "An open discussion on the Executive Presidency will be held with all parties. The Executive Presidency will be converted into a Trusteeship which honours the mandate given to Parliament by being accountable to parliament, establishes equality before the law, is accountable to the judiciary and enacts laws that are accountable to the judiciary, and is not in conflict with the judiciary."[40]

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[38] NSA Deb, 4th October 1977, Vol.23: Col.1293.
[39] '*Victory for Sri Lanka, Presidential Election 2005: Mahinda Chinthana, Towards a New Sri Lanka*': p.97, available at: www.priu.gov.lk/mahindachinthana/MahindaChinthanaEnglish.pdf> accessed 3rd October 2013 (24th December 2014).
[40] Groundviews, '*A Timeline of Duplicity: Promises to Abolish the Executive Presidency*', 9th May 2010: www.groundviews.org/2010/09/05/a-timeline-of-

The Left parties were concerned that there was no explicit commitment to abolish the executive presidency. Ministers Tissa Vitarana and D.E.W. Gunasekera, leaders of the LSSP and the Communist Party respectively, accordingly raised the issue with the President and reported back to their parties that the President had assured them that 'it was not a problem as it has already been agreed to.' However, even before the President's second term began in November 2010, the Eighteenth Amendment Bill was presented to Parliament.

The Eighteenth Amendment removed the two-term limit imposed on a person who has held the office of President, abolished the Constitutional Council, and set up a Parliamentary Council in its place. The Parliamentary Council consists of the Prime Minister, the Speaker, the Leader of the Opposition, and a nominee each of the Prime Minister and the Leader of the Opposition who shall be Members of Parliament. The President is only required to seek the 'observations' of the Parliamentary Council when making appointments to the offices and commissions mentioned in the Seventeenth Amendment. The Eighteenth Amendment also took away some powers of the Election Commission.

It is significant that in no country with a parliamentary form of government is there a term limit on a person holding the office of Prime Minister. This is because he is counterbalanced by the presence of the Opposition in the chamber of Parliament. Further, the Prime Minister loses his position if at any time he does not have the support of a majority in Parliament. On the contrary, term limits are found only in countries with an executive president. A term-limit is an important instrument of democratisation in electoral-authoritarian countries. Not only do term limits constrain the powers of leaders but they promote changes in government and changes of the political parties in power as was seen in Croatia in 2000 and Kenya in 2002. Term limits provide an important check on the concentration of power; they strengthen democracy and ensure long-term stability. The longer a chief executive is in power the demarcation between the state and the ruling party becomes more and more blurred.

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duplicity-promises-to-abolish-the-executive-presidency (accessed 24th December 2014).

Experiences show that more terms erode the balance of power between government authorities and weaken the authority of legislatures, judiciaries, electoral authorities, and even other political parties, thus leading to authoritarianism. In the absence of term limits, an incumbent may govern for too long and other aspirants may grow impatient. Term limits assure such aspirants that they would also have a chance. Thus, term limits reduce the stakes of politics and may prevent alternate candidates from resorting to unconstitutional action or intra-party or 'palace coups.' They are in fact one method of strengthening democracy. They also promote a party-based, as opposed to personality-based, vision of democracy. Term limits assume that, ultimately, no one individual, no matter how capable and illustrious, has a monopoly on the skills needed to govern.[41]

A survey of constitutions from around the world shows that a fixed term of office is a defining characteristic of democratic presidential government. The following are among the countries that have no term limits: Azerbaijan, Syria, Turkmenistan, Vietnam, Venezuela, Yemen, Belarus, Costa Rica, Niger, Algeria, Burkina Faso, and Uganda. Of these, Turkmenistan, Syria and Vietnam are one-party states while several are not functioning democracies. Cuba recently announced that it would limit the presidency to two five-year terms. Peru, Chile, and Uruguay permit an unlimited number of terms, but they cannot be consecutive and this limitation operates in practice against the same person holding the position for many terms.

In the United States, which has one of the strongest presidencies, there is a two-term limit. This is in addition to the various checks and balances discussed earlier. President George Washington declined to run for a third-term suggesting that two terms of four years were enough for any President. Washington's voluntary two-term limit became the unwritten rule for all Presidents until 1940. In 1940, Roosevelt won a third term and was re-elected for a fourth term in 1944. Following his death in April 1945,

[41] Submissions, both oral and written, were made along the above lines by the writer, as counsel for two petitioners, who challenged the Eighteenth Amendment Bill in the Supreme Court in Case No. SC (SD) 01/2010.

Amendment XXII was passed imposing the two-term limit.[42] Even in France, where executive power is diffused between President, Prime Minister and the Council of Ministers, a limit of two five-year terms was introduced in 2000. Earlier, the term of office was seven years and there was no term limit.[43]

There can, of course, be no comparison between established democracies and emerging 'monarchical presidencies' in which power is highly personalised and centralised around the President. In the absence of strong mechanisms of accountability, the President under this system may remove any obstacles that could inhibit his maintenance of the office, including term restrictions. In fledgling democracies, the main importance of term limits stems from its positive impact on power alternation, which, in turn, contributes to democratic consolidation.[44] It has been argued that a President would be re-elected for a third time or more only if people vote for him. In practice, people vote largely on party lines. The absence of a term limit prevents new candidates from the same party being able to contest, and supporters and sympathisers have little choice than to vote for the incumbent. Also, if the other candidates at the election are not attractive, there is little choice than to vote for the incumbent. Term limits, on the other hand, throw up new choices.

Defeating a long-sitting President is quite a difficult task as seen in many countries. A President in office has unrivalled and unfettered access to public resources and is also better poised

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[42] See also A. Welikala, '*The Eighteenth Amendment and the Abolition of the Presidential Term Limit: A Brief History of the Gradual Diminution of Temporal Limitations on Executive Power since 1978*' in R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives): Ch.V at pp.116-21.

[43] See chapter by Kamaya Jayatissa in this book.

[44] F. Guliyev, '*End of Term Limits: Monarchical Presidencies on the Rise*' (2009) ***Harvard International Review***: www.academia.edu/187243/End_of_Term_Limits_Monarchical_Presidencies_on_the_Rise (accessed 24th December 2014); see also D. Vencovsky, '*Presidential Term Limits in Africa*' (2007) ***Conflict Trends*** 2: p.15; B. Cibane, '*Africa's Elected Monarchs: Presidential Term Limits and Democracy in Africa*', ***Africa on the Blog***, 20th June 2013: www.africaontheblog.com/africas-elected-monarchs-presidential-term-limits-and-democracy-in-africa/ (accessed 24th December 2014).

when it comes to campaign funds. Even in the most consolidated of multiparty democracies, international observers have reported the flagrant abuse of state resources during elections. An incumbent President thus has an undoubted advantage.[45]

The Eighteenth Amendment Bill was challenged in the Supreme Court. It being a constitutional amendment, the only ground of possible challenge was that it was inconsistent with the constitutional provisions listed in Article 83 and thus necessitated the approval of the people at a referendum. The main entrenched provision cited was Article 3: "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise." The salutary effects of presidential term limits set out above were placed before the Supreme Court to show that the abolition of the limit was inconsistent with the concept of people's sovereignty protected by Article 3. It was also argued that Article 83 is not exhaustive of the constitutional provisions that necessitate a referendum. For example, the removal of the writ jurisdiction of the Court of Appeal would necessitate a referendum, as it would result in taking away an important safeguard against arbitrary executive action. When Articles 3 and 4 speak of powers of government, safeguards against arbitrary action are necessarily included.

It was also submitted that the 1978 Constitution provided for a particular form of government, namely a strong executive presidency. One of the few effective safeguards was the term-limit and its removal adversely affected the sovereignty of the people. The Seventeenth Amendment, it was submitted, was clearly a restriction of the executive presidency. The sovereignty of the people was strengthened by the restriction of the powers of the all-powerful President. The Seventeenth Amendment provided for a national consensus for appointments to important positions, including the judiciary and the independent commissions. Under the proposed set up, the President would only 'seek the observations' of the Parliamentary Council. The leverage that the

[45] S. Griner, '*Term Limits can Check Corruption and Promote Political Accountability*', (2009) ***Americas Quarterly*** (Spring): www.americasquarterly.org/pros-and-cons-of-term-limits (accessed 24th December 2014).

Constitutional Council had with important appointments would be completely lost.

In regard to the argument that since the Seventeenth Amendment was not approved at a referendum it can also be deleted or amended without a referendum, it was submitted that a referendum was not needed to enhance sovereignty. For example, if the right to life is to be included in the chapter on fundamental rights, that would not necessitate a referendum. But to take away the right to life later would certainly need approval at a referendum. The Seventeenth Amendment weakened the executive presidency to some extent, although the President still remained very strong. The little gains achieved through the amendment contributed to the strengthening of the sovereignty of the people. Therefore, the removal of the gains so achieved affected sovereignty and necessitated approval at a referendum.

The Supreme Court (Shirani Bandaranayake CJ, and Sripavan, Ratnayake, Imam and Suresh Chandra JJ) held that the abolition of the term limit would by no means restrict the franchise but would, in fact, enhance the same since voters would be given a wide choice of candidates including a President who had been elected twice by them.[46] The arguments put forward by the petitioners about the beneficial effects of presidential term limits and the experiences of other countries were not alluded to.

Regarding the Seventeenth Amendment provisions sought to be removed, the Court stated that, as was held in *Premachandra v Jayawickrama*,[47] there are no absolute or unfettered discretions in public law. Discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. Thus even prior to the introduction of the Constitutional Council there were necessary safeguards that restricted the discretion of appointing authorities since no one possessed an unfettered

[46] *Re Eighteenth Amendment to the Constitution Bill* (2010-2012) X Decisions of the Supreme Court on Public Bills 5. See also N. Anketell, 'A Critique of the 18th Amendment Bill Special Determination' in Edrisinha & Jayakody (2010): Ch.IV, and chapter by Rohan Edrisinha in this book.
[47] (1994) 2 SLR 90.

discretion. The proposed provisions relating to the establishment of a Parliamentary Council was only a process of redefining the restrictions placed on the President by the Seventeenth Amendment.

It is submitted that *dicta* such as 'there is no absolute or unfettered discretions in public law' have little meaning when applied to actions of the powerful President under the Sri Lankan constitution. In view of the immunity the President enjoys, paralleled elsewhere only in dictatorships and monarchies, he or she is in fact above the law as the country was warned when the executive presidency was first introduced. The Seventeenth Amendment sought to remedy this, albeit to a small extent, by establishing a mechanism that had the potential to create a national consensus on important appointments. As explained earlier, the Seventeenth Amendment was never fully implemented. The non-implementation could not be challenged specifically because of the immunity the President enjoyed.[48] Contrary to what the Supreme Court stated, the Parliamentary Council process does not impose any effective restrictions on the President, who is only obliged to 'seek' the observations of the Council.

The performance of the Left in relation to the Eighteenth Amendment was disappointing, to say the least. The three Left parties, the Lanka Sama Samaja Party (LSSP), the Communist Party of Sri Lanka (CPSL), and the Democratic Left Front (DLF) held several meetings to protest against the amendment and also made strongly worded statements. The LSSP decided, not once but twice, that its two Members of Parliament should not participate in the vote. Finally, however, all five parliamentarians of the Left shamelessly voted for the amendment. The excuse given was that the amendment would have received the required two-thirds majority even without the Left members voting for it. If the members did not want to embarrass the government of which they were a part by being a party to denying it a two-thirds majority, non-participation would not have resulted in such denial, as a two-thirds majority was forthcoming in any case! The CPSL has since graciously admitted that voting for the

[48] SC (FR) Nos. 297 and 578/2008, SCM, 18th March 2011.

amendment was a mistake.[49] The conduct of the Left members whose parties and departed leaders had been in the forefront of the opposition to the executive presidency was a classic instance of '*kiri kalayata goma tikak demma wage*' ('putting a blob of cow dung into a pot of milk'), as the Sinhala saying goes.

Dr Colvin R. de Silva described the system of government under the 1978 Constitution as a constitutional presidential dictatorship dressed in the raiment of a parliamentary democracy.[50] How true. With no term limit and the Seventeenth Amendment out of the way, the executive presidency in Sri Lanka has certainly become one of the strongest and vilest, if not *the* strongest and vilest, presidential systems in the 'democratic' world.

[49] Resolution passed at the Special National Conference, Colombo, 27th- 28th October 2012.
[50] C.R. de Silva, '*Foreword*' in Perera (2013): p.v, xi.

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Constitutionalism and Sri Lanka's Gaullist Presidential System

Rohan Edrisinha

Sri Lanka's constitutional evolution since independence from Britain in 1948 has been marked by a crisis of constitutionalism. The framers of its two autochthonous constitutions demonstrated utter disregard for basic principles of constitutionalism and it is therefore not surprising that since 1972 the country's democratic traditions and respect for liberal democratic principles have been steadily undermined. Sri Lanka's failure to create a constitutional dispensation that is inclusive and acceptable to all its ethnic and religious groups is another consequence of the failure to uphold basic principles of constitutionalism.[1]

Constitutionalism requires that a constitution imposes restraints on the wielders of political power; acts as a counter-majoritarian check to prevent the tyranny of the majority and to protect individual freedom and dignity; empowers people through the protection of their rights and by ensuring that governments are accountable and responsive to them; establishes independent institutions to ensure that the reach of government is circumscribed so that with respect to decisions where partisan political considerations are inappropriate, independent and principled decisions can be made in the public interest. In more recent years, constitutions are also expected to enshrine basic values and principles by which the country is to be governed.[2] Sri Lanka's political leadership across the political spectrum and its legal community, with rare exceptions, have generally failed to appreciate and recognise these constitutional fundamentals as they have drafted, implemented and interpreted constitutional provisions. The debate on whether the executive presidency should continue as a feature of Sri Lanka's constitution has to be assessed in this context.

[1] See C. Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy); and R. Edrisinha & A. Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka*** (Colombo: Centre for Policy Alternatives).
[2] See for example the South African Constitution of 1996.

The Republican Era

Both the first Republican Constitution of 1972 and the Second Republican Constitution of 1978 were fundamentally flawed when assessed from the perspective of constitutionalism.[3] They both provided for a concentration of power in a single institution, introduced structures and systems that facilitated executive convenience, entrenched majoritarianism, undermined institutions that had remained reasonably independent under the Soulbury Constitution, and failed to protect basic liberal democratic values and principles. Both constitutions were partisan documents introduced by governments with two-thirds majorities in Parliament and with no serious efforts to forge consensus across the political or ethnic spectrum. The irony is that though the framers of each constitution were the fiercest critics of the other constitution, both constitutions essentially suffered from the same basic law: a concentration of power in a single institution.

The debate on which of Sri Lanka's home-grown constitutions was worse will be an evenly contested one. Colvin R. de Silva, the Trotskyite Minister of Constitutional Affairs, who was primarily responsible for the First Republican Constitution, trumpeted the need for autochthony and a home-grown constitution. However the constitution that he helped craft introduced the British doctrine of parliamentary sovereignty by making the legislature, the National State Assembly, the supreme instrument of state power, concentrating legislative, executive and judicial power in it and expressly prohibiting the universally accepted mechanism by which the supremacy of the constitution is upheld: constitutional or judicial review of legislation. The principle of the separation of powers was expressly repudiated, the independence of the judiciary was undermined, and the provisions providing for an independent public service repealed. A Bill of Rights was introduced with a limitation clause that was so comprehensive that the executive could curtail them at will.[4] There was,

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[3] See R. Edrisinha. M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) ***Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*** (Colombo: Centre for Policy Alternatives) for more information on the two constitutions.

[4] J. Wickramaratne, '*Fundamental Rights and the 1972 Constitution*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on***

therefore, virtually no constitutional jurisprudence based on the bill of rights during the operation of the constitution. An example of the mind-set of executive convenience that pervaded the 1972 Constitution were the unprecedented provisions that validated existing laws even if they were inconsistent with the constitution, and provisions setting out how the legislature could enact unconstitutional laws. In a departure from the Soulbury Constitution the new constitution entrenched the language and religion of the majority and inserted the provision that the new republic was a unitary state.[5] The countervailing forces to the power of the preeminent institution under the first republican constitution were less powerful than those under the second republican constitution. Many of the worst features of the first constitution were reproduced verbatim in the second constitution. The Left movement of Sri Lanka that was part of the United Front coalition of 1970-75 introduced the practice of what Neelan Tiruchelvam called the instrumental use of constitutions, sacrificing basic principles of constitutionalism in the interests of political expediency and ideological considerations, and for the benefit of the government rather than the governed. Sri Lanka is fortunate that the constitution lasted for just six years.

The Second Republican Constitution of 1978 continued this tradition. Power was concentrated in the office of the Executive President rather than the omnicompetent National State Assembly. The argument that that it was worse to repose power in a single individual than a collective assembly is persuasive. The provisions that undermined the supremacy of the constitution were reproduced. However, the new constitution's provisions on electoral systems, the independence and powers of the judiciary, the public service and the bill of rights were superior. Furthermore the principles that sovereignty was vested in the people, rather than in the legislature, and the principle of the separation of powers, were recognised more explicitly. The

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Constitutional History, Theory and Practice (Colombo: Centre for Policy Alternatives): Ch.19.

[5] N. Jayawickrama, '*Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective*' in Welikala (2012): Ch.1; A. Welikala, '*The Sri Lankan Conception of the Unitary State: Theory, Practice and History*' in A. Amarasingham & D. Bass (Eds.) (forthcoming, 2015) *Post-War Sri Lanka: Problems and Prospects* (London: Hurst & Co.)

requirement that certain constitutional amendments required the approval of the people at a referendum imposed some limitations on the powers of the legislature and affirmed the sovereignty of the people rather than Parliament.

The Second Republican Constitution and the Executive Presidency

The two radical changes introduced by the Second Republican Constitution were the introduction of a semi-presidential executive in place of the Westminster-style parliamentary executive and a system of proportional representation to replace the simple plurality electoral system. Each of these new features had a J.R. Jayewardene tweak to them that made them suit the interests of Jayewardene and his party. Though described as a hybrid, mixed or semi-presidential model, given the balance of power between the President and the Prime Minister and the Parliament, the model was most certainly a presidential-prime ministerial executive with the President wielding enormous powers within the total constitutional structure rather than a premier-presidential executive with a greater balance of power between the two offices.[6] The President enjoyed sweeping legal immunities including those usually reserved for a nominal head of state.[7] The President could assign to himself ministerial portfolios, dissolve the legislature virtually at any time, was solely responsible for the appointment of persons to numerous important offices, including judges of the appellate courts, and during states of emergency, which were the norm rather than the exception during the first 30 years of the operation of the constitution, exercise what amounted to legislative power through the promulgation of regulations that could override legislation. [8]

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[6] This is distinction that is drawn in the literature on different models of semi-presidentialism. See for example, R. Elgie, S. Moestrup & Y-S Wu (2011) ***Semi-Presidentialism and Democracy*** (London: Palgrave).

[7] See also chapters by Niran Anketell and Sachintha Dias in this book.

[8] See A. Welikala (2008) ***A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*** (Colombo: Centre for Policy Alternatives).

The dangers of mixed systems were clearly demonstrated by the 1978 Constitution. In a 'pure' presidential (like in the United States) as opposed to a semi-presidential system, ministers are appointed from outside the legislature. This strict separation of powers promotes an adversarial relationship between the two institutions that acts as an important check and balance. Requiring the President to appoint Cabinet colleagues from among Members of Parliament enabled the President to co-opt MPs, entice opposition MPs to cross the floor, and effectively undermine the legislature's watch dog function. This was made into a fine art by President Rajapaksa, who ensured that most members of the legislature were also members of the executive.

Another example of how the so called semi-presidential model of Sri Lanka undermined basic features of representative democracy was when for the first time President D.B. Wijetunga assigned to himself the finance portfolio.[9] Presidents Kumaratunga and Rajapaksa continued this practice that was contrary to basic norms of parliamentary democracy and possibly the constitution itself.[10] The history of parliamentary democracy demonstrates the importance of parliamentary control over finance and taxation. Having a Minister of Finance who as a Member of Parliament is physically present in Parliament and who can respond to questions is an important method by which Parliament can exercise effective control over finance. This practice would of course be impossible in a 'pure' presidential system like in the United States.

Under President Jayewardene, various extra-constitutional practices added to the powers of the already 'overmighty executive.'[11] Despite the fact that his party commanded more than a two-thirds majority in Parliament, he requested, and received from, his shameless party MPs, undated letters of resignation, which made the President's control over the legislature absolute. This combination of the executive controlling

[9] It is noteworthy that both Presidents Jayewardene and Premadasa did not do this.
[10] I argued at the time (1993) that President D.B. Wijetunga's unprecedented move was unconstitutional as it violated Article 157. Unfortunately this unconstitutional course of action became almost the norm thereafter.
[11] See chapter by Chandra R. de Silva in this book.

the legislature as a result of constitutional design and also political and extra-constitutional factors meant that in effect, the powers of the President of Sri Lanka in a constitutional scheme described as semi-presidential were greater than the powers of Presidents under constitutions described as 'pure' presidential.

The Rationale for the Executive Presidency

It is important to critically evaluate the justification put forward by defenders of the presidential system in Sri Lanka. J. R. Jayewardene, to his credit, advocated its introduction since 1966 at a time when he had little chance of becoming a nationally elected President. He proposed its introduction, with the support of R. Premadasa, again in the Constituent Assembly of 1970-72, while he was an Opposition MP following his party's defeat at the parliamentary election of 1970. A. J. Wilson, an admirer and close associate of J.R. Jayewardene, argued that the two main rationales for the introduction of the executive presidency were: (a) the need for stability; and (b) the empowerment of minorities.[12] Both these rationales were flawed as was clearly demonstrated by subsequent political developments. The argument that Sri Lanka prior to 1977 was unstable is difficult to comprehend. Peaceful change of government at regular elections which were free and fair[13] and where ruling parties accepted defeat and relinquished power to the victors is hardly a symptom of instability. Electoral manipulation, depriving political opponents of civic rights, unconstitutional postponements of elections, serious electoral malpractices and the systematic undermining of democratic institutions and the rule of law, all reached new heights after the introduction of the 1978 Constitution.

The empowerment of minorities justification appears more attractive at first sight which is probably why Tamil and Muslim organisations and political parties initially supported the

[12] See A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka 1978*** (London: Macmillan)

[13] The need to use the adjectives 'free' and 'fair' when describing elections is also a post-1978 phenomenon.

initiative.[14] It is probably true that minorities are empowered at a nationwide election for the President as every vote from every part of the country counts equally. However the crucial defect in the system is that after the election the influence of the minorities effectively ends. As the experience under all the Executive Presidents demonstrates, once elected, the President functions as a virtual elected dictator and pressure from any quarter, let alone the minorities, is of limited impact. The minorities soon realised that the most effective way to ensure that the executive was responsive to their concerns and aspirations was to ensure that the head of the executive was *continuously* accountable and responsible to an elected legislature of which they were a part. This feature which is part of the classic defence of the parliamentary executive model, ensures that the main political actor is physically present in the legislature, the main locus of political power, and also prevents a shift of power to a Presidential Secretariat consisting of unelected, unaccountable presidential advisors. It also facilitates accountability on the part of the head of the executive who has to lead the government in the legislature, respond to backbench opposition concerns and criticisms, within the framework of parliamentary conventions, rules and procedures. There is also a crucial 'humbling function' very important in third world democracies, in the "real" head of the executive being subjected to parliamentary scrutiny and question time.

The Conceptual Critique

There is also a more conceptual critique of presidentialism developed primarily with the South American experience in mind, which I argue is relevant for the South Asian context. Juan Linz in his seminal article, '*The Perils of Presidentialism*' developed a convincing case to suggest that the presidential system generally promoted authoritarianism and undermined liberal democratic values and institutions.

> "A careful comparison of a parliamentarism as such with presidentialism as such, leads to the conclusion that on balance the former i.e. the parliamentary system is more

[14] See also the chapters by K. Guruparan and A.M. Faaiz in this book.

> conducive to stable democracy than the latter. This conclusion applies especially to nations with deep political cleavages and numerous political parties."[15]

Linz focused primarily on several countries in South America, though he mentions Sri Lanka in passing at the beginning of the article. The Sri Lankan experience of presidentialism from 1978 to the present, however, demonstrates that his basic thesis is relevant to this part of the world too.[16]

Linz argued that the presidential system encourages a personalised style of politics that favours charismatic politicians or populists and such politics is often at odds with the basic norms of constitutionalism. He also cited the danger that given the fact that s/he is elected by the whole country it fosters a mind-set where the President tends to think that because s/he is elected by the entire country s/he has the authority and legitimacy to basically do anything. It gives a person an exaggerated sense of her own importance.

Linz also discusses the defence of presidentialism in terms of stability and rigidity. Apart from the need to have a more nuanced understanding of stability as discussed above, the experience of Sri Lanka is that what is often cited as stability has resulted in a kind of unresponsiveness and strong government that goes against the interest of the people. The corruption, nepotism and the abuse of power that Sri Lanka has experienced in recent years has created enormous problems with respect to good governance and generated widespread cynicism about politics in the minds of the people. Furthermore in recent years Sri Lanka had to deal with a strong separatist movement led by the Liberation Tigers of Tamil Eelam (LTTE) that promoted, not surprisingly, an obsession with national security. The cumulative effect of all these factors created a negative kind of stability – authoritarianism and a national security state rather than a constitutional state.

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[15] J.J. Linz, '*The Perils of Presidentialism*', (1990) ***Journal of Democracy*** 1(1).
[16] Bangladesh flirted briefly with the presidential model in recent years. A vigorous debate has taken place in Nepal in the past six years and has continued for even longer in Sri Lanka.

The third argument that I would like to borrow from Linz is that the danger of the presidential system is that it promotes a winner takes all or zero-sum game outcome. The stakes are very high. This has at least two negative consequences. Given the South Asian reality it means that Presidents once elected are reluctant to relinquish power, as the enormous powers of patronage, the privileges and perquisites of office are all lost. Secondly, it makes power-sharing or coalition politics, which may often be desirable in plural, multi-ethnic countries where different interests need to be accommodated within the executive branch of government. In the Sri Lankan context since the powers of the President and Prime Minister are so different, it is difficult to develop an effective power-sharing arrangement. In Sri Lanka's short but significant period of cohabitation from 2001 to 2003, this tension was clearly demonstrated and the power sharing arrangement lasted as long as it did as the President chose not to exercise many of the powers vested in her. As soon as she asserted those powers the government collapsed.

A fourth argument highlighted by Linz refers to the danger that the presidential system could devalue democratic institutions. This has certainly happened in Sri Lanka since 1978. It is particularly tragic in the Sri Lankan context given its long tradition of the rule of law, parliamentary democracy and universal franchise that positioned it as one of the brightest prospects within the British Empire and also at the time of independence.[17] The quality of parliamentary debates in the 1950s, 60s and 70s, was exceptionally high. Parliament functioned as an effective deliberative assembly, an important function in a constitutional democracy. The Parliament had a strong committee system. Since the introduction of the Executive Presidency and the shift in power away from Parliament many of these traditions have been severely undermined and had a corrosive effect on Parliament as an effective democratic institution.

An additional consequence of the devaluation of Parliament is that capable people no longer aspire to enter Parliament any more in Sri Lanka. The quality of Parliament as a democratic

[17] See H. Kumarasingham (2013) ***A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka*** (London: I.B. Tauris).

institution has, therefore, suffered. The institution of the Cabinet of Ministers has been devalued as well. It is no longer the focal point for policy debate and formulation. Indeed Linz has argued that a presidential cabinet is less likely to include strong-minded people because those appointed to the cabinet hold office at the pleasure of the President. In a parliamentary executive model, on the other hand, there is a greater chance that even though most of the Cabinet Ministers belong to the same party as the Prime Minister, there are invariably strong members of the party, persons whom the Prime Minister is compelled to appoint, and therefore there is greater likelihood that the quality of the Cabinet will be enhanced. Ministers could resign from the Cabinet, return to the back-benches and then make matters extremely difficult for the Prime Minister. Furthermore given the more equal relationship that exists between a Prime Minister and Cabinet colleagues in comparison with that of an Executive President and colleagues, the environment within the Cabinet is more conducive to debate and deliberation. This would apply even more forcefully in situations where there are coalition governments.

The Working of the Constitution

Many of these dangers of the presidential model have been demonstrated in Sri Lanka. Presidents Premadasa and Rajapaksa, probably the country's most populist Presidents, often cited the fact that they were elected by the whole country as justification for various acts that were of dubious constitutional legitimacy. President Premadasa argued that senior government bureaucrats including Secretaries to Ministers were primarily accountable to him rather than their Ministers as executive power was vested in him. Presidential advisors on various subjects were often more powerful than Ministers who were responsible for those subjects.

President Rajapaksa deliberately and intentionally refused to implement an entire chapter in the constitution designed to promote good governance, the Seventeenth Amendment to the Constitution. While various bizarre and unconvincing justifications for such violations were presented by his ministerial cronies, the basic reason seems to me the fact that the President just did not want to implement constitutional provisions that

reduced his discretion, patronage, and power. It is almost as if he took the position 'I am the President, I am elected by the people; I should be able to appoint whomever I want to key institutions.' In Sri Lanka certainly, therefore, presidentialism has fostered a kind of crude populism that is very dangerous from a liberal democratic perspective.

In South Asia where generally the political culture is hierarchical, where there is very little internal party democracy, where there are strong linkages between the welfare state and patronage politics, and where other democratic institutions are weak or can be undermined by a powerful presidency, the dangers and the perils of presidentialism that Linz highlighted apply even more forcefully given that political context and reality.

A related point that again assumes added importance in the Asian context relates to the relative ease with which the main political actor in a country can be removed. In 1971, Colvin R. de Silva, defending the parliamentary executive model, referred to the possibility of removing the head of the executive relatively easily as a virtue rather than a weakness. Since a Prime Minister has to be 'continuously accountable to the Parliament,' a Prime Minister knows that her tenure in office is conditional on parliamentary support. In a presidency it is virtually impossible to remove the President before the end of his term.

The perils described by Linz were also foreseen in 1971 when the proposal to introduce the presidential system in Ceylon/Sri Lanka was made J.R. Jayewardene and R. Premadasa in the Constituent Assembly. Jayewardene and Premadasa's party colleague, and the country's most distinguished liberal former Prime Minister, Dudley Senanayake, made what turned out to be a prophetic statement:

> "The presidential system has worked in the United States where it was the result of a special historic situation. It worked in France for similar reasons. But for Ceylon it would be disastrous. It would create as tradition of Caesarism. It would concentrate power in a leader and undermine parliament and the structure of the political parties. In America and France it has worked, but

generally it is a system for an Nkrumah or a Nasser, not for a free democracy." [18]

The Referendum of 1982

Within four years of the adoption of the new constitution, the powers of the Executive President were used to undermine the sovereignty of the people. President Jayewardene decided that he did not want to risk losing his two-thirds majority in Parliament at the parliamentary elections scheduled for 1983. He decided to hold a referendum instead at which he asked the people to decide whether the Parliament elected in 1977 should continue for another six years. The President who had presided over national celebrations on the occasion of the 50th anniversary of the introduction of universal adult franchise the previous year had no qualms about destroying that impressive tradition through constitutional manipulation.

The Left and left-of-centre opposition and other democratic parties were outraged by the decision. [19] The government's defence led by its legal luminaries such as Lalith Athulathmudali, was that the government was asking the people to decide, that the people were sovereign, and that the referendum was an ultra-democratic device where the people through a majority vote would determine the future of the Parliament. The Left which had 10 years previously in the constitution they drafted entrenched the principle of majoritarianism both in several constitutional provisions and by assigning so much power to an assembly that operated on the basis of majoritarian decision-making, found it difficult to present a persuasive principled argument against such a move.

Such a position was articulated by the nascent Liberal movement, which had also been strongly critical of the first republican

[18] Dudley Senanayake allowed his party colleagues, J.R. Jayewardene and R. Premadasa to propose the adoption of a presidential system though he opposed the idea.
[19] See also the chapter by Jayampathy Wickramaratne in this book.

constitution.[20] It argued that both constitutionalism and liberalism emphasised the limits of majoritarian decision-making and focused on the extent of a government's power, the legitimate reach of state power *vis-a-vis* the individual, minorities and society as a whole. They argued that therefore the question posed to the people was not a question that could be decided by majoritarian decision-making as it involved an individual's inalienable right, the right to vote. One of the most effective counter arguments to the disingenuous claim that the referendum was legitimate because it was ultra-democratic was a quotation by Jayewardene's predecessor as leader of the United National Party, Dudley Senanayake, which was widely used by parties and civil society groups opposed to the referendum and who were campaigning for a calling for a negative vote. Senanayake's liberal and constitutionalist credentials, already demonstrated by his warnings against a presidential system, were evident once again:

> "There are some things in every true democracy which no mandate can ever destroy. Even if a majority agrees, the freedom of speech, the freedom to organise political parties, the freedom of the press, the right to vote to elect your representatives at periodic and regular elections; these are features which cannot ever be abolished. Even if a majority agrees, a country which deprives any man of these fundamental rights and liberties, is not a true democracy, is not even a really human society. A free people should not be condemned to state slavery under cover of an alleged mandate."[21]

The crisis of constitutionalism since 1948 in Sri Lanka including the failure of the courts to utilise the limited minority safeguards provided in the Soulbury Constitution, the retrogressive features of the First Republican Constitution, the continuation of this tradition

[20] The Council for Liberal Democracy led by Chanaka Amaratunga which played a key role in informing the constitutional reform debate in the period 1981 to 1994.

[21] Statement made by Dudley Senanayake, former Prime Minister of Ceylon in 1971, during discussions on the proposed new Constitution of 1972, cited in R. Edrisinha, '*In Defence of Judicial Review and Judicial Activism*' in Amaratunga (1989): p.467.

in the Second Republican Constitution; the disappointing Constitution Bill 2000, which while certainly containing improvements was disappointing in the context of more recent developments in constitution-making,[22] and the positions of the main political parties even today on the direction of constitutional reform, indicate a lack of appreciation of constitutional fundamentals and first principles.[23] Such a lack of appreciation is not confined to political leaders and parties but extends even to the legal community.

Constitutionalism and the Presidency: The Role of the Judiciary

This part of the paper will deal with two more recent controversies that arose with respect to the interpretation of the constitution and the response of the Supreme Court. The first involves the controversy with regard to the term of President Kumaratunga, when it commenced and when it ended, and the date of the presidential election in 2005. The second deals with the Eighteenth Amendment to the Constitution that repealed the Seventeenth Amendment to the Constitution and increased the powers of the President.

The Third Amendment Controversy

The first issue arose because of the Third Amendment to the Constitution, an amendment introduced by President Jayewardene for his own convenience. A key element of an executive presidential system and its promotion of stability is that the executive has a fixed term. Though he cited this feature when he defended the introduction of the system, Jayewardene soon hankered after the advantages of a Prime Minister under a Westminster executive, where a Prime Minister has the advantage of calling for elections

[22] Given the developments in constitution making around the world in the 1990s, including the adoption of a new constitution in South Africa in 1996, the draft constitution produced in 2000 after a process that commenced in 1994, was also flawed both from the perspectives of process and substance.

[23] As stated earlier, these relate primarily to the issue of the supremacy of the constitution and its basic rationale.

when it suits him/her. The Third Amendment provided that a President could seek a mandate for a second term after four years of the first six-year term. Jayewardene thereafter sought re-election in October 1982 even though his six-year term ended in February 1984. It is important to note that despite being declared (re)-elected in October 1982, the then Chief Justice administered the oaths for his second term in February 1983, on the date that corresponded to the date of his election to his first term, as provided in the Third Amendment. An unprincipled and clumsily drafted provision which most people even to date struggle to comprehend, provides for different consequences depending on whether the election is won by the incumbent or challenger. If the challenger, Hector Kobbekaduwa, had been elected in 1982, his term would have begun on the date on which the election result was declared in October 1982.

When President Kumaratunga was re-elected President in December 1999 after she made use of the Third Amendment to call an early election, the then Chief Justice, Sarath Silva, erred in administering the oath of office for the commencement of President Kumaratunga's second term on 22nd December 1999. President Kumaratunga's second term should have begun on the date *corresponding to the date of her election to her first term in the following year*, i.e., 12th November 2000. The Chief Justice made a mistake; and so the whole country, including the President, the Cabinet of Ministers and the Commissioner of Elections assumed she had commenced her second term after she took her oaths before the Chief Justice on 22nd December 1999. When President Kumaratunga's second term was reaching its conclusion, the date controversy resurfaced. If her second six-year term had begun in December 1999, then a presidential election would have to be held in 2005. If it had begun in November 2000, then the next presidential election would only be required in 2006. The matter then went to the Supreme Court in 2005. It held in a controversial judgment, that President Kumaratunga's second term had commenced in 1999.

There were two serious defects in the response of the Supreme Court, one relating to process, the other to substance. With respect to process, Chief Justice Sarath Silva should not have heard the case. He was part of the problem. When President

Kumaratunga was re-elected as President in 1999, it was he who erroneously administered the oath for her second term on the date on which the results were declared. It was therefore inappropriate that Chief Justice Sarath Silva presided over a bench that decided the question of when her second term began. The judgment was questionable in terms of substantive reasoning as well. Not surprisingly, the court's decision was one that covered up the Chief Justice's blunder and was contrary to the letter and intent of the constitutional text. It was also inconsistent with past practice, what had happened after the presidential election of 1982. The decision in effect stated that even an incumbent's term commenced on the date that the results were declared. This interpretation effectively rendered an entire paragraph of the constitution nugatory and superfluous. The decision also worked to the advantage of the person waiting to succeed Kumaratunga as her party's next presidential candidate, Mahinda Rajapaksa.[24]

The Eighteenth Amendment Controversy

While many Sri Lankans had reservations about the manner in which the Rajapaksa administration defeated the LTTE and ended the war in 2009, they all hoped that the government would thereafter introduce constitutional and political reforms to address the underlying causes of the conflict and reach out to the Tamil people who had suffered as a result of the long and bloody conflict. A constitutional amendment was introduced as an urgent bill in 2010. But it had nothing to do with Tamil rights and indeed by abolishing the Constitutional Council deprived them of some influence and power.

The Eighteenth Amendment repealed the Seventeenth Amendment which was introduced to restrict the wide powers of the President in relation to appointments, and promote the de-politicisation of important constitutional bodies. President Rajapaksa had consistently sought to undermine the Seventeenth Amendment by non-implementation since his election to his first term in 2005. In addition, the Eighteenth Amendment removed

[24] Given the political context at the time and the conduct of Sarath Silva C.J. throughout his tenure as Chief Justice, this was an important consideration.

the two-term limit on the President. The brazen nature in which a President elected on a mandate to abolish the presidency, removed restraints on the office and increased its powers was one of the lowest points in the constitutional evolution of the country. Civil society sought to intervene in the Supreme Court to protect many of the gains of the previous amendments that enhanced the rights and sovereignty of the people. However the Supreme Court presided over by Chief Justice Shirani Bandaranayake and including recently appointed Chief Justice K. Sripavan, far from facilitating a fair process where such principled arguments could be presented, conducted the proceedings in a shockingly partisan manner.[25]

The President placed the Eighteenth Amendment before the Cabinet on Monday, 30th August 2010. Since the Cabinet declared it as urgent in the national interest the Amendment Bill was automatically referred to the Supreme Court, the following day on Tuesday, 31st August. Those who were fortunate enough to have had access to a copy of the Amendment Bill intervened before the Supreme Court. At the Supreme Court hearing, it became apparent during the Attorney General Mohan Peiris's submissions that the version of the bill in possession of the intervenient petitioners was different to the version relied on by the Attorney General. When the intervenient petitioners objected, the Attorney General turned to them and stated in open court, "This is what happens when you have documents you are not supposed to have." Thus, the intervening petitioners were only given accurate copies of the proposed changes after the Attorney General had commenced his submissions. The Supreme Court did not censure the Attorney General or intervene to assist the intervenient petitioners.

Within a day of the hearing the Supreme Court issued its opinion in a determination consisting of a few pages, holding that the amendment did not affect the entrenched provisions of the constitution, and thus, did not require a referendum. Many of the principled submissions of the intervenient petitioners were just ignored in the short, insubstantial determination. Though a

[25] See R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives).

parliamentary debate took place, it did so without the participation of the main Opposition party, which with its then characteristic irresponsibility boycotted the debate, and with little contribution from the smaller opposition parties. The government was able to secure a two- third majority to pass the amendment a few days after the Supreme Court hearing. The adoption of the Eighteenth Amendment, its content, the manner in which it was adopted and the meek, submissive response of the court illustrate the mood of triumphalism and arrogance that dominated the Rajapaksa administration and the impact this in turn had on other democratic institutions and political parties.

The Lanka Sama Samaja Party (LSSP) and the Communist Party of Sri Lanka, coalition partners in the Rajapaksa administration, abandoned their opposition to the presidential system and voted in support of the amendment. They seemed oblivious to the fact that the amendment, by removing restraints on the powers of the President over the judiciary and other independent institutions, as well as the two-term limit, recognised as an important check in presidential systems around the world, was consolidating the presidency and promoting even greater authoritarianism. The refusal of these two parties to support the common opposition candidate at the presidential election of January 2015 when several of their former Cabinet colleagues did so citing the commitment to abolish the presidency also raises serious doubts about these parties' commitment to do so.[26]

[26] It should be noted, however, that several veteran leaders of these two parties and influential left leaders remain committed to the abolition of the executive presidency. They actively supported the common opposition candidate and have strongly criticised the leadership of these two parties. A similar lack of consistency was seen within the Liberal movement, which changed its principles and approach after the tragic and premature death of Chanaka Amaratunga in 1995. The Liberal Party supported the most illiberal regime in post-independence Sri Lanka from 2005 to 2014. Like with the Left, Liberals outside the party, continued to critique the Rajapaksa regime from a Liberal perspective and advocate radical constitutional reform on the lines of the Liberal Party, pre-1995.

Abolition or Reform?

Presidents Kumaratunga and Rajapaksa both were elected on platforms that promised to abolish the executive presidency but once they started to enjoy the overwhelming powers of the position, conveniently forgot their commitments. Already some commentators have begun to urge President Sirisena and the leadership of the new government to introduce reforms to the executive presidency rather than abolish it. As is often the case when discussions on constitutional reform take place in Sri Lanka, there is a lack of clarity with respect to what these two options entail. If the executive presidency is abolished, the constitution will still have the office of President, but the President will exercise very limited substantive power and perform largely ceremonial functions. The advocates of reform suggest that while the Prime Minister will be the main political actor in the executive, some additional powers to those exercised by a nominal head of state should be assigned to the President. Until a more detailed discussion on the scope and nature of such powers is held, there will continue to be confusion as to what is meant by 'abolition' and 'reform' of the executive presidency.

It may be more useful to adopt the position that the executive presidency will be abolished; executive power will be exercised by a Cabinet of Ministers responsible and answerable to Parliament; a President, not elected by the country, but rather by an electoral college, shall exercise the nominal powers of a head of state and certain additional powers that relate to national reconciliation and the development of independent institutions.[27]

Conclusion

The executive presidency needs to be abolished. The experience of the past 36 years clearly establishes a link between the executive presidency and the rise of authoritarianism in the country. However, given the fact that both republican constitutions ignored constitutional first principles and the draft

[27] These will have to be worked out once some of the other features of the constitutional reform process are determined.

Constitution Bill of 2000 was also inadequate and deficient given international best practice, there is a need for an informed and participatory constitution reform initiative.

The process by which a new constitution is to be adopted must be carefully reviewed. The process adopted will affect the content or substance that emerges from the process. Unlike during the period 1995-2000, where it seemed as if the drafts were amendments to the text of the existing constitution, there should be a fresh start. Political parties and the legal community must be willing to learn the lessons from the past, be open to new developments and most important of all, reflect on and internalise the basic conceptual foundations of constitutionalism. One can only hope that the promises of the Sirisena-Wickremesinghe government for its first 100 days in office with respect to constitutional reform are fulfilled and that the results of the next parliamentary election are conducive to a more ambitious and radical constitutional reform process that Sri Lanka so badly needs.

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The **Centre for Policy Alternatives** (**CPA**) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.