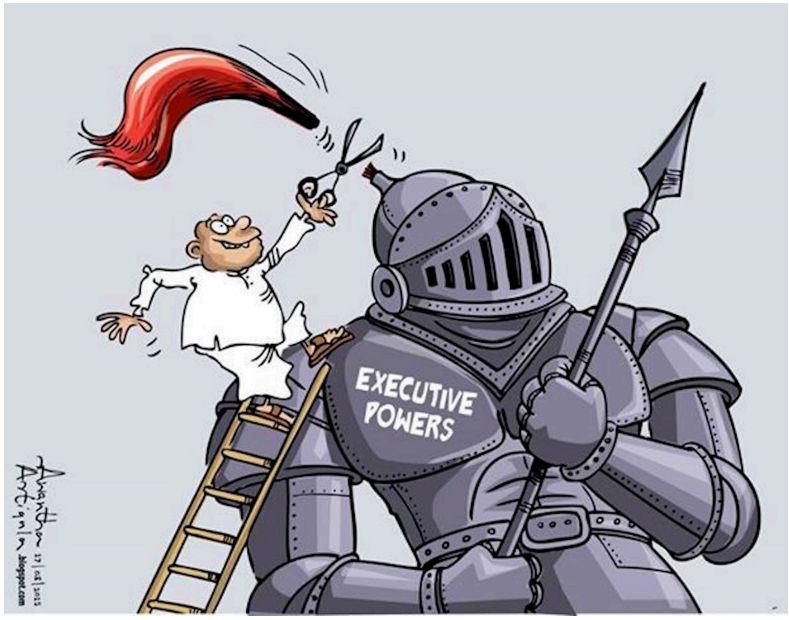
# THE NINETEENTH AMENDMENT TO THE CONSTITUTION

## CONTENT AND CONTEXT

EDITED BY ASANGA WELIKALA

CENTRE FOR POLICY ALTERNATIVES

# The Nineteenth Amendment to the Constitution: Content and Context

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# Foreword

In its two decades in existence, the Centre for Policy Alternatives (CPA) has maintained a robust commitment to constitutional reform as an integral component of democratic governance and as a primary instrument of conflict transformation. This edited work on the Nineteenth Amendment marks CPA's continuing commitment in this regard and now, at a time when constitutional reform is at the forefront of public affairs. CPA has always reiterated the supremacy of the constitution, the critical importance of checks and balances on the exercise of executive power, the indispensability of meaningful power-sharing for governance, and for an architecture of authority and power that accommodates the aspirations of all the peoples of Sri Lanka and addresses their grievances. This publication, we hope and believe, will highlight the need for further constitutional reform and in shedding light on its uneasy evolution so far, inform and improve the renewed commitment to it in terms of both process and content.

The Nineteenth Amendment did not meet the expectations in full of those who voted for a change of regime in January 2015 and indeed, those amongst them who for decades had argued for a liberal democratic constitutional framework and structure of power for Sri Lanka. In particular, it was a product of the confusion that arose soon after that historic election, as to whether the commitment was to the abolition of the executive presidency – the non-retention of that office in its then current form being the centrepiece of the opposition platform for governance – or as to whether it was to a diminution of the powers of that office. The reform commitment was invariably conditioned by ensuing political dynamics, and the debate over whether the desirable was attainable was obscured by a consensus amounting to a seeming *fait accompli*, that if the sincerity of the new government's commitment to reform was to be salvaged, the attainable had to win the day to fight another day, perhaps.

Dissimilar for sure, to the process by which the notorious Eighteenth Amendment was passed by the previous regime, the process by which the Nineteenth Amendment came to be,

nevertheless, left room for legitimate criticism from the perspective of governance as a process. These are concerns that should be borne in mind as we proceed with constitutional reform; the best need not be the enemy of the good, and the good not defined as such on an uncritical equation with the possible.

None of the above is meant in any way to detract from the significance of the amendment. Significant it is as it stands and stands it does as a democratising amendment. The pruning of the powers of the presidency it effected, is unprecedented in that it constitutes the first instance of a constitutional amendment in our post-colonial history with such an objective and one that was passed. The concerns, subsequently allayed, that it would create an executive prime minister in place of an executive president, highlighted the pivotal role of the legislature in checking and balancing the executive – greater attention to the separation and balance of powers being of central importance for democratic governance and constitutional reform into the future to secure it. Likewise, the curbing of the powers of the president over the dissolution of the legislature, term limit for the incumbent, and immunity.

In similar vein, the revival of the Constitutional Council as a nominating and recommendatory body for key positions of state and for independent oversight commissions directly involved in the protection and promotion of governance. The partisan politicisation of state institutions has been a cancer on the body politic and the lack of transparency and accountability, the culture of impunity and nepotism, all hallmarks of the state capture by the previous regime, which led to its historic downfall in January 2015. The Constitutional Council that has been provided for under the Nineteenth Amendment fell prey to opposition suspicions of civil society and as a consequence, unlike what was originally proposed, retains a majority of politicians in its composition. Like the provisions on the presidency, those on the Constitutional Council too can be reviewed when the constitutional reform programme begins in earnest in the coming months.

The Nineteenth Amendment illustrates the dimension of political compromise inevitably attached to constitutional reform. It is

hoped that as constitutional reform is extended, as it must, the Nineteenth Amendment will be improved upon in process and substance, and the promise of governance so widely subscribed to in January 2015 redeemed in fullest measure. This publication is yet another contribution from CPA to debate, deliberation, and design in this regard.

On behalf of CPA, I wish to thank Dr Welikala and all those who assisted him in underpinning the organisation's commitment and contribution in this field.

Dr. Paikiasothy Saravanamuttu
Executive Director

# Editor's Introduction

The Centre for Policy Alternatives (CPA) publishes this collection of essays assessing the changes brought about by the Nineteenth Amendment to the Constitution (2015) in a context in which further constitutional reforms are being contemplated. On 9th March 2016, Parliament unanimously passed a resolution establishing a Constitutional Assembly to consider major constitutional changes including the possibility of a new constitution.[1] The Public Representation Commission (PRC) has travelled the country and obtained public submissions on constitutional reform from December 2015 and is due to report on 31st April 2016.[2] CPA has since its inception contributed to the constitutional reform debate in Sri Lanka through many of its programmes, including a number of policy-oriented or scholarly publications.[3] This volume seeks to continue this contribution to

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[1] Resolution of Parliament, 9th March 2015, available at: http://www.parliament.lk/en/news-en/view/1160 (last accessed 14th March 2015)

[2] CPA's preliminary submission to the PRC, 23rd January 2016, is available at: http://www.cpalanka.org/preliminary-submission-by-the-centre-for-policy-alternatives-cpa-to-the-public-representation-commission/ (last accessed 14th March 2015)

[3] More recent publications in this vein include: H. Kumarasingham (Ed.) (2015) ***The Road to Temple Trees – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings*** (Colombo: Centre for Policy Alternatives); A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects***, Vols. 1 & 2 (Colombo: Centre for Policy Alternatives); L. Ganeshanathan & M. Mendis (2015) ***Devolution in the Northern Province: September 2013-February 2015*** (Colombo: Centre for Policy Alternatives); A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice***, Vols. 1 & 2 (Colombo: Centre for Policy Alternatives); R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives); Centre for Policy Alternatives (2010) ***Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010*** (Colombo: Centre for Policy Alternatives); R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2009) ***Power Sharing in Sri Lanka: Political and Constitutional Documents 1926 – 2008*** (Colombo: Centre for Policy Alternatives); A. Welikala (2008) ***A State of Permanent Crisis: Constitutional Government, Fundamental Rights, and States of Emergency in Sri Lanka***

public debate through the articulation of constitutional options and alternatives in a spirit of constructive critique. Given that the constitutional changes under discussion were passed less than a year ago, the insights presented here are necessarily preliminary and sometimes speculative in nature, but it is hoped that the analyses of the various aspects of the Nineteenth Amendment by the authors in this volume would assist constitution-makers as well as the general public as new reforms are presented, debated, and eventually validated in a future constitutional referendum.

### *Background*

The reformist government headed by President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe was returned in the Sri Lankan parliamentary elections held on 17th August 2015, consolidating the democratic regime change that occurred at the presidential election of 8th January. The defeat of former President Mahinda Rajapaksa in January was dramatic, and largely unexpected. His authoritarian regime had entrenched itself deeply within Sri Lanka's political structures through a mixture of authoritarianism, constitutional manipulation, and populist nationalism. But its nepotism and clientelist corruption had also undermined its electoral support base, even if its strident brand of majoritarianism nationalism continues to enjoy substantial support within the Sinhala-Buddhist heartlands of the Sri Lanka.

The Sirisena-Wickremesinghe 'national government' brings together Sri Lanka's two main political parties, respectively the Sri Lanka Freedom Party (SLFP) and the United National Party (UNP), as well as a number of smaller parties in a centrist grand coalition. The common opposition candidacy of Sirisena in the presidential election was predicated on the promise of a series of major constitutional reforms to democratise the state after the Rajapaksa excesses, in particular to cut back the scope of the

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(Colombo: Centre for Policy Alternatives); R. Edrisinha & A. Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka*** (Colombo: Centre for Policy Alternatives); R. Edrisinha & A. Welikala (Eds.) (2008) ***The Electoral Reform Debate in Sri Lanka*** (Colombo: Centre for Policy Alternatives).

executive presidency and to strengthen the independence of public services. Wickremesinghe fought the parliamentary election on the promise of further reforms to come, including the vexed question of devolution in settlement of Tamil claims to territorial autonomy in the north and east of the island.

The Nineteenth Amendment was the centrepiece of a '100-day programme' of constitutional and governance reforms offered by the common opposition at the presidential election, which in addition to the reforms to the presidency included other measures such as a Right to Information Act and a reform of the parliamentary committee system. In the event, however, most other measures fell by the wayside given that attention had to be focussed on the enactment of the Nineteenth Amendment against the obstructionist tactics of the opposition parliamentary majority.

The Nineteenth Amendment, even if it did not go far enough, constitutes a welcome start to a badly needed series of constitutional reforms to consolidate democracy and devolution in Sri Lanka. Whether the democratic reawakening registered by the two elections of 2015 fulfils its promise depends on how successfully both President and Prime Minister would work together to complete the process. Overall, however, the elections have created an historic opportunity to drive the country's constitutional development in a more enlightened direction than it has taken in the past. This is imperative to unleashing and fully realising the Sri Lanka's tremendous economic, social, and political potential.

### *The Nineteenth Amendment to the Constitution (2015)*

The Sri Lankan Parliament passed the Nineteenth Amendment to the Constitution Act on 28th April 2015 and the process of enactment was completed by the Speaker's certification two weeks later on 15th May.[4] Since the new government took office on 9th January and began its 100-day reform programme, the process

[4] The final text of the Nineteenth Amendment Act is available at: http://www.parliament.lk/files/pdf/constitution/19th-amendment-act.pdf (last accessed 14th March 2015).

used in drafting the Nineteenth Amendment was chaotic, sometimes fractious, did not meet its own deadlines, and conspicuously failed to meet contemporary benchmarks of transparency and public consultation. But due to the unique configuration of political representation in the executive and the legislature that emerged from the January presidential election, the government was forced to accommodate not only differing views within the ruling coalition but also the opposition which continued to hold the parliamentary majority.

Maithripala Sirisena won the presidency only with the support of the common opposition, after defecting from the Rajapaksa government. After the election he appointed Ranil Wickremesinghe, the then Leader of the Opposition, as his Prime Minister at the head of a minority government. The new President was thus left in the unenviable position of having to persuade his former party colleagues to support his reforms, in a context in which many of them still retained their loyalty to the deposed Mahinda Rajapaksa. The President however showed an admirable commitment to his electoral mandate to reform the presidency in sustaining consultations within his party to the end. Prime Minister Wickremesinghe too showed restraint and understanding of the President's political constraints, and their co-operation ensured that the necessary two-thirds majority in Parliament was eventually secured.

One of the key concessions they had to make, however, was to introduce electoral reforms demanded by the opposition in conjunction with the presidential reforms. While these were to be embodied in a Twentieth Amendment to the Constitution, the negotiations around the content of the new electoral system broke down, and Parliament was dissolved due to the absence of consensus. Electoral reforms to introduce a new Mixed Member Proportional (MMP) system are high on the agenda in the current process.

The compromise reflected in the Nineteenth Amendment was achieved without conceding the core elements of the January reform mandate, and without resorting to unilateral options such as a snap general election. This centrist policy rejected both the more extreme Rajapaksa loyalists who wanted the hyper-

presidential state to remain untouched, as well as others who wanted an early election to sweep away the Rajapaksa loyalists in Parliament. While no doubt this diluted some of the stronger reforms contemplated at the start of the process, at least notionally, it denotes a broad consensus of all parties that could strengthen the durability of the reforms. It can also be seen as a noticeable demonstration of the return to a more democratic way of conducting constitutional politics, when contrasted with, for example, the authoritarian efficiency with which the Rajapaksa regime passed the ruinous Eighteenth Amendment within ten days in 2010.[5] The final text disappointed many Sri Lankans who would have wanted the abolition of executive presidentialism, or something approximating to that. Yet what is embodied in the Nineteenth Amendment perhaps reflects what was politically possible within the parliamentary balance of power after the presidential election. It was in this context also that the Wickremesinghe government indicated that it would seek a fresh mandate for a new constitution in the parliamentary elections. It has now obtained such a mandate which, coupled with the President's own mandate in January, provides a strong impetus to continue with the process of reforms in the new Parliament.

### *The Main Changes Introduced by the Nineteenth Amendment*

It cannot be denied that the Nineteenth Amendment introduced a number of very positive reforms that have been long overdue in Sri Lanka. The presidential term is reduced to five years from the previous six, and the two-term limit is restored, although the incumbent can seek re-election after four years in the first term. It is expressly provided that no one twice elected as President is qualified to contest again. Parliament's term is also reduced to five years, and significantly, the previous presidential power to dissolve Parliament at will has been removed by the provision that, unless it requests so by a resolution of a two-thirds majority, Parliament cannot be dissolved by the President until the expiration of four and a half years of its term. These provisions establish more or less fixed presidential and parliamentary terms, which have the

[5] See Edrisinha & Jayakody (2011).

effect of removing the vast presidential discretions of the past, of strengthening the separation of powers, and promoting stability.[6] Presidential immunity from suit has been abridged by extending the jurisdiction of the Supreme Court to entertain fundamental rights applications in respect of official acts of the President. These actions are to be instituted against the Attorney General. This is an improvement, but falls far short of the restriction of legal immunity that is required.

Another positive feature is the repeal of the 'urgent bill' procedure. Previously, a Bill endorsed by the Cabinet as being urgent in the national interest could be passed by a fast-tracked process, which attenuated the scope for pre-enactment challenges in the Supreme Court. This procedure has been frequently abused, especially in using it to pass manipulative constitutional amendments. Similarly, a minor improvement is that that all Bills are now required to be gazetted fourteen days (against the previous seven) before being placed on the Order Paper of Parliament, which again should improve the scope for legal challenges.

A constitutional limitation of thirty has been placed on the number of Cabinet Ministers, and there are similar limitations on the number of other Ministers, although it is provided that where there is a national government (defined as where the first and second largest parties represented in Parliament come together to form a government), then the size of the Cabinet could be enlarged through an Act of Parliament. This strengthens Parliament's independence by limiting the scope for the co-option of MPs through patronage appointments and vote bloc clientelism. This practice was taken to preposterous levels by the Rajapaksa regime, but it has been a major problem of Sri Lankan political culture for much longer. This provision seems likely to be used in the current Parliament in order to secure the support of MPs with wavering loyalties for constitutional reform, which would be disappointing for many given the recent experience of 'jumbo cabinets' under Rajapaksa. However, if this tactic provides the stability and crucially the parliamentary votes needed to enact the reforms to come, including in relation to devolution and

[6] See chapters by Reeza Hameed and Artak Galyan in this volume.

power-sharing,[7] then arguably it may well be a price worth paying.

A new right to information has been added to the chapter on fundamental rights, making it a judicially enforceable right.[8] Incidentally, the 100-day programme also proposed right to information legislation to elaborate upon and provide the institutional apparatus for the exercise and promotion of the constitutional right to information. While much progress was made in the drafting of a Right to Information Bill, this fell victim to the political exigencies of passing the Nineteenth Amendment that overtook all else in the 100-day programme. The government has assured that this legislation will be enacted in the current Parliament, but this perhaps demonstrates the lack of forethought and realism in the design of the 100-day programme whilst in opposition.

Perhaps the strongest feature of the Nineteenth Amendment is the de-politicisation framework that is established with the Constitutional Council and the independent commissions.[9] This restores much of the Seventeenth Amendment framework that was repealed or weakened by the Eighteenth Amendment, and indeed goes further in strengthening the commissions and adding new ones. The Constitutional Council has two functions: it recommends presidential appointments to the independent commissions, and it approves presidential appointments to high posts such as superior court judges and law officers.[10] It was originally proposed that the Council, which would be chaired by the Speaker and have the Prime Minister and the Leader of the Opposition as members, would have a majority of its membership drawn from independent eminent persons.

However, this encountered serious disapproval during the parliamentary debate, with the opposition claiming that a majority of civil society members would render the Council democratically unaccountable. The compromise was to allow for

[7] See chapter by Niran Anketell in this volume.
[8] See chapter by Gehan Gunatilleke in this volume.
[9] See chapter by Dinesha Samararatne in this volume.
[10] See chapter by Hejaaz Hizbullah in this volume.

a composition of seven MPs (which includes the three *ex officio* members mentioned above) and three independents. While this weakens the apolitical character of the Council, it is nonetheless a multiparty body and therefore can be expected to be politically non-partisan. Addressing the previous experience under the Seventeenth Amendment where Presidents have refused to follow the Council's recommendations, it is now provided that if the President has not acted pursuant to recommendations, then such appointments are deemed made by operation of law after fourteen days. Independent commissions to oversee the public service, judiciary, the police, elections, and human rights are all restored. The bribery and corruption commission has been given constitutional standing and its powers have been enhanced. New commissions on audit and procurement have been introduced.

These are all indubitably progressive institutional reforms and innovations, which have moreover been the subject of public demand for years. However, as with all institutional reforms, their success can only be judged in implementation. It remains to be seen whether they are robust enough to overcome inevitable resistance from vested interests, to engender professionalism, independence, and capacity in the public sector, and to reshape a decrepit political culture with a high tolerance for authoritarianism and corruption.[11]

### *Presidentialism: Reform or Abolish? The Tussle over the 'Advice Clause'*

What eventually became the Nineteenth Amendment went through a number of schemes between January and April. While this is not unusual in any process of constitutional change, as noted above, the process was marked by a lack of transparency and public information, which added to the perception of indiscipline and chaos as the parties within the government tried to resolve their own differences whether to abolish or merely reform the executive presidency.[12] This disagreement and confusion stemmed from a noteworthy – and surprising –

[11] See chapter by C. Narayanasuwami in this volume.
[12] See chapter by Aruni Jayakody in this volume.

ambiguity in the common opposition manifesto itself. While the English version promised to 'abolish' the executive presidency, the more authoritative Sinhala version reflected a much more ambivalent statement about 'changing' the institution.[13] The explanation for this inconsistency is debatable, although it may not have been a deliberate attempt to mislead the public and is more likely to be the result of carelessness and the absence of attention to detail and precision around a political commitment towards which there were substantially different opinions within the opposition coalition.

Indeed, the process can be characterised as a struggle between the 'abolitionists' and the 'reformists', with the latter eventually prevailing because their view was more in line with what the opposition parliamentary majority were willing to support. Moreover, given the centrality of the executive presidency to the structure of the 1978 Constitution, the abolitionists were perhaps optimistic in thinking that the deeper changes to the presidency they desired could be made without attracting a referendum, as became evident when the Bill was challenged before the Supreme Court. This central disagreement therefore centred on the 'advice clause': if the abolitionists succeeded in establishing the principle that the President always acts on the advice of the Prime Minister, then this would transform the presidential 1978 Constitution into a parliamentary constitution; which was why the reformists were so intent on ensuring that the advice clause was either removed, or so circumscribed in its application as to be innocuous.

The initial scheme of the reforms was embodied in a Discussion Paper, which was never officially published but was leaked in February.[14] This conceptual scheme was also rendered into an unofficial legal draft, again never properly published but also leaked.[15] This underwent further changes before the Nineteenth

[13] See chapter by Kalana Senaratne in this volume.
[14] ***Colombo Telegraph***, 9th February 2015, available at: https://www.colombotelegraph.com/index.php/maithri-proposals-on-constitutional-reforms-full-text/ (last accessed 14th March 2015).
[15] ***Colombo Telegraph***, 7th March 2015, available at: https://www.colombotelegraph.com/wp-content/uploads/2015/03/Exclusive-19th-Amendment-draft-.pdf (last accessed 14th March 2015).

Amendment to the Constitution Bill was officially gazetted on 13th March. The provisions of the gazetted Bill were challenged before the Supreme Court, which heard the petitioners and the Attorney General over three days in early April. [16] The Court's determination was then communicated to the Speaker, who informed Parliament of its findings on 9th April.[17] An unusual feature of the judicial proceedings was that the Attorney General had to inform Court, on behalf of the government, of a series of amendments to be further made to the text of the Bill before Court. These amendments had been agreed in Cabinet previously in response to criticisms of the gazetted Bill. The Court therefore had to make its determination on whether or not the Bill required a referendum not only on the basis of the published Bill but also the amendments proposed by the government through the Attorney General. A memorandum containing the list of changes that the government intended moving at the committee stage of the legislative process was, yet again, not officially published but leaked.[18]

The Bill was taken up for debate on 28th April and was passed late in the evening of the same day. It is remarkable that under Sri Lankan parliamentary procedure, it is possible to pass a constitutional amendment within a day of debate, with the committee stage being a Committee of the Whole House. This not only precludes consultation, reflection, and detailed, line-by-line scrutiny (even though a vote is taken on each clause), but encourages the opposite result of grandstanding and point-scoring – or to use the metaphor in its original context, 'playing to the gallery' – by MPs on both sides of the House. There are therefore four key stages to this unnecessarily labyrinthine process that

[16] ***Colombo Telegraph***, 17th March 2015, available at: https://www.colombotelegraph.com/wp-content/uploads/2015/03/19th-Amendment-English-Gazetted-Bill.pdf (last accessed 14th March 2015).
[17] ***Colombo Telegraph***, 6th April 2015, available at: https://www.colombotelegraph.com/wp-content/uploads/2015/04/SC-SD-4-to-19-of-2015.pdf (last accessed 14th March 2015).
[18] ***Colombo Telegraph***, 26th March 2015, available at: https://www.colombotelegraph.com/wp-content/uploads/2015/03/Amendments-proposed-to-the-19th-Amendment-to-the-Constitution-Bill-26.03.2015-Clean-copy-2.pdf

require examination: the Discussion Paper, the Gazetted Bill, the Supreme Court determination, and the final text of the Nineteenth Amendment Act.

The Discussion Paper outlined an unusual hybrid system of government that would nevertheless be effectively an abolition of executive presidentialism. In this framework, the President would be the head of state but not the head of government, which would revert to the Prime Minister as the head of the Cabinet. Crucially, the President would be required to act on the advice of the Prime Minister (or other Minister authorised by the Prime Minister), except in the appointment of the Prime Minister or other specific acts authorised by the constitution or other law in which he acts in his own discretion. By contrast in the view of the Jathika Hela Urumaya (JHU), reflected in a draft constitutional amendment bill it published in late 2014, the President would have a more substantive role in government, including a special responsibility for defence and ensuring the territorial integrity of the state.[19] The JHU was a small but (disproportionately) influential party of Sinhala-Buddhist nationalists who are part of the current government, having highly effectively supported the common opposition after abandoning Rajapaksa in late 2014. Its Cabinet Minister Champika Ranawaka led the anti-abolition campaign within the government since January. These competing views about the form of government, which reflect much deeper ideological differences on fundamental issues such as the nature of the state and attitudes to the accommodation of minority claims, gave rise to serious and public disagreements between the coalition partners when the contents of the Discussion Paper became known.

The cumulative effect of the reforms outlined in the Discussion Paper was the establishment of what is effectively a parliamentary executive with a titular presidency. However, the holdover from the pre-existing framework was in the mode of election of the President, which was by a state-wide direct election. This was unusual to the extent that titular Presidents are commonly and

[19] Pivithuru Hetak National Movement (n.d.), available at: http://www.sadahamsevana.org/New folder/A.pdf (last accessed 14th March 2015).

more appropriately elected by Parliament (and where relevant sub-state legislatures) rather than by direct election. Changing the mode of election was reserved for the next Parliament. The JHU proposal also envisaged a direct election, but at least this was more consistent with the reformed but still presidential system that it sought.

In the next iteration, the Gazetted Bill also involved a significant reduction in the scope of presidential power by proposing that the Prime Minister would be the head of the Cabinet and that the President would act on his advice in the appointment and dismissal of Ministers. However, the language of the draft clauses where couched in much less expansive terms than the Discussion Paper. The provision that the President 'always' acts on advice was absent, and instead a more conventionally Gaullist formulation of the President acting on advice on some matters and in his own discretion in others was included. This was therefore a continuation of presidentialism in principle, albeit with the 1978 Constitution's more egregious features removed. But the proposed dyadic executive assumed the presence of a fairly sophisticated democratic culture of governance – which for example can accommodate 'cohabitation' – that has been demonstrably absent in Sri Lanka in the past. However, the JHU found this too to be too radical a diminution of the presidency and consequently the government undertook to further dilute the powers of the Prime Minister when the Bill was taken up by the Supreme Court.

One of the key points in the Supreme Court's determination was that it disagreed with petitioners who argued that all of the changes proposed in the Bill would be unconstitutional because they would take executive power away from the President, in whom it is solely vested, thereby violating the basic structure of the constitution. On the contrary, the Court noted that executive power was exercised by the President as well as the Cabinet even under the unreformed constitution. Executive power was to be understood as an aspect of the sovereignty of the people, not something that was exclusive and personal to the individual holding the office of President. While therefore executive power may be delegated by the President, or divided between actors in

its exercise, the constitution nonetheless required that the President held the ultimate executive authority.[20]

The provisions of the Bill seeking to make the Prime Minister the head of the Cabinet and attendant powers, which would be exercised solely by the Prime Minister without recourse to the President, would therefore be unconstitutional, but only to the extent that the President was excluded from the exercise of these executive powers by the Prime Minister and Cabinet. Presumably then, as long as the President remained the ultimate authority, the exercise of executive power 'on the advice of' the Prime Minister or Cabinet would not be unconstitutional. In other words, the implication of the Court's reasoning seemed to be that even if the President is in effect largely titular in the day-to-day exercise of executive power – because he always acts on the advice of Ministers in the running of the government – that would not be unconstitutional provided that those powers are exercised for and on behalf of the President. This interpretational leeway in the Court's reasoning to some extent placated the 'abolitionists' that, while they could give way to the 'reformists' at this stage of the process, once they could obtain a fresh mandate in the parliamentary election for abolition, they would be able to revisit the issue in the new Parliament.[21]

However this naturally meant that the government had to undertake to remove these 'advice' provisions if it wished to pass the Nineteenth Amendment without a referendum, which for political reasons the government wished to avoid.[22] These changes (among others) were done at committee stage when the Bill returned to Parliament, where in any case, the opposition

[20] See chapter by Shehara Athukorala in this volume.
[21] See e.g., J. Wickramaratne, '*SC Decision On 19A Clears Way For Ultimate Abolition Sans Referendum*', ***Colombo Telegraph***, 13th April 2015, available at: https://www.colombotelegraph.com/index.php/sc-decision-on-19a-clears-way-for-ultimate-abolition-sans-referendum-dr-jayampathy-wickramaratne/ (last accessed 14th March 2016)
[22] A. Welikala, '*From Presidential to Parliamentary State? A Midterm Look at Sri Lanka's Constitutional Reform Process*', ***ConstitutionNet***, 31st March 2015, available at: http://www.constitutionnet.org/news/presidential-parliamentary-state-midterm-look-sri-lankas-constitutional-reform-process?utm_source=newsletter&utm_medium=email (last accessed 14th March 2015).

majority was willing to concede much less with regard to pruning presidential powers. Consequently, some language from the old constitutional provisions was reintroduced into the text of the Nineteenth Amendment in the final parliamentary stage of the process.

Thus as a result of opposition within the government from the JHU, the opinion of the Supreme Court as to what would and would not require a referendum, and the political opposition of the parliamentary majority, the expansive promise of the initial Discussion Paper was quite substantially cut down. Yet the enhanced role of the Prime Minister after the Nineteenth Amendment in relation to government formation and operation is not insignificant. Rather than transforming a presidential constitution into a parliamentary constitution as initially promised, the Nineteenth Amendment has retained the semi-presidential character of the 1978 Constitution while moving it from a 'president-parliamentary' to a 'premier-presidential' model.[23]

In terms of the final text of the Nineteenth Amendment, then, the President remains head of state, head of the executive and of the government, and the commander-in-chief. He is a member and the head of the Cabinet, which is in turn responsible and answerable to Parliament for the direction and control of government. The President appoints the Member of Parliament most likely to command the confidence of Parliament as the Prime Minister, and the President determines the number of Cabinet Ministries, the assignment of subjects to Ministers, and the reassignment of such subjects and composition of Cabinet from time to time. In relation to all these powers, the President needs to only consult the Prime Minister where he considers such consultation to be necessary. The advice clause is however retained where the President is required to act on the advice of the Prime Minister in identifying specific Members of Parliament for appointment as Cabinet and other Ministers, and critically, Ministers can only be dismissed by the President on the advice of the Prime Minister. This gives in effect a coequal role for the Prime Minister in government formation and dismissal, and despite the reiterations of the formal (and symbolic) supremacy of

[23] See chapter by Artak Galyan in this volume.

the President in the executive, it is difficult to imagine how even the formally exclusive presidential powers in this area can be exercised without the advice, or at least without the acquiescence and certainly without the active opposition, of the Prime Minister.

### *Assessment of the Process and Substance of the Nineteenth Amendment*

It can be concluded therefore that the 1978 Constitution after the Nineteenth Amendment remains semi-presidential. The delicately balanced provisions with regard to the relationship between the President and Prime Minister (and the relationship between the executive and legislature) would largely depend on the co-operation between President and Prime Minister. It is, however, in the other changes and limits placed on presidential power that the Nineteenth Amendment might be regarded as effecting a real constitutional regime change, and that the landmark presidential election of January 2015 was not a mere change of government for the continuation of business as usual. Under the Rajapaksa regime, power was concentrated in a ruling elite through both formal and informal means, and while it was populist in its methods of political mobilisation through the invocation of a majoritarian nationalist ideology, this did not mean access to political power for citizens at large. This regime was voted out in January on the explicit promise by the common opposition to fundamentally change the structures, rules and procedures of the Sri Lankan state. While retaining the presidential character of the constitution and the state, the Nineteenth Amendment has established a more even structural balance between the three organs of government and a thoroughgoing institutional framework for good governance. As noted above, however, the efficacy of the reforms can only be tested in implementation.

This process, and the evolution of the advice clause especially, highlight several characteristic features of the 'Sri Lankan way' of undertaking constitutional reform. Constitutional historians would see many path dependent resonances between the Nineteenth (and Twentieth) Amendment process and constitutional reform efforts of the past, especially the elitist nature of the decolonisation

process.[24] The modern Ceylonese state was created by a small group of local leaders, constitutional advisors, and colonial officials, and this seems to have determined the path dependency of the Sri Lankan tradition of constitutional change ever since.[25] In this tradition, unlike for example in India, there is little or no space for mass political mobilisation, public deliberation in constituent assemblies, and open negotiation of group interests. While in 2015 the process outlined above involved the accommodation and balancing of competing group interests within Parliament and government to a greater extent than in the 1940s, it nevertheless was an exercise in representative rather than participatory democracy.

The first point to note therefore is the elitist character of the process. Even though the presidential campaign of 2014/5 engendered a remarkable societal discourse on democracy and good governance, public involvement in the process of constitutional reform stopped abruptly on the day of the election.[26] No effort was made even to share evolving documents with the public, let alone put in place a framework of public consultation. Secondly, while a wide political consensus was built for the democracy reforms – helped in no small measure by the excesses of the Rajapaksa regime – the reform consensus is unlikely to extend automatically to the even more fundamental restructuring of the state that is required to address Tamil and other minority demands for devolution and power-sharing. If it is the intention of the government to address these matters in the new constitution that it seeks to promulgate in the current Parliament, then it would seem that a much more rigorous process of consensus-building across ethnic communities will have to be undertaken. Thirdly, the Nineteenth Amendment process underscores how the significance of personalities in Sri Lankan politics extends also to constitutional change. While doubtless there were some deeper philosophical commitments about

[24] H. Kumarasingham, '*'The Jewel of the East yet has its Flaws' The Deceptive Tranquillity Surrounding Sri Lankan Independence*', Heidelburg Papers in Comparative and South Asian Politics 72, available at: http://archiv.ub.uni-heidelberg.de/volltextserver/15148/ (last accessed 14th March 2015).
[25] Kumarasingham (2015).
[26] See chapters by Laksiri Fernando and Asanga Welikala in this volume.

presidentialism and parliamentarism competing in the debate between abolitionists and reformists on the advice clause, it is very clear that the eventual compromise settlement was decided not so much by principles of constitutional design, but by how Sirisena and Wickremesinghe (and their respective parties) might work together in the foreseeable future. The underlying rationale of the cluster of provisions governing the relationship between the President and the Cabinet emerges with any clarity only if they are looked at this way.

The Nineteenth Amendment represents an incremental step in the right direction in democratising the Sri Lankan state. It would have been desirable to go much further in cutting back presidentialism, but what it achieved was what was politically possible between January and May 2015. It is stronger in establishing a credible framework for de-politicisation but its full potential can only be realised through meaningful implementation. The process of its enactment was messy and lacked public involvement. But in terms of both the substance of the reforms it has instituted, as well as the unruly multi-polarity of political views that characterised and contributed to its creation, the Nineteenth Amendment signifies a reminiscent return of Sri Lankan politics to an older and more familiar mould, after the interlude of the Rajapaksa regime in which populism, nationalism, and authoritarianism retarded Sri Lanka's constitutional development.

### *The August 2015 Parliamentary Election and the Prospect of Further Reforms*

The successful enactment of the Nineteenth Amendment provided the basis for the dissolution of Parliament and for the minority government to go to the country seeking its endorsement and the promise of further reforms. While former President Rajapaksa and his loyalists attempted a strong comeback, in the event, the coalition called the United National Front for Good Governance (UNFGG) led by the UNP of Prime Minister Wickremesinghe emerged as the single largest party in the Parliament elected on 17th August with 106 seats. This fell short of an overall majority of 113 seats in the 225-member legislature.

The United People's Freedom Alliance (UPFA) led notionally by President Sirisena but effectively by Rajapaksa gained 95 seats. It is important to recall that large disparities in parliamentary representation are unusual under Sri Lanka's system of proportional representation and that the UPFA vote share fell significantly from January to August. Since the last general election in 2010, the UNP increased its representation by 46 seats, whereas the UPFA's strength declined by 49 seats. This result can therefore be seen as an ample validation of the government's record by the electorate, even though some may have hoped for an overall majority for the UNFGG for the sake of stability and clarity.

In the Tamil majority areas of the north and east, the Tamil National Alliance (TNA) emerged as the dominant political force, with 16 seats. The moderates in the TNA successfully withstood a strong challenge from hard-line nationalists, especially in Jaffna where Tamil politics has become the most pluralistic and competitive in decades, with the relative relaxation of the repressive atmosphere created first by the long dominance of the Liberation Tigers of Tamil Eelam (LTTE) and then by the militarised post-war administration of the Rajapaksa regime. The TNA has therefore solidly delivered its constituency for the reform platform in both elections of 2015 and would have legitimate expectations to have its constitutional claims to greater devolution addressed by the new government in the next Parliament.

The wins for the UNFGG in the south, and indeed for the TNA in the north, then, strongly imply that the process of constitutional and governance reforms will have to be sustained in the new Parliament. As noted before, a substantial part of the 100-day programme remains to be enacted and implemented, and these as well as a number of other proposals for change featured prominently in the UNFGG manifesto. The sections on institutional reforms in the manifesto are set out only in rudimentary terms, but they outline an ambitious programme. A new constitution is promised that will uphold principles of good governance, strengthen representation, and fortify the principle of equality between individuals and communities. The 'advice clause' returns subject to a sunset on President Sirisena's powers,

i.e., the executive in the future constitution would be in line with the formulation in the Discussion Paper discussed above. The Nineteenth Amendment made some special provisions for President Sirisena, including the right to hold certain Ministries, and this is to continue, subject to the solemn undertaking given by the incumbent that he would only serve one term.

A mixed electoral system (MMP) combining elements of first-past-the-post and proportional representation is promised, although there is no detail as to the design of the system. Legal provision will be made to ensure that 25% of the nominations of political parties for parliamentary elections would be women candidates. Resurrecting another idea from the Discussion Paper, the Constitutional Council is to be reconstituted as a Council of State, which would include a large component of civil society representation in addition to the Speaker, the Prime Minister, and the Leader of the Opposition. The Council of State and the strengthened independent commissions ensuring good governance are to be regarded as the fourth branch of the state. The parliamentary committee system is to be overhauled so as to strengthen its oversight role, and Freedom of Information and Nation Audit Acts are to be introduced. The manifesto promises a new bill of fundamental rights and the establishment of a Constitutional Court vested with the power to determine all constitutional questions.

Finally, the UNP manifest undertakes 'To take measures to devolve powers to the maximum extent under the unitary state.' The reaffirmation of the commitment to the unitary state will disappoint the TNA and other Sri Lankan liberals who would like a federal-type devolution of powers. However, the explicit mention of the unitary state clearly had a strategic purpose in protecting a vulnerable flank in the election campaign. If not for its presence, the Rajapaksa camp would have capitalised on Sinhala fears about federalism, and perhaps even have converted the entire general election into a referendum on the issue. Now that that threat has been averted, it is to be hoped that the government will approach devolution issues with flexibility and a decentralising spirit. Sri Lanka's long war ended in 2009 with the military defeat of the LTTE, but there was no prospect of a constitutional settlement with regard to the Tamils under the

Rajapaksa regime. Without such a settlement, and one that the TNA can plausibly defend to its constituency, the long-term stability of the Sri Lankan state would not be guaranteed. And it would constitute a betrayal of the hopes of the Tamils and other minorities who voted solidly for reform and ensured the particular outcomes of the two elections of 2015.

In all these respects therefore the 'constitutional moment' created by the presidential election and extended by the parliamentary election would continue into the foreseeable future, with the focus now moving to the deliberations of the Constitutional Assembly. The challenges of constitutional reform cannot be underestimated, not only in terms of their inherent complexities – a settlement of the Tamil claim to self-government has completely eluded Sri Lanka for its entire post-history – but also because of the economic context. The Rajapaksa regime left behind an indebted and bloated state that requires a major retrench: an inherently difficult task in a society addicted to state provision of subsidies and employment. Whether the new national government is robust enough to undertake tough political reforms while also dealing with unpopular economic decisions remains to be seen. However, as evidenced in the results of the elections, most Sri Lankans have entrusted the combination of President Sirisena and Prime Minister Wickremesinghe to steer them through these perilous waters.

### *The Structure of the Book*

The essays in this volume are broadly organised into two parts, dealing, respectively, with the process and politics of constitutional change in 2015, the substantive changes introduced by the Nineteenth Amendment, and an essay on future prospects. Chapter 1 by Paikiasothy Saravanamuttu provides an analysis of the political backdrop in 2015, the historic nature of the elections and of the Nineteenth Amendment, and discusses the challenges that remain to be addressed in Sri Lanka's on-going process of democratisation. In Chapter 2, Aruni Jayakody provides a detailed account of the development of proposals from January to May which eventuated in the final version of constitutional

changes embodied in the Nineteenth Amendment. In Chapter 3, Kalana Senaratne explores the political dynamics that were at play between competing forces within the common opposition to Rajapaksa, and provides an insightful analysis of the politics and the constitutional visions within those Sinhala nationalist forces that formed an important part of the common opposition. Developing thoughts first articulated in his prolific opinion pieces to the Sri Lankan online media, in Chapter 4 Laksiri Fernando reflects on whether the Sri Lankan electorate has taken a cosmopolitan turn in 2015, and if so, as he suggests is the case, the implications of that change. In Chapter 5, Asanga Welikala discusses the normative content of the idea of 'yahapalanaya' or 'good governance' that so vividly captured the public imagination in the presidential election campaign, and argues that some of these aspirations denote a deepening of Sri Lanka's republican democracy.

The next eight chapters deal with various aspects of the most important substantive reforms brought about by the Nineteenth Amendment, commencing with a review of the Supreme Court's Special Determination on the Nineteenth Amendment Bill by Shehara Athukorala in Chapter 6. Reeza Hameed critically discusses the new relationship between Parliament and government in Chapter 7, and highlights a number of constitutional problems that are likely to emerge in the future. Dinesha Samararatne engages in a detailed and comprehensive analysis of the most important changes (re)introduced by the Nineteenth Amendment, *viz.*, the Constitutional Council and the independent commissions, in Chapter 8. In Chapter 9 Gehan Gunatilleke provides a similarly detailed and comprehensive treatment of the new fundamental right to information and its scope and limits. In Chapters 10 and 11, respectively, C. Narayansuwami and Hejaaz Hizbullah discuss the civil service and the administration of justice, how these vital public institutions have been affected by the Nineteenth Amendment, and what further improvements are necessary. Devolution was a major constitutional concern that was deliberately excluded from both the common opposition campaign as well as the Nineteenth Amendment, but in Chapter 12 Niran Anketell points out those areas in which it has inevitably impacted on the existing framework of devolution under the Thirteenth Amendment.

Chapter 13 by Artak Galyan is an absorbing study of the Nineteenth Amendment as a framework of semi-presidential government, placed in a comparative politics and theoretical context, which is a framework of analysis that is an unusual and unique approach to our understanding of the Nineteenth Amendment as well as the 1978 Constitution. Galyan's findings would be interesting for many Sri Lankan readers accustomed to the notion of an 'over-mighty executive presidency.[27] The last two essays deal with constitutional reform issues that may well arise in the near future. The option of replacing executive presidentialism with the unusual innovation of a directly elected Prime Minister is critically discussed by Asanga Welikala in Chapter 14, and in Chapter 15, Rohan Edrisinha provides closing reflections on the broader constitutional reform issues that require to be addressed as the Constitutional Assembly commences its work.

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Dr Asanga Welikala
Colombo
8th April 2016

[27] See e.g., C.R. de Silva, '*The Overmighty Executive Reconsidered*' in Welikala (2015): Ch.26.

# The Process and Politics of Constitutional Change

# 1

## *The Process of Constitutional Reform: January to May 2015*

*Aruni Jayakody*

## *Introduction*

One of common opposition candidate Maithripala Sirisena's core campaign promises was to abolish the executive presidency, and repeal the Eighteenth Amendment during his first one hundred days in office. Once elected, it was thought that an expedited process of constitutional reforms, followed closely by parliamentary elections, would allow a new government to take hold on a more durable mandate, and at the same time, limit the space available for opposition forces to re-group. Prior to the official release of the draft Nineteenth Amendment Bill, a number of discussion papers, and un-official drafts were leaked online. These initial drafts were far-reaching, requiring the President to always act on the advice of the Prime Minister, and proposed to make the latter the head of government. On 12th March 2015, an official draft was tabled before Cabinet, which included the provisions requiring the President to always act on the advice of the Prime Minister. However, prior to being published in the Gazette, the draft was discussed later at a party leaders' meeting on 15th March. At this meeting objections were raised against the advice clause. An official draft was published in the Gazette, removing the advice clause but retained the provisions allowing the Prime Minister to be the head of Cabinet. Once released, the Jathika Hela Urumaya (JHU) objected to the limitations on presidential power, and vowed to defeat the Nineteenth Amendment. The JHU's opposition was not unexpected but given their limited presence in Parliament it was thought their opposition could be overcome. However, the government did not seem to have foreseen that factions of the President's own party would revolt against the Nineteenth Amendment. The government, conscious of the fast approaching deadline, engaged in a series of closed door negotiations hoping to enlist the support of the opposition. The resulting process was extremely opaque and confusing, with frequent changes and re-changes to the draft bill. Even after offering ministries to Sri Lanka Freedom Party (SLFP) members, and agreeing to enact concomitant electoral reforms, only a significantly weakened version of the Nineteenth Amendment was able to garner the necessary two-thirds majority in Parliament.

### *Initial Drafts*

The origins of the Nineteenth Amendment lay in a draft prepared by the National Movement for Social Justice (NMSJ) led by the late Maduluwawe Sobitha Thero.[1] Once Maithripala Sirisena emerged as the common opposition candidate, one of his core promises was to 'abolish' the executive presidency and to restore the independence of government institutions within the first one hundred days of taking office. It is important to note that the Sinhala version of the Maithri manifesto consistently refers to "changing the executive presidency" [2] whereas the English manifesto inter-changeably promises to both "change" and "abolish" the executive presidency.[3] The manifesto promised to introduce a new constitutional structure that would "essentially be an executive allied with parliament through the cabinet."[4] A core component of its promise to reform the constitution was also to repeal the Eighteenth Amendment, and restore the independence of governance oversight commissions. A number of additional reforms were also promised, including the removal of presidential legal immunities; determining the number and composition of cabinet ministers according to a "scientific basis"; "reinforcing" the parliamentary committee system; and enacting a binding code of ethics on all representatives including at the provincial level.[5]

Early on in the Sirisena administration, Prime Minister and Minister in charge of Constitutional Affairs, Ranil Wickremesinghe appointed a political committee on constitutional reforms, consisting of representatives from all

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[1] New Democratic Front [Common Opposition] (2014) *Manifesto: A Compassionate Maithri Governance: A Stable Country*: p.14. See also *Parliamentary Debates*, 234 (8) (Part I), 28th April 2015: Col.725, where M.A. Sumanthiran MP refers to early efforts by civil society stakeholders, including the National Movement for Social Justice (NMSJ) to abolish the executive presidency and repeal the Eighteenth Amendment.
[2] New Democratic Front (2014) (translated from Sinhala): pp.14-15.
[3] Ibid: pp.13-15. For e.g., in the first chapter titled 'A Constitutional Amendment Guaranteeing Democracy,' the first subheading reads as, 'Abolishing the Executive Presidential System with Unlimited Powers.' However, in the text following the subheading, the manifesto proposes to 'change the Executive Presidential System.'
[4] New Democratic Front (2014): p.14.
[5] Ibid.

parties in government, as well as Dr Jayampathy Wickramaratne, who is also a member of the NMSJ, and two senior retired legal draughtspersons.[6] Based on decisions reached by the political committee, an initial draft Nineteenth Amendment Bill was prepared, and was submitted to the government legal draughtsperson for further drafting. Dr Wickramaratne has publicly stated that preliminary drafts prepared by the committee provided for the abolition of the executive presidency, and at the same time allowed the President to retain certain limited powers.[7]

A document titled 'Discussion Paper on Constitutional Reform' was leaked in early February, containing a proposal to make the Prime Minister the head of government and requiring the President to always act on the advice of the Prime Minister.[8] The President could ask the Prime Minister to reconsider his advice; however, the President was to always act on the re-considered advice. The Paper also suggested that a Council of State was being considered to make recommendations to government on implementation of matters contained in the Statement of Government Policy. The Discussion Paper further included a proposal to establish Consultative Committees for each Ministry. The Seventeenth Amendment was to be largely reintroduced with some modifications, and two new commissions were to be established: the Audit Service Commission and a National Procurement Commission. A draft bill containing these provisions was leaked and published online in early March.[9] However, this document appeared to be an unofficial draft, as it used different stylistic conventions, including gender neutral language, from the

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[6] C. Kuruppu, '*Jayampathi on the 19th A, electoral reforms and 100-day program*', ***DailyFT***, 31st March 2015, http://www.ft.lk/article/401653/Jayampathy-on-19th-A--electoral-reforms-and-100-day-program (accessed 5th September 2015).
[7] Ibid.
[8] '*Maithri Proposals on Constitutional Reforms: Full Text*', ***Colombo Telegraph***, 9th February 2015, https://www.colombotelegraph.com/index.php/maithri-proposals-on-constitutional-reforms-full-text/ (accessed 5th September 2015).
[9] '*Exclusive: Full Text of Sirisena's 19th Amendment*', ***Colombo Telegraph***, 7th March 2015, https://www.colombotelegraph.com/index.php/exclusive-full-text-of-sirisenas-19th-amendment/ (accessed 5th September 2015).

language that is generally employed by government legal draftspersons.

From the outset a decision was made to expedite the process of drafting the Nineteenth Amendment, and complete the entire process by April. It was also agreed that only changes that does not require a referendum would be enacted. Fortunately, despite these extremely short time constraints, at a February meeting of the National Executive Committee, it was decided that the Nineteenth Amendment would not be rushed through as an 'urgent bill.'[10] Ostensibly this was done with a view to facilitate at least some public discussion of the proposed amendment. Yet, well into early March, no official draft was released by the government.

A draft Nineteenth Amendment Bill was tabled before Cabinet on 12th March.[11] The draft bill much like the earlier unofficial leaked version provided that the President shall be Head of State but not the Head of Government. Except "in case of the appointment of the Prime Minister or as otherwise provided by the Constitution" the President was to always act on the advice of the Prime Minister.[12] The President could ask the Prime Minister to reconsider his advice; however the President must act on such reconsidered advice. The Prime Minister was to be the head of Cabinet. On the advice of the Prime Minister, the President could appoint a Deputy Prime Minister from among the members of Cabinet. The Prime Minister was to determine the number of Cabinet Ministers, as well as the Ministries and the assignment of

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[10]Additionally in late January, a prohibition order was sought in the Court of Appeal to prevent constitutional changes as an 'urgent bill.' See '*Appeal Court Prohibitory Order sought on passing constitutional changes as an "urgent bill"*', ***The Island***, 31st January 2015, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=118738 (accessed 5th September 2015).

[11] '*Cabinet in emergency meeting tomorrow to solve crisis over 19-A*', ***Ceylon Today***, 14th March 2015, https://www.ceylontoday.lk/51-87298-news-detail-cabinet-in-emergency-meeting-tomorrow-to-solve-crisis-over-19-a.html (accessed 5th September 2015). See also Office of the Cabinet of Ministers, '*Proposed Amendments to the Constitution*', Cabinet Paper No 15/0237/602/021.

[12] See Article 33A(2) of the Bill annexed to Cabinet Paper No15/0237/602/021.

subjects and functions to such Ministers. Similar to the leaked version, the draft bill also provided for a Council of State.

Media reports indicate that at the meeting Champika Ranawaka, Rajitha Seneratne, Duminda Dissanayake, and M.K.A.D.S. Gunawardena had raised strong objections to the contents of the bill.[13] Owing to the disagreements, a meeting was scheduled among party leaders on the morning of Sunday 15th March with a view to reaching a consensus.[14] The decision to share the draft bill with the party leaders may have been strongly influenced by the fact that without opposition support, there was no possibility of the government securing the required two-third majority to effect constitutional change.

The party leaders' meeting was attended by the Prime Minister, Nimal Siripala De Silva, Anura Priyadharshana Yapa, G. L. Peiris, Champika Ranawaka, Rauff Hakeem, Rishad Bathiudeen, and Vasudeva Nanayakkara.[15] Interestingly, leaders of the Tamil National Alliance (TNA) and the Janatha Vimukthi Peramuna (JVP), who had strongly supported abolition of the executive presidency, had not participated in the meeting.[16] Subsequent media reports indicate that at the meeting there was disagreement among party leaders on who should be the Head of the Government, and the advice clause requiring the President to always act on the advice of the Prime Minister.[17]

Following the party leaders meeting, the provisions containing the advice clause, the appointment of a Deputy Prime Minister, and the Council of State were deleted. Instead of re-drafting the bill, a

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[13] Political Editor, '*Premier presents 62-page constitutional amendment, but deadlock over deadline*', ***The Sunday Times***, 15th March 2015, http://www.sundaytimes.lk/150315/columns/premier-presents-62-page-constitutional-amendment-but-deadlock-over-deadline-139982.html (accessed 5th September 2015); '*19th A and electoral reforms run into a storm*', ***Ceylon Today***, 22th March 2015, http://www.ceylontoday.lk/51-87914-news-detail-19a-and-electoral-reforms-run-into-a-storm.html (accessed 5th September 2015).
[14] Ibid.
[15] '*19th Amendment Approved by Cabinet*', http://laska.asia/buzzzz-247/19th-amendment-approved-by-cabinet/ (accessed 5th September 2015).
[16] Ibid.
[17] Kuruppu (2015).

bill edited by hand, crossing-out the provisions to be deleted was re-submitted for Cabinet approval, later that afternoon. Late into Sunday 15th March, the draft Nineteenth Amendment Bill was sent to be published in the government Gazette.

### *The Gazetted Bill*

The Nineteenth Amendment Bill was officially published in the Gazette on 16th March, and it appeared to be substantively different from earlier, leaked drafts. Most importantly the advice clause requiring the President to always act on the advice of the Prime Minister had been deleted. Additionally, the provisions relating to a Council of State had been omitted.

The President was to be the Head of Government, but the Prime Minister was to be the Head of Cabinet.[18] The Cabinet of Ministers was charged with the direction and control of the government and was both collectively responsible and answerable only to Parliament.[19] The Prime Minister was given substantive powers to determine the composition of Cabinet. He determined the number of Cabinet Ministers as well as their subjects and functions.[20] All ministers were to appointed be by the President on the advice of the Prime Minister. [21] The Prime Minister recommended to the President any changes to the composition of the Cabinet.[22]

The President was to now be the "symbol of national unity."[23] The President's functions were limited to promoting national reconciliation; facilitating preservation of religious and ethnic harmony; and ensuring the proper functioning of the Constitutional Council and independent commissions.[24] The term of the President was reduced to five years,[25] and the two-term

[18] Nineteenth Amendment to the Constitution: A Bill, 16th March 2015: Cl.30(1), 42(3).
[19] Ibid: Cl.42(1), (2).
[20] Ibid: Cl.43(1).
[21] Ibid: Cl.43(2), 44(1).
[22] Ibid: Cl.43(3).
[23] Ibid: Cl.33(1).
[24] Ibid: Cl.33(2).
[25] Ibid: Cl.30(1).

limit was re-introduced.[26] The Seventeenth Amendment was re-introduced, with some changes. The Constitutional Council was to be appointed with the reference to the "pluralist character of Sri Lanka, including professional and social diversity." Amendments were also made to address loopholes from the past, including that appointments are deemed to be made, if the President does not appoint the nominated individuals. Additional provisions included granting powers to the Election Commission to issue guidelines to media institutions in the midst of election campaigns, and to appoint a Competent Authority when such guidelines are not followed.

Additionally, the bill sought to address one of the excesses of the Rajapaksa regime by limiting the number of Cabinet Ministers to thirty, and other ministers to forty.[27] If there was to be a national government following the next general election, then the number of Cabinet Ministers could be increased to forty five, and other ministers to fifty five.[28] A right to information was also introduced subject to a number of restrictions.[29]

### *Political Backdrop*

In his manifesto, the President claimed he could deliver on the promise to change the constitution within the first hundred days, as the United National Party (UNP) and the JVP had entered into an agreement with him to support constitutional change.[30] He further promised that once elected, he could "obtain the support of the SLFP" to enact constitutional reform.[31] Once elected,

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[26] Ibid: Cl.35(1).
[27] Ibid: Cl.46.
[28] Ibid: Cl.46(3).
[29] Ibid: Cl.14A.
[30] New Democratic Front (2014): p.15.
[31] Ibid. See also L. Ockersz, '*19th Amendment seeing its final touches*', ***The Island***, 5th February 2015, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=119003s (accessed 5th September), where Presidential Advisor on Constitutional Affairs Dr Jayampathy Wickramaratne PC stated in an interview, "The government does not have a majority in Parliament, but since the President is also the leader of the SLFP, which is the largest party in Parliament, I do not see any obstacles being posed to the implementation of the 100 day programme."

President Sirisena appointed the leader of the UNP, Ranil Wickremesinghe, as the Prime Minister and a Cabinet largely consisting of members of the UNP. However, despite these changes, the new government faced a Parliament that was overwhelmingly constituted of the United People's Freedom Alliance (UPFA).

As the debate surrounding the Nineteenth Amendment evolved, Minister Ranawaka emerged as a prominent opponent of the draft, supported by the Mahinda faction of the UPFA. Along with the Mahinda faction, Minister Ranawaka objected to there not being accompanying electoral reforms. Relying on assurances made by the Election Commissioner, the SLFP argued that it was possible to complete delimitation of constituencies, within three months.[32] Second, Ranawaka objected to the Prime Minister heading the Cabinet, arguing that such a change required a referendum. Ranawaka argued that the bill reduced the role of the President to a mere figurehead, similar to the position of the President under the 1972 Constitution.[33] The amendment amounted to an 'abolition' of the executive presidency; whereas the President had only received a mandate to 'reform' the executive presidency.

Ranawaka's argument is plainly disingenuous as President Sirisena's campaign, had promised to abolish the executive presidency. Despite the contradictory language in the English and Sinhala manifestos, the rhetoric used during the campaign and other campaign documents, for example the '100 Day Work Programme' promised to abolish the executive presidency.[34]

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[32] Political Editor, '*Premier presents 62-page constitutional amendment, but deadlock over deadline*', ***The Sunday Times***, 15th March 2015.
[33] H. Gunaratna, '*Ranil runs into brick wall in Ranawaka*', ***The Island***, 7th April 2015, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=122756 (accessed 5th September 2015).
[34] See e.g., Sirisena's first media conference announcing his candidacy, where he promised (speaking in Sinhala) to abolish the executive presidency and remove the Eighteenth Amendment: '*I will contest as the Common Candidate – Maithripala Sirisena*', ***Adaderana***, 21st November 2014, https://www.youtube.com/watch?v=f7VgUw7PMnE (accessed 5th September 2015); See also the 100 Day Programme, where he promised to begin the process of 'abolishing' the executive presidency and repeal the Eighteenth Amendment, on 21 January 2015.

Additionally, the other coalition partners of the National Democratic Front (the common opposition led by Sirisena in the presidential election), including the UNP, TNA, and the Sirisena faction of the SLFP, all campaigned promising to abolish the executive presidency.

However, Ranawaka is partially correct in that the JHU's conditional support for candidate Sirisena was based on a commitment to 'reform the executive presidency.'[35] At the time, JHU's legal advisor, Udaya Gammanpila quit the party, allegedly over the disparities in the promises made by the Sirisena campaign to the UNP and to the JHU. Gammanpila pointed out that Sirisena's agreement with the UNP agreed to 'abolish the executive presidency' whereas the memorandum of understanding with the JHU promised to 'reform the executive presidency.'[36] Ranawaka's opposition was not unexpected, given the JHU's long-standing views on constitutional reform. Since its inception, the JHU has supported the unitary constitution and the centralisation of power as a means to preserve the supremacy of the Sinhala-Buddhist polity. In particular, the JHU has strenuously opposed any meaningful devolution of power to minorities. Viewed within this lens, a President directly elected by the majority Sinhala-Buddhist community, is essential to preserving its nationalist ideology.

An additional objection raised by Ranawaka was the process used to enact constitutional reform. Ranawaka complained that on various occasions the Prime Minister attempted to 'hoodwink' the alliance members.[37] In particular, Ranawaka repeatedly alleged that at the party leaders meeting on Sunday 15th March, a

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'*Maithripala Sirisena's 100 day work program*', ***News.lk***, 12th January 2015, http://www.news.lk/fetures/item/5665-maithripala-sirisena-s-100-day-work-programme (accessed 5th September 2015).

[35] M. Mudugamuwa, '*Jathika Hela Urumaya Extends Conditional Support to Maithripala Sirisena after signing a 9 point MOU*', ***The Island***, 2nd December 2014, http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=115258 (accessed 5th September 2015).

[36] C. Weerasinghe, '*Obviously Sirisena Lied*', ***Daily News***, 2nd December 2014, http://www.dailynews.lk/?q=local/obviously-sirisena-lied (accessed 5th September 2015).

[37] Gunaratna (2015).

consensus was reached to retain the President as Head of the Cabinet, whereas the bill that was published in the Gazette continued to provide that the Prime Minister shall be the Head of the Cabinet.[38] The Prime Minister denied claims of subterfuge, and pointed out that the final version had been considered by the Cabinet, which included the JHU.[39]

Aside from the legal and constitutional considerations, some of the arguments were predicated on personal attacks on the Prime Minister. Both factions of the SLFP and the JHU sought to cast the provisions granting enhanced powers to the Prime Minister, as a coup by Wickremesinghe to create an 'Executive Prime Minister' position for himself.[40] Ranawaka claimed that the "19th Amendment presented in parliament was a constitutional coup to allow a person who is unable to win at an election to retain power."[41] Additionally, some quarters speculated that Minister Ranawaka objected to reductions of the President's powers, as he had his own presidential ambitions.[42] In particular, a report was widely repeated in the media that Ranawaka's astrologer had informed him that he could become President in 2020, and as a

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[38] See e.g., N. Ariyawansha, '*JHU rejects 19th Amendment*', ***Ceylon Today***, 20th March 2015, https://www.ceylontoday.lk/51-87755-news-detail-jhu-rejects-19th-amendment.html (accessed 5th September 2015); Gunaratna (2015).

[39] '*JHU threatens to block 19A*', ***The Sunday Times***, 5th April 2015, http://www.sundaytimes.lk/150405/news/jhu-threatens-to-block-19a-143674.html (accessed 5th September 2015).

[40] Gunaratna (2015).

[41] L. Pothmulla, '*19a "Constitutional Coup – JHU*', ***Daily Mirror***, 24th March 2015, http://www.dailymirror.lk/67077/stitutional-coup-jhu (accessed 5th September 2015).

[42] See C. Nathaniel, '*Champika Stands His Ground*', ***The Sunday Leader***, 12th April 2015, http://www.thesundayleader.lk/2015/04/12/champika-stands-his-ground/ (accessed 5th September 2015); C. Gunawardana, '*JHU defends Ranawaka; says he is more suitable for presidency*', ***DailyFT***, 2nd April 2015, http://www.ft.lk/article/402877/JHU-defends-Ranawaka--says-he-is-more-suitable-for-presidency- (accessed 5th September 2015); '*Viyangoda says Champika Ranawaka Wants To Be Prime Minister By 2020*', ***Asian Mirror***, 31st March 2015, http://www.asianmirror.lk/news/item/7928-viyangoda-says-champika-ranawaka-wants-to-be-prime-minister-by-2020 (accessed 5th September 2015).

consequence, he did not wish to curtail the powers of the Executive President.[43]

### *Supreme Court Hearing*

On 6th April 2015, the Supreme Court heard thirteen petitions on the constitutionality of the Nineteenth Amendment Bill. The Supreme Court ruled that a number of provisions be struck down so that the bill does not require approval at a referendum. A number of petitioners argued that the provisions giving enhanced powers to the Prime Minister alter the basic structure of the constitution, as it diminishes the "discretionary authority of the President to make decisions concerning executive governance." The Supreme Court held that executive power can be distributed to others via the President. However, in such situations, "the President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his Executive Power."[44] Applying this reasoning, the Court held that a number of provisions be struck down including ones that provided the Prime Minister to be the Head of the Cabinet; the power of the Prime Minister to determine the composition of the Cabinet, as well to assign and reshuffle Ministries.[45] It is important to note that the Court did not object to the Prime Minister exercising these functions per se. Rather the Prime Minister could exercise these powers, provided the President had the power to "monitor or give directions" to the Prime Minister. Additionally, the Court ordered that draft article 33(1) which provided that the President shall be the symbol of national unity be struck down as the national flag had long been recognised as the symbol of national unity.[46]

During the hearing the Attorney General introduced new amendments that were later leaked but was never formally

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[44] Supreme Court Determination on the Nineteenth Amendment to the Constitution (2014) SD No 04/2015, SCM 9th April 2015: p. 10, per Sripavan CJ, Ekanayaka J, and Dep J.,
[45] Court held that Clauses 42(3), (43(1), 43(3), 44(2), (44(3), (44(5) of the Bill should be struck down: SD No 04/2015: p.11.
[46] Ibid: p.14.

released by the government. This highly secretive move by the government further attracted criticism from opposition groups about the process being used to enact constitutional reform. Ranawaka argued that the attempt to introduce new amendments before the Supreme Court, in principle violates Article 78 of the constitution, which provides that every bill must be published in the Gazette seven days before it is placed on the order paper of Parliament.[47] The Attorney General's memorandum proposed a number of substantive as well as procedural changes to the version that was published in the Gazette. The right to access information was amended to limit the right of access to information "as provided by law."[48] Clause 14(1)(d) was amended to limit the range of persons that would be under an obligation to provide information to persons who possessed information in relation to one of the specified government bodies.[49] Additionally, the prevention of contempt of court, the protection of parliamentary privilege, and the prevention of disclosure of information communicated in confidence, were inserted as bases for limiting the right to information.

Importantly, the Attorney General's memorandum provided for the powers of the President to be modified with an advice clause where the President shall act on the advice of the Prime Minister except when appointing the Prime Minister or when the constitution provides otherwise.[50] The President could ask the Prime Minister to reconsider such advice. If the Prime Minister does not change his advice, then he must inform Parliament and seek Parliament's views. In such instances, the President must act on the advice of Parliament, or when Parliament does not express any views, the President shall act in accordance with the advice of the Prime Minister. An additional clause was inserted to provide an exception to instances where privately owned media institutions would not have to follow guidelines from the Election Commissioner, provided they inform the Commission that it is their policy to support a specific candidate, party or position.

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[47] Nathaniel (2015).
[48] Attorney General (2015)'*Amendments proposed to the 19th Amendment to the Constitution Bill*': p.1.
[49] Ibid.
[50] Ibid: p.5.

***Period leading up to Committee Stage***

In response to the Supreme Court determination, the Prime Minister announced that the government would not re-draft the bill but would seek to introduce the necessary changes during the committee stage.[51] The UNP was eager to dissolve Parliament and rush to the polls within the timetable stipulated in the 100 Day Programme. However, at the same time, President Sirisena was increasingly losing control of his own party. The 'troika' consisting of the Prime Minister, former President Chandrika Bandaranaike Kumaratunga, and President Sirisena, attempted through closed-door meetings to offer concessions and enlist support from SLFP members. Prior to sending the bill to the Supreme Court, in a move calculated to win over factions of the SLFP, the President appointed a new round of Ministers, including eleven Cabinet Ministers, five Minister of State, and ten Deputy Ministers. Additionally, the President agreed to enact electoral reforms, in the form of a Twentieth Amendment, alongside the Nineteenth Amendment. The task of drawing up the reforms was also given to Opposition Leader Niman Siripala de Silva, side-lining UNP proposals for an electoral commission to draft changes to the electoral system.

Despite these concessions, the JHU and the Mahinda loyalists among the UPFA continued to vow to defeat the Nineteenth Amendment in Parliament. In particular, with the prospect of looming parliamentary elections, former President Mahinda Rajapaksa and his allies commenced a grassroots campaign with the hope of restoring him to the post of Prime Minister. Additionally, a number of former UPFA Ministers who been side-lined in the Sirisena administration, whose prospect of gaining nomination from the SLFP looked slim, agitated for Rajapaksa and became increasingly vocal in their opposition to the Nineteenth Amendment Bill. Signs of a possible split within the UPFA emerged when on 7th April, when a UNP resolution to

[51] Political Editor, '*Sirisena, Ranil struggling for good governance with backs to the wall*', ***The Sunday Times***, 12th April 2015, http://www.sundaytimes.lk/150412/columns/144396-144396.html (accessed 5th September 2015).

raise the upper limit of a treasury bill issue for borrowing rupees 400 billion was defeated. Despite assurances by Opposition Leader de Silva that it would not oppose the resolution, large numbers of UPFA members voted against the resolution. Matters came to a head when UPFA members called on the Speaker to appoint Dinesh Gunawardena, a Rajapaksa loyalist, as Leader of the Opposition.[52]

The UNP on the other hand had promised its rank and file that Parliament would be dissolved on 23rd April.[53] The UNP had to either muster a constitutional amendment or break the alliance and go back to opposition. This could also mean a considerable wait, and losing out on the advantage of going into an election as an incumbent government. Additionally, it could also have faced a backlash from the voters that it had failed to fulfil one of the core promises contained in the 100 Day Programme. The UNP's credibility was also being undermined by its failure to pursue corruption allegations against those in the previous administration. In particular, the scandal surrounding the Central Bank Governor Arjuna Mahendran, was further adding to the perception that the UNP was no better than its predecessor.

### *Committee Stage*

As the parliamentary debate on the Nineteenth Amendment approached, significant uncertainty remained over whether the bill would in fact be successfully enacted. On the eve of the parliamentary debate, two teams were appointed to address the continuing opposition to the Nineteenth Amendment. The government team included M. A. Sumanthiran, Ajith Perera, and Rauff Hakeem, and the SLFP team constituted of Anura

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[52] C. Kirinde, '*National Govt. on the rocks as 19 A hangs over dissolution of House*', ***The Sunday Times***, 12th April 2015, http://www.sundaytimes.lk/150412/columns/national-govt-on-the-rocks-as-19a-hangs-over-dissolution-of-house-144425.html (accessed 5th September 2015).

[53] This intention is also clear from the version published in the Gazette, which indicates that certain provisions shall come in to force on 22nd April 2015.

Priyadarshana Yapa, Faizer Musthapa, and Rajiva Wijesinha.[54] Among the key issues negotiated included demands to limit the instances where the President would have to act on the advice of the Prime Minister and a demand to alter the composition of the Constitutional Council to allow increased participation by Members of Parliament. Ultimately these demands were met and a number of important provisions that curtailed the powers of the President and provided an enhanced role for the Prime Minister were weakened.

At the beginning of the parliamentary debate, the Prime Minister conceded that the Nineteenth Amendment was not what the government had originally envisaged, but that it was better than no reform.[55] Throughout the process, there was also a view among the UNP members that after the next parliamentary election, there would be an additional opportunity to enact further reforms.[56] During the committee stage a number of SLFP members led by Dinesh Gunawardena, Vasudeva Nanayakkara, and Wimal Weerawansa made a series of interventions, and succeeded in adding a number of additional amendments to the final text. Among the changes made included removing appointments to the University Grants Commission and the Official Languages Commission from the purview of the Constitutional Council.[57] Additionally, the clause in the official draft requiring the Constitutional Council to consult the views of the Attorney General, Minister of Justice, and President of the

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[54] Political Editor, '*President's diplomacy brings about win-win solution to 19 A*', ***The Sunday Times***, 3rd May 2015, http://www.sundaytimes.lk/150503/columns/presidents-diplomacy-brings-about-win-win-solution-to-19a-147635.html (accessed 5th September 2015).
[55] *Parliamentary Debates*, 234 (8) (Part I), 28th April 2015: Col.869.
[56] For example, Eran Wickramaratne MP, in his speech to Parliament during the debate on the Nineteenth Amendment, noted that following the next parliamentary election, it was hoped to turn Parliament into a Constituent Assembly, to re-examine the entire constitution. See *Parliamentary Debates*, 234 (7), 27th April 2015: Cols.551-552. The Prime Minister himself had made a similar statement to *The Sunday Times* following the Supreme Court ruling: see Political Editor, '*Sirisena, Ranil struggling for good governance with backs to the wall*', ***The Sunday Times***, 12th April 2015.
[57] *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: p.904; See also Constitution of Sri Lanka (1978): Article 41B, Schedule.

Bar Association, when appointing judges to the Supreme Court and the Court of Appeal was removed.[58] Further a clause only affording the Supreme Court the jurisdiction to hear matters related to disciplinary action taken by political parties over MPs was removed.[59]

The final text of the Nineteenth Amendment provides that the President shall be a member and Head of the Cabinet. The President may consult the Prime Minister "where he consider such consultation to be necessary" when determining the number of Cabinet Ministers, other Ministers, and their subjects and functions. [60] As Anura Priyadarshana Yapa explained, the rationale for diluting the advice clause was that a President should only have to take advice from the Prime Minister, when both are not from the same party.[61] Additionally, according to the final text, the President could without consulting the Prime Minister, at any time reshuffle Cabinet or other Ministers.[62]

The composition of the Constitutional Council was altered to allow greater participation by Members of Parliament. The Council now consists of three *ex officio* members – the Speaker, the Prime Minister, and the Leader of the Opposition – as well as one MP appointed by the President, two MPs nominated by the Prime Minister and the Leader of the Opposition, and one MP nominated by agreement of MPs belonging to political parties other than the parties of the Prime Minister and the Leader of the Opposition. This only leaves three non-MPs to be nominated by the Prime Minister and the Leader of the Opposition. Yapa explained that the reason behind the change was that civil society representatives were not accountable to anyone, unlike MPs who must answer to Parliament.[63]

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[58] *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: Col. 904.
[59] Dinesh Gunawardena MP proposed the removal of the clause as it is important to protect the rights of MPs, see *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: Col.954.
[60] Constitution of Sri Lanka (1978): Articles 43(1), 44(2).
[61]Political Editor, '*President's diplomacy brings about win-win solution to 19 A*', ***The Sunday Times***, 3rd May 2015.
[62] Constitution of Sri Lanka (1978): Articles 43(3), 44(3).
[63] Political Editor, '*President's diplomacy brings about win-win solution to 19 A*', ***The Sunday Times***, 3rd May 2015. Dinesh Gunawardena offered a

The parliamentary procedure is that once any final amendments are made during the third reading of the bill, a final draft text is not presented to members prior to approving the amendments. The final text of the amendment is based on the government legal draughtsperson's understanding of the debate as recorded on an audio file and on Hansard. In this case, it took more than two weeks for the final Nineteenth Amendment Act to be published, as the legal draughtsperson had to review the record of proceedings and compile the final amendments. The debate on the floor of the House is fast paced, and often no additional legal advice is sought prior to agreeing to amendments. In the case of the Nineteenth Amendment, provisions relating to the formation of a national government, and whether independent institutions should be answerable to Parliament, were amended causing some ambiguity and allowing superfluous provisions to be inserted. For example, Tissa Vitharana insisted that an amendment be included requiring all independent commissions mentioned in the schedule of Article 41B, except the Election Commission shall be "responsible and answerable" to Parliament.[64] However, the constitution already provides that the Election Commission, along with a number of other commissions, are answerable to parliament.[65]

The question of whether the number of Ministers should be capped under a national government came under much debate. Members argued over whether there should be a limit on the maximum number of Ministers or whether it should be left at the sole discretion of Parliament; and over whether ad how a 'national government' should be defined. Some members wanted it left open so that a national government could be formed between the party that wins the largest number of seats and any other party. The amendment was verbally re-phrased by the Minister for Justice, Wijayadasa Rajapakshe, as follows: "Not withstanding Article 46(1) in an instance where a government is formed between the party winning the highest number of seats

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similar explanation during the third reading of the Bill, see *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: Col.905.

[64] *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: Cols.907-908, 916; Constitution of Sri Lanka (1978): Article 41B (6).

[65] Constitution of Sri Lanka (1978): Articles 104B(3), 55(5), 155N.

and the party winning the second highest number of seats, the number of Cabinet positions shall be determined by Parliament." [66] However, immediately afterwards Dinesh Gunawardena intervened and suggested that the provision should read as, "…whenever the main party forms a government with another party" and that matter should be "…determined by Parliament."[67] To which the Minister for Justice responded by saying, "We agree, Parliament should decide".[68] The final text of Article 46(4), as formulated by the government legal draughtsperson provides as follows: "…where the recognized political party or the independent group which obtains highest number of seats in Parliament forms a National Government" the number of Ministers shall be determined by Parliament. [69] 'National Government' is further defined in Article 46(5) as "…a Government formed by the recognized political party or the independent group which obtains the highest number of seats in Parliament together with the other recognized political parties or the independent groups." [70] Unlike in the gazetted bill, this clause was no longer merely a transitional provision that was to apply only to the period following the August 2015 general election. Under its current formulation, national governments can be formed in the future, and in such situations, the number of Cabinet Ministers, other Ministers, and Deputy Ministers can be increased at the discretion of Parliament.

Once the general election was over, a question was raised whether the UNP and the SLFP could in fact come within the definition of the 'National Unity Government' under the Nineteenth Amendment. JVP leader Anura Kumara Dissanayake raised a point of order, arguing that Article 46 (4) and (5) required a national government to "comprise of all parties" and that "just because a couple of parties entered into an agreement it could not

[66] *Parliamentary Debates*, 234 (8) (Part II), 28th April 2015: Col.939 (translated from Sinhala).
[67] Ibid: Cols.939-940 (translated from Sinhala).
[68] Ibid: Col.940 (translated from Sinhala).
[69] Constitution of Sri Lanka (1978): Article 46(4).
[70] Ibid: Article 46(5).

be called a National Government."[71] In particular he pointed out that Article 46(5) does not state that a "certain number of parties" or "some parties" could join the party with the highest number of seats to form a national government.[72] The matter was resolved with the Speaker determining that the agreement between the UNP and the SLFP did amount to a national government. However, the confusion raised by Article 46, underscores a larger problem whereby at the committee stage, members verbally propose and agree to constitutional amendments without in fact sighting the written amendment.

### *Conclusion*

The idea of constitutional reform via a Nineteenth Amendment had been in public discourse at least two years prior to its enactment. The initial draft presented a genuine opportunity for reform. The advice clause requiring the President to always act on the advice of the Prime Minister, had it been enacted in its original form, would have significantly contributed to curtailing the excesses of the executive presidency. However, during the entire process of drafting, negotiating, and enacting the Nineteenth Amendment, a series of countervailing political forces served to weaken the final text. The political wrangling during the negotiations of the Nineteenth Amendment serves as a cautionary tale for the new government. The allies that had entered into a formal agreement with the President promising to support constitutional reform at the outset of the elections, turned spoilers once the process began in earnest. No doubt the parliamentary arithmetic is now in new the government's favour, and importantly, the President has far greater control over his own party. However, all stakeholders must give pause to consider why elite-driven progressive reform moments are not sustained in the longer term.

As the government moves forward with plans to transform Parliament into a 'Constitutional Assembly' to enact further

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[71] G. Weerakoon & S. Gunasekara, '*National Government*', ***Ceylon Today***, 4th September 2015, https://www.ceylontoday.lk/51-102781-news-detail-national-government.html (accessed 5th September 2015).
[72] Ibid.

reform, serious thought must be given to improving the quality of the process of constitutional reform. Genuine participation in a constitutional reform process requires that members of the public participate at all stages of the process, from setting the agenda, determining the content, to final ratification. The extent and quality of the participation in a constitution-making process has a direct correlation to the strength of the final text, as well as its legitimacy and level of acceptance among the citizenry. A broader, more consultative, constitutional reform process may also serve to protect against political spoilers, who seek to advance narrow, nationalist, or otherwise self-serving interests.

# 2

# The Politics of Negotiating Competing Interests in Promulgating the Nineteenth and Twentieth Amendments

*Kalana Senaratne*

Constitutional reform in recent times has been predominantly shaped and guided by a number of interrelated political objectives. Two such objectives of proposed constitutional reform, especially during the latter stages of Mahinda Rajapaksa's presidency, were: firstly, to limit the powers of (the then) President Rajapaksa, and more broadly, the Rajapaksa regime, by forcing him to accept certain democratic reforms; and secondly, to defeat President Rajapaksa and to bring about a regime change, in case Rajapaksa failed to adopt the proposed reforms. A third and new objective of constitutional reform emerged after the defeat of Rajapaksa at the Presidential election in January 2015: to consolidate power of the new political leadership and establishment, while preventing the rise or the return of Rajapaksa. Such political objectives coexisted and comingled with a genuine desire for constitutional reform in certain quarters, making the passage of negotiating and introducing constitutional reform a complex affair. This complexity was best witnessed in relation to the adoption of the Nineteenth Amendment [1], and the aborted Twentieth Amendment.[2]

Viewed from the political perspective and logic of Mahinda Rajapaksa, the adoption of the Eighteenth Amendment to the Constitution in 2010 – which sought to perpetuate his hold on power by abolishing the two-term limit placed on a President by the 1978 Constitution – was not entirely unpredictable. Having failed to defeat the LTTE for some three decades, here was a leader who had given political leadership to a decisive military victory, who had done what his predecessors had failed to do. The majority of the Sri Lankan population had supported the war effort; defeating the LTTE militarily was always their cherished, but hitherto unrealised, dream. For many, then, it was not

[1] The Nineteenth Amendment introduces a set of governance reforms pertaining, in particular, to the executive presidency and independent institutions. See 'Nineteenth Amendment to the Constitution', http://slembassyusa.org/downloads/19th_Amendment_E.pdf. (last accessed 17th March 2016).

[2] The aborted draft bill of the Twentieth Amendment sought to introduce electoral reforms. The draft bill which was gazetted in June 2015 is available at: https://www.colombotelegraph.com/wp-content/uploads/2015/06/20th-Amendment-E.pdf. (last accessed 17th March 2016).

unnatural to think of Mahinda Rajapaksa as a leader who deserved to be in power. After all, the very manner in which the Eighteenth Amendment was endorsed in Parliament, and the very absence of mass protest, made Rajapaksa's political motives utterly logical and natural within the political context and time he was placed in; and especially, for a majority of the Sinhala constituency. For the constitutional reformists though, the Eighteenth Amendment was deeply problematic. After years of advocacy and campaigning for the abolition of the executive presidency, here was a new constitutional amendment which sought to strengthen it.

What was also to be noted was that the end of the war in May 2009 was a decisive blow to many who had aspired for a negotiated political settlement, amounting to the adoption of a constitution providing meaningful devolution of power, amounting especially to a federal solution. It was the reverse form of constitutional reform that was now bound to happen. This was affirmed with the adoption of the Eighteenth Amendment in 2010, just over one year after the war. Opposition to these developments, which came from oppositional political parties, the TNA, and various other civil society groups, was largely ineffective. Identified as forces belonging to the anti-war campaign (and hence, anti-Sri Lankan, anti-Sinhala, and much else), theirs was a voice that had no real impact in a world where the LTTE had been defeated.

But there was something more interesting happening too. Consumed by hubris, Mahinda Rajapaksa was also misreading the potential of Sinhala nationalism: its ability and potential to engage in some form of a reformist revival, first from within and if required, even from without. The corruption, nepotism, and mismanagement of affairs, together with an ineffective opposition, meant that the opposition to the Rajapaksa juggernaut had to come from within; a form of opposition which could have had the potential of significantly changing the status quo, with the assistance of all other opposition forces. This was perhaps what reformists may have desired. This new type of opposition was going to be different: and some of the new rules of the game

would now be set by a different set of forces, which were more aligned with, or even the representatives of, the political aspirations and ideologies of Sinhala nationalism. If 'constitutional reform' was going to be the main tool with which the Rajapaksa juggernaut was going to be tamed, negotiating the form and character of such reform was, assuredly, an arduous task. The backdrop was now set for some serious negotiations pertaining to constitutional reform.

Negotiating political interests was bound to be difficult and interesting, now that there were some significant additions to the opposition that was forming against President Rajapaksa. They came in the form of two civil society groups, unlike the traditional and popular Colombo-based civil society groups. One was the National Movement for Social Justice (NMSJ), led by the late Ven. Maduluwawe Sobitha Thera. The other was the *Pivithuru Hetak* movement of Ven. Athuraliye Rathana, who was also a Member of Parliament from the Sinhala-Buddhist nationalist party, the *Jathika Hela Urumaya* (JHU), which was in alliance with the Rajapaksa regime at the time.

Examining the role of these movements, especially the *Pivithuru Hetak* movement, and their interactions with opposition political forces, provides useful insights into the deeply political and pragmatic character of the political process and movement that was set in motion. To be sure, it was a process which first sought to ensure that necessary constitutional reform was undertaken by President Rajapaksa, failing which the aim would be to oust him from power. A detailed account of the politics behind this entire movement to oust Rajapaksa from power is contained in a publication authored by one of the central characters and policy makers attached to this movement, Asoka Abeygunawardana.[3]

A principal feature of these reformist movements was the emphasis they placed on the need for constitutional reform. This was amply evident from the manner in which the NMSJ, for example, was articulating its politics: largely in the language of

[3] See: A. Abeygunawardana (2015) ***The Revolution of the Era*** (Colombo).

constitutional law, assisted by the involvement of well-known constitutional law scholars and lawyers. The need for constitutional reform was also an aspect sought to be highlighted by the *Pivithuru Hetak* movement. It drew up a policy document titled 'The Path the Country Should Take', in which the greatest emphasis was placed on the section concerning constitutional reform.[4]

One would have imagined that the best way to attack President Rajapaksa was by going for a policy of total abolition of the executive presidency. It would have been a policy that was easily adoptable, for many opposition forces – ranging from the UNP, the JVP, and the TNA to civil society groups, including the NMSJ – would have agreed on it. However, what was significant here was that for the first time, the *Pivithuru Hetak* movement was able to replace the popular slogan, 'Abolish the Executive Presidency', with the counter-slogan: 'Reform the Executive Presidency'. The idea behind the latter was to reduce some of the powers of the President, which had made the executive presidency over-mighty.

It was the firm view of the more nationalist-minded actors in the *Pivithuru Hetak* movement that the abolition of the executive presidency in total would be a dangerous course of action.[5] In arguing so, attention was drawn to the relationship between the executive presidency and the voting system in the country (i.e. the respective subjects which later came to be addressed through the Nineteenth and Twentieth Amendment proposals). Having argued that the complete abolition of the executive presidency, while continuing with the existing proportional representation system, would be destabilising, the policy document referred to above stressed that the "curbing of the powers of the executive president coupled with an election mechanism with the preferential voting system removed from it" would be the most feasible short-term solution. [6] In other words: reform the presidency, and introduce an electoral system sans the preferential

[4] Ibid: pp.30-33. This policy document had been formulated by Abeygunawardana.
[5] Ibid: p.33.
[6] Ibid.

voting system. Useful to note here is the dominant concern affecting the nationalist movements: that if the government became unstable, "the majority party would be forced to dance to the tune of the Muslim and Tamil parties", an eventuality which, at present, was only curbed due to the "strength of the office of the Executive President."[7] Hence, the recommendation was to ensure some sort of a balance in the power structure, between the President and the Prime Minister.

A most significant and practical question arose now. How could this political vision of groups such as the *Pivithuru Hetak* be synthesised or reconciled with the vision of groups such as the NMSJ (which stood for the complete abolition of the presidential system)? This question was most acute when the issue of how these movements were to enter into a common agreement came up. Here, the actors involved had to engage in some "semantic manipulation"[8] to show that what was proposed was a balance between the two posts: i.e., the abolition of the presidency towards creating a constitutional alliance between the President and Prime Minister. The argument would be that while the first proposal is to reform the presidency, abolition would take place later. But was this the real motive of groups such as the *Pivithuru Hetak* movement? Abeygunawardana notes, "Although this was the argument, in practice, the executive presidency would not be abolished."[9] Interestingly, however, the leader of the UNP and the Opposition, Ranil Wickremesinghe, agreed to fully support the constitutional reforms proposed by the *Pivithuru Hetak* movement, in case President Rajapaksa decided to accept them. Wickremesinghe even made a statement to this effect in Parliament.[10]

One reaches a prominent landmark in this story with the signing of the Memorandum of Understanding between presidential candidate Maithripala Sirisena and the JHU on 1st December

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[7] Ibid: p.44.
[8] Ibid: p.45.
[9] Ibid.
[10] Ibid: p.82; See also, '*Ranil says UNP Supports Proposed 19th Amendment*', ***Asian Mirror***, 26th October 2014, http://asianmirror.lk/news/item/4469-ranil-says-unp-supports-proposed-19th-amendment (last accessed 9th March 2016)

2014. The MoU emphasised its commitment to reform the executive presidency by removing the excessive powers of the President, in a manner that did not affect the sovereignty and territorial integrity of the country. The MoU was also clear on the idea that nothing would be done to change the unitary character of the state, as well as the foremost status given to Buddhism. It was also around this time, as a clear understanding had now been reached, that one began to see the likes of Minister Patali Champika Ranawaka, a prominent nationalist supporter of the war and the Rajapaksa leadership, becoming one of the strongest and most articulate critics of Rajapaksa.[11] There was now a considerable shift in the political stance of the likes of Ranawaka towards the Rajapaksas, and a slightly more tender shift in their stance on the over-mighty executive presidency.

Negotiating these political shifts and interests reached a critical point with the task of having to release the manifesto of the presidential candidate representing the 'common opposition'. The drafting process concerning this manifesto sheds much light on the politics of negotiating competing interests. The narrator of these details, Abeygunawardana, was also the person tasked with the job of drawing up a 'hybrid' draft; one which sought to synthesise a draft which had been earlier written by Champika Ranawaka (a draft thought to have been extremely problematic had other parties got to know about it) and the manifesto of the *Pivithuru Hetak* movement. Abeygunawardana notes:

"To all practical intents and purposes, there was no common ground on which the JHU, JVP, NMJS and UNP could all agree on. I surmised that if we went into a detailed discussion of these issues at the onset of Maithri's campaign it would be doomed to utter failure… Therefore, strategically, I formulated the draft manifesto for Maithri purposefully leaving the exact nature of the proposed reforms open."[12]

[11] Ibid: p.129.
[12] Ibid: p.49.

In Sirisena's manifesto, the above strategy was articulated as follows:

"In order to change the Executive Presidential System I am taking as background material agreements for abolishing the Executive Presidential system reached by the Movement for a Just Society [NMSJ] headed by Venerable Maduluwawe Sobhitha Thero as well as the proposals contained in the Draft 19th Amendment compiled by the Pivithuru Hetak Jathika sabhava headed by Ven. Athuraliye Rathana Thero which proposed a Constitutional alliance of the President and the Prime Minister. I will also consider the changes proposed to these proposals by the United National Party."[13]

A pragmatic assessment of the broad coalition that was sought to be formed and the political situation under which Sirisena was contesting and trying to challenge the Rajapaksa regime would suggest that such an approach was inevitable and of much strategic potential. But all of this made the relationship between the idea of a new President and Prime Minister a thorny issue. How could the different understandings of this relationship be articulated? According to Abeygunawardana, it had been Ranil Wickremesinghe who had stepped in to resolve this problem, by recommending the following:

"The new constitutional structure would be essentially an Executive allied with the Parliament through the Cabinet instead of the present autocratic Executive Presidential System."[14]
All parties had agreed to this proposal, and Wickremesinghe had resolved a critical problem. Abeygunawardana states that this wording was nebulous in character. "I am still unaware what it means exactly." [15] Indeed, much of the negotiations on constitutional reform and many other issues that have (or may have) taken place to ensure the defeat of President Rajapaksa

[13] Ibid: p.149; Sirisena Manifesto, '*Manifesto: A Compassionate Maithri Governance, A Stable Country*': p. 14.
[14] Abeygunawardana (2015): p.153; Sirisena manifesto: p.14.
[15] Ibid.

could have evoked in the general political observer sentiments similar to those of Abeygunawardana.

The above would explain what followed with regard to the Nineteenth Amendment. Groups such as the JHU and *Pivithuru Hetak* had argued that the presidential system should be reformed (not abolished), and also that any significant change or abolition of the system could only be enabled through a popular referendum. Even the Sirisena manifesto stated that in the constitutional amendments he proposed: "I will not touch any Constitutional Article that could be changed only with the approval at a Referendum."[16] Additionally, the UNP was influential in promoting the idea of the '100 Days Programme', with the abolition of the executive presidency scheduled to take place within 100 days from the election of President Sirisena; this now being another unrealistic factor that only made the stance of forces such as the JHU and *Pivithuru Hetak* more credible, realistic, and pragmatic.

As discussed before, the idea of reforming the executive presidency conflicted with the aspiration of those who were focused on the total abolition of the presidential system. And though unstated in clear terms, it was this highly complex issue of a referendum that was sought to be avoided when the key drafters of the Nineteenth Amendment Bill[17] tried to include a provision, in the form of Clause 11 ('The Executive – The Cabinet of Ministers'), which sought to make the Prime Minister the head of the Cabinet of Ministers. Realising that a referendum was going to be a messy affair, and sensing that abolishing the presidency through a referendum is bound to be very difficult, this was the only move left for the constitutional lawyers drafting the Nineteenth Amendment; hoping, in addition, that in case the Bill goes before the Supreme Court, the clause would receive the judges' approval.

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[16] Sirisena manifesto: p.14.
[17] The Nineteenth Amendment to the Constitution Bill, available at: http://documents.gov.lk/Bills/2015/19th%20Amendment/E.pdf (last accessed 9th March 2016).

The Bill did go before the Supreme Court, and it held[18], inter alia, that:

"… if the Prime Minister seeks to exercise the powers referred to in the aforesaid Clause, then the Prime Minister would be exercising such powers which are reposed by the People to be exercised by the Executive, namely, the President and not by the Prime Minister. In reality, the Executive power would be exercised by the Prime Minister from below and does not in fact constitute a power coming from the above, from the President […]

The President cannot relinquish his Executive power and permit it to be exercised by another body or person without his express permission or delegated authority… Thus permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be struck down as being in excess of authority and violate Article 3 [Sovereignty of the People]. "[19]

The Supreme Court was correct in holding that Clause 11 of the Bill would violate the sovereignty of the people (and hence, require the holding of a referendum as per Article 83 of the constitution), especially also since the mandate received by President Maithripala Sirisena in January 2015 was not necessarily a clear mandate to abolish the executive presidency. Though political promises were made, it was never clear that the coalition of parties and groups supporting Sirisena had reached a firm decision on the question of abolishing the executive presidency; as was also evident from the discussion above on how the negotiations concerning the issue took place during the presidential campaign. While there were many parties willing to abolish the presidency, there were also forces very much closer to Sirisena that were against the idea.

[18] Supreme Court Determination on the Nineteenth Amendment to the Constitution (2014) SD No 04/2015, Supreme Court Minutes, 9th April 2015
[19] Ibid: p.11.

Finally, the Nineteenth Amendment,[20] apart from providing for a more independent institutional framework (as was hoped to be achieved via the Seventeenth Amendment), introduced a number of reforms to the executive presidency. Whereas the duration of the President's term was six years, the Nineteenth Amendment reduced it to five years. Whereas presidential terms were unlimited under the Eighteenth Amendment, the Nineteenth Amendment reintroduced the two-term limit. Reflecting the contentious and competing views on the abolition and reformation of the executive presidency, the Nineteenth Amendment contains in the form of Articles 42 and 43 a complex formulation setting out the relationship between the President, the Prime Minister, and the Cabinet of Ministers. For instance, though the President is considered to be a member as well as the Head of the Cabinet of Ministers (Article 42(3)), Article 42(1) states that the Cabinet is "charged with the direction and control of the Government of the Republic."[21] More interestingly, Article 43(2) states: "*The President shall, on the advice of the Prime Minister*, appoint from among Members of Parliament, Ministers, to be in charge of the Ministries so determined."[22] (emphasis added). Such reforms and provisions, on the one hand, reflected the conflictual character of the political objectives at play. On the other hand, however, some of these provisions appear relevant only within a political context wherein the President and Prime Minister belong to two different parties. The political context in which the Nineteenth Amendment was passed added some meaning to certain provisions which would have otherwise lacked much value.

Although the Nineteenth Amendment was adopted by an overwhelming majority in Parliament (and curiously so, since it was a two-thirds majority of the same Parliament which adopted the Eighteenth Amendment), the proposal to change the electoral system – what was to be embodied in the Twentieth Amendment – did not succeed. There were a number of reasons for this failure. Principally, a complex and delicate matter as the reformation of

[20] See http://slembassyusa.org/downloads/19th_Amendment_E.pdf (last accessed 17th March 2016).
[21] Ibid.
[22] Ibid.

the electoral system could not be undertaken within a political programme which promised to introduce major governance and electoral reforms within 100 days, and especially by a minority government (which was yet to be legitimately elected by the people). Secondly, the idea of electoral reform became an intense question of power-consolidation for both the SLFP and the UNP, making the debate over the reformation of the electoral system one of great noise but little substance.

The SLFP had promoted the view that the proportional representation (PR) system should now be abolished, bringing in the first-past-the-post (FPP) system. One reason that may have encouraged such a view is the deep belief that even though a new and unelected minority government led by the UNP was in place after the election of President Sirisena, the SLFP (or the UPFA) may still win a comfortable majority of seats under a FPP system if parliamentary elections were to soon follow the presidential election.

The UNP, on the other hand, appears to have held a different view. On the one hand, it had, in 2013, proposed what it considered to be a 'radical' set of constitutional reform proposals, which included, inter alia, the proposal that:

i. Parliament shall consist of 225 members elected on a mixed system where each constituency will elect its representative and the final result (seats in Parliament) will reflect the Party's true strength (i.e. total votes polled) at elections. This system will give value for every vote cast;
ii. The system of preference votes will be abolished…[23]

However, after the presidential election in 2015, the UNP seemed to have adopted a very reluctant stance on the question of electoral reform. This was perhaps due to its nagging suspicion that an election based on the FPP system would not be entirely

[23] See '*Full Text Of The Principles: UNP's New Draft Constitution To Submit People Within 6 Months After The Formation Of A Government*', ***Colombo Telegraph***, 29th May 2013, https://www.colombotelegraph.com/index.php/full-text-of-the-principles-unps-new-draft-constitution-to-submit-people-within-6-months-after-the-formation-of-a-government/ (last accessed 17th March 2016).

advantageous to the UNP. Rather, the UNP appears to have been more willing to go ahead with the existing PR system for a general election, hoping either to win a majority of seats or at least be able to form a 'national' government, through a coalition with other parties. Indeed, the UNP-dominated Cabinet of Ministers, established soon after the presidential election of January 2015, did endorse the proposed Twentieth Amendment, though with reservations and often confusing public reactions (as was evident from the statements made by UNP-politicians to the media). Also, the UNP opposed certain proposals made by the drafters of the Twentieth Amendment; such as the proposal to increase the number of MPs from the existing 225 to 255.[24] Such controversies and conflicting proposals helped the UNP to sustain its opposition while continuing to support the idea of electoral reform in principle. Such an approach was also due to the understanding that the Twentieth Amendment was largely a project handled by entities within the Presidential Secretariat and the likes of Asoka Abeygunawardana; with the UNP playing no significant part in the drafting of the proposed bill on electoral reforms.

Ultimately, these conflicting political aspirations stood in the way of a more measured and detailed discussion on electoral reform; and with progress concerning the draft Twentieth Amendment reaching an unsurprising deadlock, Parliament was dissolved.

As it will be one of the major issues before the new Parliament, it is useful to conclude this discussion by referring to the positions adopted by some of the nationalist groups on this issue, groups which are influential within President Sirisena's circle of policy-makers and advisors. Groups such as *Pivithuru Hetak* had made electoral reform one of their key goals. However, electoral reform was to come together with the reformation, not abolition, of the executive presidency. The nationalist forces strongly believe that the executive presidency and electoral reform were interrelated issues, which have to be addressed through a single package of

[24] See '*UNP defends 20th constitutional amendment*', ***Colombo Gazette***, 11th June 2014, http://colombogazette.com/2015/06/11/unp-defends-20th-constitutional-amendment/ (last accessed 17th March 2016).

reforms. Their understanding of electoral system reform was initially captured by Abeygunawardana in the following way:

"Under the FPP system, a majority of the Sinhala seats were usually obtained by a single party. In Tamil areas a single Tamil party won. Therefore, under that system, it was possible for a single party to obtain a majority representation in parliament… However, under the PR system, it was near impossible for any major party to obtain a clear parliamentary majority. Therefore, under that system a country will obtain, at best, a relatively unstable government and it is possible for a small group of MPs or a smaller party to topple it at any time. Therefore, the only reason why stable governments were possible in Sri Lanka after the introduction of proportional representation was thanks to the great stability provided by the powerful executive presidency. If, under some circumstance, the executive presidency is completely abolished and power given over completely to the parliament, no one will be able to prevent the country from becoming highly volatile and unstable."[25]

In the common proposal drafted by the *Pivithuru Hetak* movement's National Council, specific reference was made to the need for the reform of the election process. The idea proposed by the Council was to have a Parliament of 225 Members, with elections being held in 160 electorates that existed prior to the present system of elections to 22 electoral districts. Such elections were to be held on the FPP system, with candidates securing the highest number of votes in an electorate being declared elected. 15 members were to be elected from the National List; and the rest, on the proportional basis based on votes obtained by the losers from the 22 electoral districts with each district returning at least one member.[26]

The adoption of the Nineteenth Amendment and the abortion of the Twentieth Amendment brought to the fore some of the enduring tensions underlying Sri Lanka's contemporary politics, reflecting in turn the arduous and messy character of negotiating

[25] Abeygunawardana (2015): p. 41.
[26] Ibid: p.47.

competing political interests. The little success that was achieved in the form of the adoption of the Nineteenth Amendment had much to do with the particularity, even the peculiarity, of the political circumstances witnessed in January 2015. But the tensions have not subsided, and are bound to remain in a democratic framework as the one present in Sri Lanka. Unresolved, these tensions will take different forms and continue to guide the constitutional reform process presently underway. Fortunately, there will be no end to the political drama and conflict surrounding constitutional reform; reaffirming the reality that it is men and women with limited capacities, not machines, who will eventually decide what form and character their basic law ought to take.

# 3

# Cosmopolitanism as a Framework for Understanding Recent Political Change in Sri Lanka

*Laksiri Fernando*

## Introduction

In recent debates on Sri Lanka's future and required political change, academics and political analysts have extensively discussed constitutional and governance issues,[1] but not so much matters related to 'political culture' or 'electoral behaviour.' There has been some understanding for some time that the key ideology that influences the political behaviour of political leaders as well as the general public has been 'nationalism,' of various varieties and different types,[2] but no particular studies have been conducted to ascertain their influence on electoral behaviour in recent times.[3] Much of the prognosis on the adversarial effects of nationalism/s in the country was related to 'linguistic nationalism',[4] 'ethno-nationalism'[5] or 'separatist nationalism.'[6] On the normative side, however, except for some efforts to promote 'civic nationalism' in contrast to 'ethno-nationalism', [7] the prospects or possibilities for the emergence of more sober or grounded politico-psychological changes in the form of 'cosmopolitanism' has never been contemplated before.

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* Many thanks to Prema-chandra Athukorala (Australian National University) for his clarifications on P. Athukorala & S. Jayasuriya, '*Victory in War and Defeat in Peace: Politics and Economics of Post-Conflict Sri Lanka*' (2015) ***Asian Economic Papers*** 14(3): pp.22-54.

[1] J. Wickramaratne (2014) ***Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany*** (Colombo: Institute for Constitutional Studies); A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives).

[2] K.M. De Silva (1986) ***Religion, Nationalism, and the State in Modern Sri Lanka*** (Florida: University of South Florida); A.J. Wilson (2000) ***Sri Lankan Tamil Nationalism*** (London: Hurst).

[3] Much earlier analyses were by H. Wriggins (1960) ***Ceylon: Dilemmas of a New Nation*** (Princeton: Princeton University Press) on linguistic nationalism at the 1956 elections, and R.N. Kearney (1967) ***Communalism and Language in the Politics of Ceylon*** (Durham: Duke University Press) on communalism in general.

[4] Kearney (1967).

[5] N. DeVotta (2014) ***From Civil War to Soft Authoritarianism: Ethnonationalism and Democratic Regression in Sri Lanka*** (New York: Routledge).

[6] A. Bandarage (2009) ***The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy*** (New York: Routledge).

[77] L. Fernando, '*Sri Lanka's Predicament: Ethno-Nationalism versus Civic-Nationalism*', ***Asian Tribune***, 25th June 2007; L. Fernando, '*Sri Lanka: On the Question of Nationalism*', ***Colombo Telegraph***, 13th May 2013.

The dramatic political changes that swept the country at the presidential elections in January, and parliamentary elections in August 2015, to re-establish democracy and good governance, however demonstrate a certain maturity of the electorate that could be interpreted as a small but a definitive move towards cosmopolitanism.[8] This was predominantly within a context of a strong parochial discourse and xenophobic movement on nationalism, called *jathika chinthanaya* (nationalist thought), which attempted to preserve not only the status quo after the end of the war on terrorism, but also to move beyond on a further ethno-nationalist direction.[9] After the aforesaid electoral breakthroughs in January and August, the newly formed 'national government' has demonstrated a programme of action with certain traits of cosmopolitanism particularly in the areas of foreign affairs and economic policy in recognition of certain global realities.

The purpose of the present chapter therefore is twofold. Considering that cosmopolitanism is a new concept in the Sri Lankan context (although with some past roots), the first part of the chapter would be devoted to elucidating the main facets of that concept relevant to Sri Lankan debates and developments. The second part thereafter is devoted to ascertain the emergence of cosmopolitan trends and tendencies, particularly at the two elections with preliminary empirical evidence based on voting patterns and electoral demography.

## *1. The Concept and Philosophy of Cosmopolitanism*

Historically speaking, the concept of cosmopolitanism does not belong to one writer or school of thought. It has been used widely and diffusedly throughout centuries and only in recent times has a certain crystallisation of the concept emerged both as recognition

[8] L. Fernando, '*A Victory for 'Cosmopolitanism' over Narrow Nationalism*', ***Sri Lanka Guardian***, 29th August 2015.
[9] The pioneer advocate of *jathika chinthanaya* was Gunadasa Amarasekara, a popular fictionist. Later the main ideology became developed by Nalin de Silva (a professor) whose pioneer sketch of this ideology was in *Mage Lokaya* (My World) in 1986. See also, K. Senaratne, '*Jathika Chinthanaya and the Executive Presidency*' in Welikala (2015): Ch.16.

of 'globalisation' and also as a rational critique of it.[10] It is undoubtedly a concept counter to 'narrow nationalism' in the internal dimension, which also deviates from crude globalisation on the external frontier.[11] The term, which might still not be very popular or attractive in everyday political parlance, nevertheless is useful as a model of applied theory in visualising or analysing certain political trends and recent changes.

## Two Thinkers

It is customary to contrast two thinkers, one ancient and the other modern, Diogenes (404-323 BCE) and Emmanuel Kant (1724-1804), to elucidate the evolution of the concept from an individual notion to a much broader social conception. However, it should be noted that the ancient Stoics advocated a similar idea to Kant during the Greek and Roman periods, although this became somewhat tainted with Cicero's advocacy of the 'Empire.' The Stoic advocacy of the notion was as a 'cosmic community', which transcends one's national boundary especially in terms of justice, peace, and equality. This is the same meaning today.

Diogenes of Sinope, however, is considered the originator of the concept, or the term he used: *Kosmopolites* (citizens of the world). He was famous for carrying his daytime lamp as if to find the 'honest man' in the world. Since then cosmopolitanism has been part of moral philosophy. This Cynic philosopher, Diogenes, used to travel almost everywhere possible in the Mediterranean in his ragged clothes and when he was asked where he came from, he used to answer I am from nowhere, 'I am a citizen of the world.' His cosmopolitanism was thus eccentric, rootless, or represented extreme individualism, and might not be good for anyone today.

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[10] S. Vertovec & R. Cohen (Eds.) (2002) ***Conceiving Cosmopolitanism: Theory, Context, and Practice*** (Oxford: Oxford University Press); G. Delanty (2009) ***The Cosmopolitan Imagination: The Renewal of Critical Social Theory*** (Cambridge: Cambridge University Press); D. Held (Ed.) (2010) ***Cosmopolitanism: Ideals, Realities & Deficits*** (Cambridge: Polity Press); G. Delanty (Ed.) (2012) ***Routledge Handbook of Cosmopolitanism Studies*** (New York: Routledge).

[11] G. Delanty, '*Nationalism and Cosmopolitanism: The Paradox of Modernity*' in G. Delanty & K. Kumar (Eds.) (2006) ***The Sage Handbook of Nations and Nationalism*** (London: Sage).

This has been one criticism against cosmopolitanism even thereafter. Jean-Jacque Rousseau once said cosmopolitans argue that 'they love everyone, in order to have the right to love no one.'[12]

The enlightened modern philosopher, Emmanuel Kant, in the late eighteenth century was different. He turned cosmopolitanism on its feet. Therefore, the modern political conception of cosmopolitanism traces its origins to Kant and not to Diogenes. Kant's conception of a cosmopolitan is not as the rootless traveller who picks cultural titbits from different countries. It is an enlightened attitude and a 'world outlook' towards plurality, tolerance, multiculturalism, and co-existence. As Pauline Kleingeld explained:

> "Instead, on Kant's view, cosmopolitanism is an attitude taken up in action: an attitude of recognition, respect, openness, interest, beneficence and concern towards other human individuals, cultures and peoples as members of one global community."[13]

Kant was not a person who had travelled much or travelled at all. He lived in his hometown Konigsberg, Germany, most of the time. With its seaport, university, government offices, and international trade, he believed that he could easily connect with different languages, religions, and cultures, broaden his knowledge and be part of a 'common humanity.' This does not however deny the merit of travelling for the benefit of experience, knowledge or world outlook. The point is that Kant's cosmopolitanism was not rootles or unconcern for one's own culture or upbringing. Even Kant believed that cosmopolitans can or ought to be 'good patriots.'

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[12]Although Rousseau criticised cosmopolitanism of Diogenes' type, he was an advocate of 'civic patriotism' and not 'ethnic patriotism.'

[13] P. Kleingeld (2012) ***Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*** (Cambridge: Cambridge University Press): p. 1.

## The Kantian View

Kant developed cosmopolitanism beyond a mere moral philosophy. In that effort the concept came closer the modern political realities or political realism. It should be noted that he was not the only thinker who advocated cosmopolitanism during his time. Three facets of cosmopolitanism that Kant talked about were political, economic, and cultural. Moreover, he was the first person to develop some clear notions of international institutional arrangements within which cosmopolitanism could exist and thrive. The relevance of these ideas loom large today in the context of international obligations of countries and individuals in respect of universal human rights and international justice. Recent debates and changes in Sri Lanka could also be viewed in this light. According to this view, the fate of individuals particularly in the realm of human rights in a country is beyond the formal jurisdiction of that country and is a concern of the global community at large. The concept of 'responsibility to protect' (R2P), recognised by the UN, emerges from that premise.[14]

As in the case of any other philosophy, there are extremes even in the case of cosmopolitanism. The value of the Kantian conceptualisation is the avoidance of these extremes. Taking the Cynic notion of cosmopolitanism, detractors always argued about the seeming contradiction between the notion of 'world citizen' and the 'citizen of a country.' According to the Kantian view, these are two dimensions of the same citizenship, emerging from common humanity, the correlation of which would be positive given the way both national actors and the international players interact with each other. According to Kant, the ideal of correlation that could happen is not through a 'world state' but a voluntary federation or a league of nations. In these views, he undoubtedly presaged the formation of the League of Nations (1920) and later the United Nations (1945). Kant was a defender of the plurality of states and not the other way round.

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[14] G. Evans (2008) ***Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*** (Washington: Brookings Institution Press).

Although there were traces of a racial theory in Kant's early writings,[15] these racial hierarchical views became modified or abandoned later in the 1790s, and he was a firm advocate of cultural plurality in the world, colonial parts of the globe included. Kant held a theory of rights and in the same vein he defended a right to cosmopolitanism. It incorporated a 'right to hospitality' applied to migrants, refugees, and asylum seekers, or similar groups who need assistance from other states or the international community then or today.

Kant is one who extended cosmopolitanism to embrace international trade. It is often viewed as 'free-market cosmopolitanism'. However, even during his time, free-market cosmopolitanism fundamentally differed from free-market liberalism or today's neo-liberalism. He brought the notion of 'economic justice' to the notion of free-market cosmopolitanism. It was his view that international trade promotes peace and perpetual peace. He was not advocating unbridled free trade. As Pauline Kleingeld showed,

> "… Kant's legal and political theory (especially his republicanism, his theory of property, and his defence of state-funded poverty relief) implies that trade should first of all be just, and that it can be 'free' trade only within the bounds of justice."[16]

A brief look at Kant's *Perpetual Peace* (1795) might be the best way to sum up his views on cosmopolitanism.[17] Although his focus was mainly on world peace, his propositions are equally valid for peace within a country like Sri Lanka. Kant was not talking about any kind of peace or temporary peace but perpetual peace. To him, no peace is everlasting unless underlying causes of war or violence are addressed. Given the human inclination for aggression and violence, he opined, perpetual peace also require strict rules and laws based on justice. In a world context, as he said, unless laws are based on addressing the issues of global

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[15] Kleingeld (2012).
[16] Ibid: 8.
[17] See J. Bohman & M. Lutz-Bachmann (Eds.) (1997) ***Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*** (Massachusetts: MIT Press).

citizens and their rights, no peace or stability could be achieved in a perpetual manner. World law (or cosmopolitan law) should not merely be the laws between states, but the laws of or for the global citizens. In this respect, he advocated a new vision for international law. The same goes for the laws within states, whether fundamental (constitutional) law or ordinary law. They should address the needs and aspirations of the citizens. This applies in assessing the constitutional reforms in Sri Lanka including the Nineteenth Amendment and future constitution-making.

## Cosmopolitanism Studies

It is customary to consider the period since the French Revolution (1789) as the age of nationalism.[18] Kant was an exception or aberration to this period. Within this wave of strong nationalism, notions of cosmopolitanism became submerged if not completely disappeared at least until the end of the Second World War. Marxism was another philosophy which tried to counter nationalism through internationalism, but its many advocates have succumbed to nationalism through various pretexts.[19] It is only recently that academic Marxism has been in a position to influence the revival of contemporary cosmopolitanism. There were sincere attempts to prophecy the demise of nationalism after the end of the war by academics like Elie Kedourie,[20] but the attempt became submerged thereafter within the euphoria about nationalism, and much worse, ethnonationalism. But ethnonationalism was not even nationalism proper but its decomposition. It was Kedourie's view that 'for an academic to offer sympathy for nationalism is virtually impertinent.' His failure

[18] H. Kohn (1944) ***The Idea of Nationalism: The Study of Its Origins and Background*** (New York: The Macmillan Publishers); E.J. Hobsbawm (1990) ***Nations and Nationalism since 1780: Programme, Myth, Reality*** (Cambridge: Cambridge University Press).

[19]Apart from Marx's famous but often mistaken dictum that 'workers have no nationality,' his main thesis was arguing against Friedrich List's narrow analysis of the 'national system of political' economy: G. Achcar (2013) ***Marxism, Orientalism, Cosmopolitanism*** (London: Saqi Books). Marx advocated a world outlook and analysis.

[20] E. Kedourie (1960) ***Nationalism*** (London: Hutchinson).

or weakness perhaps was in not looking for alternatives. It is in this context that the value of increased academic interest in cosmopolitanism studies could be appreciated. These studies are not new but old as we have outlined. Therefore it is also independent from recent global studies or globalisation studies. As a normative philosophy, the value of cosmopolitan studies has enlarged nevertheless because of globalisation. As Gerard Delanty has argued, "The world may be becoming more and more globally linked by powerful global forces, but this does not make the world more cosmopolitan."[21] Therefore, in the broadest meaning of the term, cosmopolitanism is about broadening the moral, social, cultural and political horizons of people, leaders, and organisations beyond their close confines. It also means an attitude of openness as opposed to closure within and outside a country. It is primarily about going beyond the 'iron cage' of nationalism, whether the country is socialist or capitalist.

There are two major reasons why the concept and philosophy of cosmopolitanism has become crucially important since the last decade of the twentieth century. First is globalisation, which has created enormous space for cosmopolitanism in whatever variety you speak of the concept. Technological integration of the world has become the infrastructure through which cosmopolitanism is and can be promoted. If cosmopolitanism is not a natural outcome of globalisation, it has become an imperative because of the threats associated with globalisation. Globalisation has even produced ideas rejecting cosmopolitanism or calling for a new form of cosmopolitanism. The call is for global citizens without states.[22] However, the main theorists of cosmopolitanism and more realist academics have held the fort. There is no rejection of the state in contemporary cosmopolitanism. Jurgen Habermas has come with 'constitutional patriotism' and Ulrich Beck even with 'cosmopolitan nationalism.' Delanty's conception is 'critical cosmopolitanism.'[23]

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[21] Delanty (2012): p. 2.
[22] L. Trepanier & K. Habib (Eds.) (2011) ***Cosmopolitanism in the Age of Globalization: Citizens without States*** (Kentucky: The University Press of Kentucky).
[23] Delanty (2012): pp. 38-46.

Second is the collapse of communism. Developments in this sphere have been bizarre and contradictory. Considering the nature of socialist and communist ideologies, one could have assumed that these countries were favourable to cosmopolitanism. Unfortunately, that was not the case. In the case of some Eastern European countries, some form of cosmopolitanism was applied, although selectively.[24] However, this was not the case in the Soviet Union, and even now, the countries of the former union have not been able to overcome the situation completely. Particularly during the Stalinist period and even thereafter, those who professed any form of free cosmopolitanism, except a limited form of regime sanctioned 'international solidarity,' were considered traitors or 'enemies of communism.' This is still the case in North Korea or even the much economically opened up China. Only Cuba shows clear signs of deviating from such a closed situation. Although the collapse of communism opened up space and opportunities for cosmopolitanism, the actual developments have still not taken place in many countries.

There are many other reasons why cosmopolitanism has become important today. Apart from its utility in countering narrow nationalism, cosmopolitanism has become important as a theoretical framework in understanding many social changes in our midst in Sri Lanka or overseas. As this is being written, thousands and thousands of refugees are fleeing the Syrian crisis and are arriving in Europe, crossing difficult borders seeking 'cosmopolitan hospitality.' Tracing social changes favourable to cosmopolitanism since the early 1990s, Delanty maintained that they are linked up with the "expansion of democracy and the extension of the space for the political."[25] Some of the other developments that he traced were the end of Apartheid, Tiananmen Square upheavals, and democracy movements in the Arab world. There are many others with him who have also acknowledged the importance of the two hundredth anniversary of Kant's 1795 work *Perpetual Peace* in 1995 as an important

[24] U. Ziemer & S. Roberts (Eds.) (2013) ***Eastern European Diasporas, Migration and Cosmopolitanism*** (New York: Routledge): p.7.
[25] Delanty (2012): p. 3.

landmark in the revival of cosmopolitanism. Delanty also noted the following.

> "The 1990s were marked not only by such major political events of global significance, but in addition by the arrival of the internet and an epochal revolution in communication technologies which led not only to the transformation of everyday life and politics but capitalism too. The sense of epochal change was enhanced with a sense of a new millennium."[26]

It is on the basis of the above theoretical and conceptual premises, although not comprehensive by any means, that an attempt would be made in the next part of this chapter to understand the recent political changes in Sri Lanka in terms of cosmopolitanism and/or moving away from narrow nationalism.

## *2. Understanding the Challenges of Change*

The interpretation of political change at the two recent elections, in January and August 2015, is the main focus of this second part of the chapter from the point of view of cosmopolitanism that I have outlined above. The dramatic character of this change was signified by the ousting of the leader, the former President Mahinda Rajapaksa, who in fact won the war against 'separatism and terrorism' just six years back in 2009,[27] and therefore the change could safely be interpreted as a – small nevertheless significant – move away from strong ethnonationalism towards a desirable form of cosmopolitanism. The reason or the justification to interpret the election results as a move away from strong ethnonationalism is the fact that the former President Rajapaksa contested both the presidential elections in January and the parliamentary elections in August primarily on the basis of an ethnonationalist election platform.

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[26] Ibid.
[27] C.A. Chandraprema (2012) ***Gota's War*** (Colombo: Ranjan Wijeratne Foundation).

As far as I am aware, so far, there are no empirical studies conducted on the correlation between the emergence of cosmopolitan trends and electoral or regime change in countries where previously politics were dominated by parochial regimes and narrow nationalism. However, recently Miyase Christensen and André Jansson noted, "Iranian national elections of 2009, the Occupy Movement and the Arab Spring, taken together, have opened up a cosmopolitan space of global debates through popular communication networks."[28] Their focus in discussing the cosmopolitan trends is in relation to the media. It is on the same vein that Lilie Chouliaraki discussed two case studies, the Haiti earthquake and the Egyptian uprising.[29] Of course the role of the new media or more particularly social media was conspicuous in electoral change, generating cosmopolitan orientations among the voters in Sri Lanka.[30] However, the present interpretation goes beyond this and analyses some important glimpses of voter behaviour and changing electoral demography in Sri Lanka in analysing electoral change and the emergence of cosmopolitan trends.

In addition to the electoral change, accompanied by majority-minority alliances, civil society activities and movements of professional groups, there have emerged certain notions, propositions, and policies that could be associated with some form cosmopolitanism. A major issue at the presidential elections in January for example was 'good governance' or 'compassionate government' (*maithri palanayak*). This was contrasted to the then prevailing rule, which was criticised as authoritarian, corrupt, and nepotistic. The abolition or a fundamental modification of the executive presidential system was promised and it was put into

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[28] M. Christensen & A. Jansson (2015) ***Cosmopolitanism and the Media: Cartographies of Change*** (New York: Palgrave): p.5.

[29] L. Chouliaraki & B. Blaagaard (Eds.) (2014) ***Cosmopolitanism and the New News Media*** (New York: Routledge): Ch.8. It is interesting to note the emergence of a formative type of cosmopolitan solidarity in Sri Lanka during the Asian Tsunami in December 2004. Facing natural calamity, people, transcending ethnic and other barriers, got together. However, this trend did not last long. But the experiences seem to be absorbed by the youth.

[30] One important study in this direction is by N. Gunawardene, '*Sri Lankan Parliamentary Election 2015: How Did Social Media Make A Difference?*', ***Groundviews***, 3rd September 2015.

practice, whatever the weaknesses or deficiencies, through the Nineteenth Amendment to the Constitution under the new minority government in April 2015. A most important aspect of the Nineteenth Amendment was the reinstatement of the Constitutional Council and the independent commissions which could give a cosmopolitan orientation to the state administration and structures, drawing the best talent from all communities in society.

At the parliamentary elections in August, the leading coalition, the United National Front for Good Governance (UNFGG), declared a policy of 'Social Market Economy' for the first time in the country. If this is implemented properly, it would be a major boost to cosmopolitanism. Most importantly, the foreign policy orientation has shifted significantly from an anti-Western and anti-UN posture to cooperation and constructive collaboration. This has become very clear from the current government's position at the UN Human Rights Council (2015) in contrast to the previous postures of the previous government. There are many other policy shifts that could be considered conducive to future cosmopolitanism, but all cannot be discussed within the scope of this section.

**Cosmopolitan Electoral Change**

The January presidential elections might prove to be a watershed in Sri Lankan political history in recent times. It is called a 'silent revolution' or a 'democratic revolution.' It was 'silent' because it eventuated through the ballot box unlike the Arab Spring. It was a 'democratic revolution' because it managed to oust the incumbent President who was authoritarian and at least undemocratic. He was contesting for an unprecedented third term, after changing the constitution to that effect through dubious means. If he managed to win the elections, the form of Sri Lankan politics would have taken a disastrous path.

At the presidential elections in January when he was defeated, Rajapaksa received only 47.6 per cent of the national vote, whereas his vote at the previous presidential elections in 2010 was 57.9 per cent. This was a 10 per cent swing in percentage terms

within less than five years. In contrast, the common opposition candidate and the present President, Maithripala Sirisena, received 51.3 per cent for a comfortable victory whereas the previous opposition candidate in 2010, Sarath Fonseka, received only 40.1 per cent of the national vote. The increase was approximately 11.2 per cent.

More significant was the swing of votes at the parliamentary elections in August from the presidential elections in January. At the parliamentary elections, Rajapaksa contested again as a kind of unofficial prime ministerial candidate. However, his party, the United Peoples Freedom Front (UPFA), with considerable sections now opposing his politics, received only 42.3 per cent of the votes. This was a decrease of 5.3 per cent within seven months. The pre-January 2015 opposition and the interim government (UNFGG) between January and August 2015 received 45.7 per cent. This was also a decrease of 5.7 per cent, as two main constitutive parties of the common opposition in the presidential election, the Tamil National Alliance (TNA) (4.6 per cent) and the Janatha Vimukthi Peramuna (JVP) (4.8 per cent), as well as other smaller parties, contested the parliamentary elections separately. However, when taken together, it was an improvement of 3.8 per cent within seven months.

It is on record that Mahinda Rajapaksa attributed his defeat at the presidential elections to the Tamil vote and was hopeful of winning the parliamentary elections on the basis of the Sinhalese vote in the South. That was the case if only judged by the attendance at his public rallies. But that did not happen. As Nirupama Subramanian reported in *The Indian Express* (19th August 2015), after the last campaign meeting, Rajapaksa had predicted the following:

> "In almost every district in southern Sri Lanka, I won the presidential election. Sirisena won only because he got the minority votes from Tamils in the North. But this is not a presidential election. This is different. We will win all those districts in this election again and get a majority."

It is true that the Tamil vote particularly in the North and the East was decisive at the last presidential elections. They

overwhelmingly voted for the moderate common candidate Maithripala Sirisena. It is interesting to note the voting behaviour of those Tamil voters as shown in Table 1 in the last three presidential elections: 2005, 2010 and 2015. The table gives percentages of votes in five Northern and Eastern districts for the seemingly moderate Sinhala candidates, Ranil Wickremesinghe, Sarath Fonseka, and Maithripala Sirisena respectively at the three elections. In all these elections, Rajapaksa contested. The candidates are denoted by their initials as MR (Rajapaksa), RW (Wickremesinghe), SF (Fonseka), and MS (Sirisena).

**Table 1: Voter Behaviour at Presidential Elections in North and East (Districts)**

| | 2005 | | | 2010 | | | 2015 | | |
|---|---|---|---|---|---|---|---|---|---|
| | Turnout | MR | RW | Turnout | MR | SF | Turnout | MR | MS |
| Jaffna | 1.21 | 25.00 | 70.20 | 25.66 | 24.75 | 63.84 | 66.28 | 21.85 | 74.42 |
| Vanni | 34.30 | 20.36 | 77.89 | 40.33 | 27.31 | 66.86 | 72.57 | 19.07 | 78.47 |
| Batticaloa | 48.51 | 18.87 | 79.51 | 64.83 | 26.27 | 68.93 | 70.97 | 16.22 | 81.62 |
| Digamadulla | 72.70 | 42.88 | 55.81 | 73.54 | 47.92 | 49.94 | 77.39 | 33.82 | 65.22 |
| Trincomalee | 72.70 | 37.04 | 61.33 | 68.22 | 43.04 | 54.09 | 76.76 | 26.67 | 71.84 |

Source: Department of Elections, Sri Lanka

As the above table shows those voters have preferred a moderate candidate (WR, SF or MS) at all three elections. That is what the percentages show for RW (2005), SF (2010) and MS (2015). At the last elections, MS won 74.42, 78.47, and 81.62 per cent of vote in the three districts of Jaffna, Vanni, and Batticaloa respectively. Even MR could not win such a percentage in his home turf, Hambantota in the South, even at the 2010 elections, which was 67.21 per cent in 2010 and 63.02 per cent at the last elections. The most important factor is the voter turnouts at these elections, in respect of voting for the moderate candidates.

At 2005 elections, there was extreme polarisation between the two communities or the North and the South. There was a pronounced boycott in the North (particularly in Jaffna and Vanni) engineered by the Liberation Tigers of Tamil Eelam (LTTE). The overwhelming demand at that time was a 'separate state' and not ethnic accommodation. The voter turnout was extremely low: mere 1.21 per cent in Jaffna and 34.30 per cent in

Vanni. It is true that the voters were prevented by coercion. However, even at the 2010 elections, the voter turnouts were 25.66 and 40.33 per cent in the respective two districts. What this voter behaviour shows is moderation, and an increasing 'cosmopolitan' disposition moving away from the extremism that was evident in 2005. Judging by these election results, there has been a clear desire and willingness on the part of the Northern Tamils in the country for ethnic accommodation at the last elections, both presidential and parliamentary, which have brought political change to the country.

## Other Factors in Cosmopolitanism

The electoral behaviour of the other minorities, particularly the Muslims and the Hill Country Tamils, has been different. Judging by the positions of the Sri Lanka Muslim Congress (SLMC) and the Ceylon Workers Congress (CWC), two main parties of the two communities respectively, what could be seen until lately is the willingness for political accommodation with the Sinhalese majority or the ruling party UPFA. Although both parties supported the moderate candidate, Wickremesinghe, at the 2005 presidential elections, both parties were willing to work with Rajapaksa after his victory in 2005, even at the risk of losing rank and file support. This was one reason for various splits and splinters from both parties. However, the situation was unviable particularly for the SLMC and the Muslim community by the time of the 2015 elections. There had been major attacks on religious places of the Muslim community since 2013. Similarly, there were attacks on evangelical Christian places of congregation during the same period. Therefore, apart from the Tamils concentrated in the Northern and some parts of the Eastern Province, the other dispersed sections of the Tamils (originally Northern or Hill country), the Muslims, and even the Christians were catalysts in bringing about electoral change both at the presidential and parliamentary elections.

There are other researchers who have employed regression analysis to examine voter behaviour between 2010 and 2015

presidential elections[31]. They have examined factors that contributed to the dramatic change in the 'Mahinda Rajapaksa Margin' (MRM) between the two elections and found that inter-district differences in the 'share of all minorities' played a key role, other than what we have discussed in Table 1 for the Northern and the Eastern districts. They have shown that the 'share of all ethnic minorities' combined with the 'share of urban population' in an electoral district/province have affected the MRM to drop.[32] Two other relevant variables, which the authors could have included in this regression analysis, are the 'religious minorities' (i.e. Christians) and the 'share of youth' in the electoral demography.

By the general elections in August, however, it became clear that even where the 'share of all minorities' has been absent or low, the MRM has dropped (i.e. Polonnaruwa or even Moneragala). This may be due to the 'youth element' or leadership factors. This is also where the cosmopolitan effect has emerged in the case of the Sinhala majority districts. It has been my conviction that urbanisation and modern youth play a major role in cosmopolitanism in any country and particularly in Sri Lanka. This is without a distinction as to ethnicity or religion. They are the people who are largely influenced by the 'new news media' discussed in Chouliaraki and Blaagaard (2014).[33] They are equipped with the 'social media' devices that Nalaka Gunawardene talked about in Sri Lanka this year.[34] Between 2010 and 2015, there has been nearly a million newly registered voters, all youth. The percentage of population and thus probably the percentage of voters between 18 years and 25 is nearly 15 per cent with a decisive say in an election. They may remain dormant without leadership particularly in rural areas. But when they are given leadership or opportunity they become activated. That is what was demonstrated in the August general elections. Table 2 shows the voter shift between the 2010 and 2015 parliamentary elections in respect of the two main contending parties/coalitions

[31] Athukorala & Jayasuriya (2015).
[32] It may also be useful to undertake this analysis at the electorate level where the variations in these variables would be more conspicuous.
[33] Chouliaraki & Blaagaard (2014).
[34] Gunawardene (2015).

on a percentage basis in districts other than in the North and East. This is in a way the cosmopolitan shift.

**Table 2: Voter Behaviour at Parliamentary Elections in Districts (Other than North and East)**

**UNP/UNFGG/UPFA**

| | 2010 | 2015 | % Change | 2010 | 2015 | % Change |
|---|---|---|---|---|---|---|
| Central Prov. | | | | | | |
| Kandy | 34.48 | 55.57 | +21.09 | 60.77 | 38.98 | -21.79 |
| Matale | 28.47 | 49.84 | +21.37 | 66.96 | 45.54 | -21.42 |
| Nuwaraeliya | 36.39 | 59.01 | +22.62 | 56.01 | 37.98 | -18.03 |
| Southern Prov. | | | | | | |
| Galle | 26.03 | 42.48 | +16.45 | 66.17 | 50.07 | -16.10 |
| Matara | 27.81 | 39.08 | +11.27 | 65.31 | 52.44 | -12.67 |
| Hambantota | 29.86 | 35.65 | +5.79 | 62.87 | 53.84 | -9.03 |
| Western Prov. | | | | | | |
| Colombo | 36.17 | 53.00 | +16.83 | 51.19 | 39.21 | -11.98 |
| Gampaha | 28.67 | 47.13 | +18.46 | 63.37 | 44.92 | -18.45 |
| Kalutara | 28.32 | 44.47 | +16.15 | 63.68 | 48.56 | -15.12 |
| North-Western | | | | | | |
| Kurunegala | 31.78 | 45.85 | +14.07 | 63.84 | 49.26 | -14.58 |
| Puttalam | 31.36 | 50.40 | +19.04 | 64.83 | 42.83 | -22.00 |
| North-Central | | | | | | |
| Anuradhapura | 24.17 | 44.82 | +20.65 | 66.52 | 48.35 | -18.17 |
| Polonnaruwa | 26.67 | 50.26 | +23.59 | 69.22 | 43.63 | -25.59 |
| Sabaragamuwa | | | | | | |
| Ratnapura | 28.21 | 44.94 | +16.73 | 68.86 | 51.19 | -17.77 |
| Kegalle | 28.95 | 49.52 | +20.57 | 66.89 | 45.47 | -21.42 |
| Uva Prov. | | | | | | |
| Badulla | 32.28 | 54.76 | +22.48 | 58.25 | 37.97 | -20.28 |
| Moneragala | 18.12 | 41.97 | +23.85 | 75.64 | 52.53 | -23.11 |
| | | | | | | |
| National | 29.34 | 45.66 | +16.32 | 60.33 | 42.38 | -17.95 |

Source: Department of Elections and Wikipedia. Note that figures under 'National' include North and East.

As this table shows, the overall shift towards the UNP/UNFGG has been +23.85 per cent and the drop of MRM -23.11 per cent. The most significant shifts have taken place in districts where the 'share of minorities' or the 'multicultural dimension' is high. The Central Province, and its three districts – Nuwara Eliya (+22.62), Matale (+21.37) and Kandy (+21.09) – stand prominent. In this province, taken as an example, the share of the Muslims and the

Hill Country Tamils stands high, but without a major shift among the Sinhalese, the above result could not have been possible.[35]

Another significant factor in the cosmopolitan shift in elections is the 'share of urbanisation.' The count of urbanisation in Sri Lanka is not very sophisticated. The urban population is still considered 18.4 per cent, counted on the basis of the population in municipal and urban council areas. Even if this methodology is acceptable, it has been an extremely slow and cumbersome process to upgrade divisional (rural) councils to urban councils or municipal councils. There are 23 municipal councils and 41 urban councils at present. If we take the municipal council areas as an example, all cannot be considered congruent with old electorates although names are the same.[36] For example, the Colombo Municipal Council area covers several electorates. However, it is interesting to note that out of 23 municipal council areas, the voting in 14 areas went significantly in favour of the UNFGG, and the UPFA could win only 6 areas at the last general elections in August. When it came to the urban council areas, the congruence between a parliamentary electorate and a local government area is complicated. However, most of the urban council areas out of 41 were located within the districts, which were won by the UNFGG.

Having said the above, the 'cosmopolitanism' of rural voters should not be underestimated. After all, Sri Lanka is a small country with high connectivity. As the above table shows, the highest drop of the MRM was in Polonnaruwa (-25.59) and then came Moneragala (-23.11), although the latter district could not be won by the UNFGG. What this shift signifies is the leadership factor, and at elections, the campaign factor countering parochial nationalism.

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[35]This chapter does not attempt to analyse all the important figures in the table for want of space.

[36]The municipal council areas are: Colombo, Dehiwala-Mt. Lavinia, Kotte, Kaduwela, Moratuwa, Negombo, Gampaha, Kurunegala, Kandy, Matale, Dambulla, Nuwara Eliya, Badulla, Bandarawela, Galle, Matara, Hambantota, Ratnapura, Anuradhapura, Jaffna, Batticaloa, Kalmunai, and Akkairapattu.

There were other cosmopolitan trends discernible at the parliamentary elections. For example, the extremist political parties could not get much of a foothold whether in the South or the North. The political party of the infamous Bodu Bala Sena (Buddhist Force Army), the Bodu Jana Peramuna (BJP), contested 16 districts but obtained only 20,377 votes, mere 0.18 per cent of the total polled. The fate of the Tamil National People's Front (TNPF) was very much similar, obtaining only 18,644 votes in Jaffna and 0.17 per cent altogether. The UNFGG managed to win one seat each in Jaffna and Vanni districts showing also a trend of cosmopolitanism among the overwhelmingly Tamil voters, some of whom favouring national parties who assure minority rights.

### *Conclusion*

There were two purposes to the present chapter, one theoretical and the other empirical or practical. The first part of the chapter outlined cosmopolitanism as a concept and a social philosophy, or one might even say an ideology, which could supply a viable alternative to narrow nationalism or ethnonationalism in the case of Sri Lanka or any other country. The second part of the chapter was based on the observation that cosmopolitanism is also a social phenomenon that might appear or disappear, like any other phenomenon, and that it has appeared at the last two elections in January and August in bringing desirable political change and democracy to the country. There have been emerging synergies between cosmopolitanism, democracy, and good governance. The empirical evidence related to the two elections were analysed to ascertain this cosmopolitan trend within the limits of this short chapter.

When cosmopolitanism is understood in that twin manner, it is an obvious conclusion to say that cosmopolitanism can be promoted both as a social philosophy or a public policy on the one hand, and as a political culture (with values and attitudes) through education with desirable social or electoral behaviour on the other hand. It is also evident that the social foundations of cosmopolitanism could be further expanded and strengthened through measures such as urbanisation, promotion of cultural

integration of different communities, and technological advancements in communication. It is important to note that what appeared as an urban phenomenon with minority input at the presidential elections expanded into the rural areas at the general elections. Political leadership (i.e., President Sirisena, Prime Minister Wickremesinghe and former President Kumaratunga) and organisational factors (i.e., the UNFGG) in promoting cosmopolitanism might be the most decisive factors in this link at present and in the future. The modern youth equipped with information technology undoubtedly played (and would play) a decisive role in this transition both in the urban and rural areas.

# 4

# *Yahapalanaya* as Republicanism

Asanga Welikala[1]

[1] This chapter is an updated and revised version of A. Welikala, '*Ethnocracy or Republic? Paradigms and Choices for Constitutional Reform and Renewal in Sri Lanka*' (2015) ***The South Asianist*** 4(1): pp.1-24.

On 28th April 2015, Sri Lanka recorded an historic constitutional milestone when its Parliament enacted the Nineteenth Amendment to the 1978 Constitution.[2] The process of its drafting and enactment had been disorganised and opaque, its passage in Parliament fought clause by clause by the opposition, and the final content of the amendment was a much-diluted version of the original proposals of the government. But this was nevertheless the most substantial reduction of the powers of the executive president since the introduction of that office in 1977. Even though since the mid-1990s various presidential candidates had obtained repeated mandates for its abolition,[3] once in office they had not merely broken the promise, but in the case of President Mahinda Rajapaksa in 2010, actually expanded its powers.[4]

Since the dramatic ouster of the Rajapaksa regime in the presidential election of January 2015, the new Sri Lanka government headed by President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe has been engaged in a process of constitutional reform. The first phase of this was the 100-day reform programme, undertaken in between the presidential and parliamentary elections in 2015. The centrepiece of this programme was the abolition or at least the reform of the executive presidency. In challenging President Rajapaksa, there was the widest consensus among the parties involved in the Sirisena candidacy that something must be done to reduce the deleterious consequences of the uncontrolled presidency. Executive presidentialism has been opposed on grounds of constitutional democracy ever since it was first proposed, but

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[2] Due to the large number of committee-stage amendments that had to be incorporated into the final text in all three languages, however, there was a delay in the Speaker's certification, which is formally the final stage of the legislative process. The final text of the Nineteenth Amendment to the Constitution was published on 15th May 2015.
[3] The winning candidates in the 1994, 1999, and 2005 presidential elections unequivocally promised abolition of the executive presidency. While in 2010 the promise was more amorphous, it was still suggested that substantial reforms to cut back its powers would be made.
[4] The Eighteenth Amendment to the Constitution (2010) removed the two-term limit on presidential office and procedural restraints on presidential powers. See R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives).

especially after the expansion of its powers through the Eighteenth Amendment, these problems had become acute.[5] However, there was less consensus on whether the remedy was to abolish presidentialism altogether and return to a parliamentary system, or whether the benefits of presidentialism could be retained whilst removing its more egregious features.[6]

While such debates about systems of government are common to any constitutional reform exercise, in practice choices between presidential and parliamentary models found in political science and constitutional law textbooks are never clear-cut.[7] Heuristic models help in clarifying the available options and their strengths and weaknesses no doubt, but ultimately constitutional choices about the system of government are decided by contextual factors. History and culture – or more accurately in a plural polity, histories and cultures – influence the way more fundamental ideas like nation, state, and sovereignty are conceived, and these in turn determine how institutions of government are designed. In the mid-1960s, J.R. Jayewardene's advocacy of presidentialism was based on rationales of practical politics. He identified the transience of parliamentary majorities as a major weakness of the post-colonial political system when seen against the requirements of a stable and relatively enduring executive for rapid economic development.[8] When he eventually obtained the power to introduce presidentialism in the late-1970s, the legitimating arguments he used for this radical constitutional innovation took a more pronounced historical and cultural turn in drawing upon parallels directly from the pre-colonial Sinhala-Buddhist monarchy.[9]

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[5] See J. Wickramaratne, '*The Executive Presidency: A Left Perspective*' and R. Edrisinha, '*Constitutionalism and Sri Lanka's Gaullist Presidential System*' in A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): Chs.27, 28.

[6] See chapter by Kalana Senaratne in this volume.

[7] See chapter by Artak Galyan in this volume.

[8] See his seminal 1966 speech to the Ceylon Association for the Advancement of Science cited in K.M. de Silva & H. Wriggins (1994) ***J.R. Jayewardene of Sri Lanka: A Political Biography***, Vol.II (London: Leo Cooper): pp.377-9.

[9] S. Kemper, '*J.R. Jayewardene: Righteousness and* Realpolitik' in J. Spencer (Ed.) (1990) ***Sri Lanka: History and the Roots of Conflict*** (London:

This example of how presidentialism was designed and legitimated points us to a number of salient matters to bear in mind when discussing the reform of that institution almost forty years thence. Firstly, it reminds us of the importance of the "dialectical relationship between tradition and modernity" in most post-colonial contexts such as Sri Lanka, and the "powers of tradition to evolve creatively in a new environment."[10] The interrelationship between the traditional and the modern therefore is central to our analytical understanding of contemporary political institutions and political mobilisation.[11] Flowing from this, secondly, is the methodological caution against relying solely on modern positivist categories of institutional design. If we see reforming presidentialism as solely about the relative merits of positivist models of presidentialism and parliamentarism, we fail to appreciate the deeper ideas about collective identity and the state that are at play in the societal conversation about institutional reform.[12] Thirdly, we need to have a proper understanding of the process of constitutional change that Sri Lanka is currently undertaking, its character, and its temporal span. What happened in the January 2015 presidential election was not a routine change of government followed by changes in policy direction; it was a fully-fledged regime change aimed at bringing about a constitutional transition from a burgeoning ethnocratic state to a republican constitutional democracy. The reform moment began in mid-2014 and gained inexorable momentum throughout the latter half of the year with a growing coalescence of the broadest array of political parties and civil society groups ever mobilised against a sitting President. With the re-election of the Sirisena-Wickremesinghe government in the August 2015 parliamentary election, the reform moment

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Routledge): Ch.9; R. de Silva Wijeyeratne, '*Cosmology, Presidentialism and J.R. Jayewardene's Constitutional Imaginary*' in Welikala (2015): Ch.14.

[10] S. Amunugama, '*Ideology and Class Interest in One of Piyadasa Sirisena's Novels: The New Image of the 'Sinhala Buddhist' Nationalist*' in M. Roberts (Ed.) (1997) ***Sri Lanka: Collective Identities Revisited***, Vol.I (Colomb: Marga Institute): Ch.11 at p.342.

[11] See L.I. Rudolph & S.H. Rudolph (1987) ***The Modernity of Tradition: Political Development of India*** (Hyderabad: Orient BlackSwan).

[12] A. Welikala, '*Nation, State, Sovereignty and Kingship: The Pre-Modern Antecedents of the Presidential State*' in Welikala (2015): Ch.13.

continues until a new constitution (or a series of fundamental reforms that would in effect amount to a new constitution) is negotiated, drafted, and adopted at some point in the next Parliament, and validated by a referendum.[13]

These analytical, methodological, and contextual considerations will inform the discussion to follow. While I will discuss recent political events for the purpose of establishing the context especially in relation to the nature of the recent reform process, the main aim of this essay is not empirical but theoretical. Underlying the debates and disagreements about institutional form – about presidentialism and parliamentarism or a combination of these – is a much deeper cleavage of political opinion about the very nature of the Sri Lankan state. Those who voted for Rajapaksa and others who voted for Sirisena reflected fundamentally different worldviews. The former voted to retain a strong presidential state not because of some inherent affinity with that form of government, but because it mapped on to a particular historical and cultural conception of the state that is heavily informed by the ideology of Sinhala-Buddhist nationalism. The majority that voted for Sirisena, I argue, desired a restoration of an alternative tradition of the Sri Lankan state, which is influenced by a modernist conception of republican statehood. Theorising these competing views about the nature of the state is important, first, because of the analytical clarity that it imparts to our understanding of the transition from the Rajapaksa to the Sirisena presidencies; second, to inform choices in the Constitutional Assembly about further reforms to the institutional shape of executive power; and finally, because these competing worldviews, especially in the context of new devolution reforms, would likely continue to influence the way the Sri Lankan electorate votes in the proposed constitutional referendum.

[13] A. Welikala, '*Sri Lanka's Long Constitutional Moment*' (2015) ***The Round Table*** 104 (5): pp.551-62.

### *The Constitutional Moment Between and Beyond Elections*

By the middle of 2014, when the reform movement that led to the regime change of January 2015 started gathering pace, the Rajapaksa government seemed at its peak political strength. On the back of the euphoria over the victory in the war against the Liberation Tigers of Tamil Eelam (LTTE) in May 2009, Rajapaksa had overwhelmingly won the January 2010 presidential election. He built upon that with a comprehensive win in the parliamentary elections of April 2010.[14] In mobilising the public and especially his core constituency in the South in the war effort, the regime had drawn upon Sinhala-Buddhist nationalism's martial tropes copiously and without any heed to minority sensitivities.[15] In September 2010, the Eighteenth Amendment consolidated the hyper-presidential state by the abolition of term limits, the removal of restraints on presidential powers over key official appointments, and the enervation of the independent governance commissions.[16] In securing the two-thirds parliamentary majority needed for the enactment of the Eighteenth Amendment the regime had co-opted opposition members through fair means and foul, and the continuation of this overwhelming government majority neutralised Parliament as an effective checking mechanism on the executive. Going further in January 2013, the regime impeached the Chief Justice and by replacing her with a partisan legal advisor, nullified the independence of the judiciary.[17] Rather than demobilising the armed forces after the war and reducing them to levels more appropriate to peacetime, wartime strengths were continued and used for militarising vast areas of civil administration, especially

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[14] L. Jayasuriya (2012) ***The Changing Face of Electoral Politics in Sri Lanka (1994-2010)*** (Colombo: SSA): Ch.6.
[15] N. Wickramasinghe, '*Producing the Present: History as Heritage in Post-War Patriotic Sri Lanka*' (2012) ICES Research Paper No.2 (Colombo: International Centre for Ethnic Studies).
[16] Edrisinha & Jayakody (2011).
[17] 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*** (Colombo: Centre for Policy Alternatives).

but not exclusively in the Tamil-majority North.[18] The public service, the foreign service, the police, the armed services, and the state media had been pervasively politicised, and members of the Rajapaksa family controlled every key lever of power and authority in the Sri Lankan state.

The construction of this outwardly impregnable fortress of constitutional and informal power was repeatedly validated by a relentless succession of local and provincial elections, which debilitated the political opposition. Civil society was emasculated under a pervasive climate of fear and impunity. Beneath this seeming invincibility of the Rajapaksa presidential state, however, multiple sources of discontent were developing, stemming from its ethnic divisiveness, the lawlessness of the ruling elite, the inescapable nepotism, the ubiquitous corruption, the absence of an economic dividend from the end of the war, authoritarianism and the culture of impunity, and the creeping constriction of democratic freedoms Sri Lankans had traditionally taken for granted. The increasingly authoritarian state had either closed off normal institutional channels for the expression and mitigation of these grievances (such as law enforcement and the administration of justice) or undermined others to the point where they were meaningless (such as Parliament and other elected legislative bodies).

In this context, the reform movement brought together a wide number of civil society groups and political parties opposed to the Rajapaksas who could agree on two principal matters: that the breakdown of the rule of law and pervasive corruption needed to be addressed; and that major constitutional reforms were needed for this purpose, with the abolition or the extensive reform of the executive presidency being the main requirement. In building this broad coalition, all other more tendentious matters were excluded, in particular the issues relating to a resolution of the causes of ethnic conflict. While addressing minority demands for devolution and power-sharing is as important as democracy reforms in Sri Lanka, this was a wise strategic move on the part of the reform

[18] International Crisis Group, '*Forever War? Military Control in Sri Lanka's North*': http://blog.crisisgroup.org/asia/2014/03/25/the-forever-war-military-control-in-sri-lankas-north/ (last accessed 16th March 2016)

movement in the context of what needed to be done in 2014. This enabled the broadest possible coalition to be built against Rajapaksa, including on the one hand the Jathika Hela Urumaya (a small but influential party of Sinhala-Buddhist nationalists), on the other, the Tamil National Alliance (the conglomeration of the main Tamil nationalist parties), and everything in-between including the main opposition United National Party, other minority parties, and a sizable section of Rajapaksa's own Sri Lanka Freedom Party.

While the visible signs of the formation of an opposition coalition may not have worried the regime too much initially, a substantial reduction in the government's winning vote-share in the elections to the Uva Provincial Council in September 2014 clearly panicked it into calling an early presidential election almost two years before the next was due in November 2016. This seemed to be based on the rationale that, against the diminishing returns of incumbency, regime consolidation would be best served by making use of its biggest electoral asset in the form of President Rajapaksa himself. Together with the ability to customarily disregard the electoral law and the misuse of public resources that comes with the control of the state, it may have seemed to the regime like the routine application of a tried and tested formula.

However, the reform movement scored a major win when in November 2014 it persuaded Rajapaksa's Minister of Health and the General Secretary of the SLFP, Maithripala Sirisena, to defect to the opposition to become the common opposition candidate. The regime's usual tactic of deploying the patriot/traitor dichotomy against its opponents lost much of its purchase with Sirisena as the common candidate. That for the first time in the post-war era there was now a real contest was demonstrated by the regime's increasing desperation in the final few weeks and days of the campaign in which it abandoned any restraint whatsoever in the abuse of state power and the misuse of public resources against the opposition.[19] But all this was eventually to

[19] See for a review of the unprecedented corruption and abuses involved: Transparency International Sri Lanka (2015) *Electoral Integrity: A Review of the Abuse of State Resources and Selected Integrity Issues in the 2015 Presidential Election in Sri Lanka*: http://www.tisrilanka.org/wp-

no avail, for the idea of reform had captured the public imagination and led to the emergence of Sirisena as the clear winner in the early hours of 9th January.

Two salient points require emphasis. Firstly, that this reform movement could not only be created but could also offer a programme that a majority of Sri Lankans found plausible demonstrates that despite decades of institutional decay and soft authoritarianism – a trend that was only exacerbated and not created by the Rajapaksa regime – the basic democratic ideal had intuitive appeal to the public. The long-term travails of Sri Lankan democracy such as ethnicisation, clientelism, and sectional nationalism are extensively commented upon in the literature.[20] But the reform movement and its electoral success tells us that there is something interesting to be explored about Sri Lanka as a (non-liberal) democracy, which seems to have deeper roots than many would have thought possible in the intolerant triumphalism of the immediate aftermath of the war. Secondly, that the parties representing Tamil, Muslim, and Indian Tamil interests considered that democratisation should be prioritised over their own specific demands is important. While this could be explained on strategic or even tactical grounds, there is a deeper significance to the coincidence of interests created by the opposition to the Rajapaksa regime, as a spontaneous unifying moment of otherwise competing ethnic interests, around a substantively democratic conception of the Sri Lankan state and polity. This points to a rich seam of goodwill that could potentially be tapped in current constitution-making exercise and the development of a just settlement of Sri Lanka's ethnic and

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content/uploads/2015/02/PPPR_2015_ENG_Final.pdf (last accessed 16th March 2016).

[20] See e.g., the essays in J. Uyangoda (Ed.) (2013) ***State Reform in Sri Lanka: Issues, Directions and Perspectives*** (Colombo: Social Scientists Association); J. Goodhand, J. Spencer & B. Korf (Eds.) (2011) ***Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?*** (Abingdon: Routledge); K. Stokke & J. Uyangoda (Eds.) (2011) ***Liberal Peace in Question: Politics of State and Market Reform in Sri Lanka*** (London: Anthem Press); J. Spencer (Ed.) (1990) ***Sri Lanka: History and the Roots of Conflict*** (London: Routledge).

religious pluralism.[21] It also belies the ludicrous claims made by the Rajapaksas and their intellectual sycophants that the minorities in general and the Tamils in particular are congenitally anti-Sri Lankan and chronically secessionist.[22]

If these were the political motivations that underpinned the popular reform movement, then the regime change at the presidential election was only the first concrete step towards the realisation of the reformist goals, and the 100-day programme promised in the common opposition manifesto was the second step of this process. The moderately successful achievement of these aims through the enactment of the Nineteenth Amendment could be regarded as the end of the process and of the reform moment, but for two factors. Firstly, the reforms require to be entrenched in practice over the short to medium term, and for this they need only democratic validation they received in the parliamentary election, but also meaningful implementation over time. Put another way, the change of the old regime at the presidential election requires to be followed up with the consolidation of the new regime after the parliamentary election. For this reason, as with the presidential election if not more so, the parliamentary election was not a routine exercise of electoral democracy based on a choice of competing sets of party policies, but a validating exercise for a deeper re-conceptualisation of the Sri Lankan state as a constitutional republic.

Secondly, the ethnic and religious minorities that voted *en masse* for the common opposition candidate, as noted above, did so without any expectation that their problems would be addressed in the 100-day programme. This however does not imply that

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[21] R. Sampanthan, '*The* Ilankai Thamil Arasu Katchi *(Federal Party) and the Post-Independence Politics of Ethnic Pluralism: Tamil Nationalism Before and After the Republic*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): Ch.24.

[22] See e.g., D. Jayatilleka, '*Parliamentary Election: The Real Stakes*', ***Colombo Telegraph***, 5th May 2015: https://www.colombotelegraph.com/index.php/parliamentary-election-the-real-stakes/; D. Jayatilleka, '*The Three Stooges in a Long Hot Summer*', ***Colombo Telegraph***, 3rd May 2015: https://www.colombotelegraph.com/index.php/the-three-stooges-in-a-long-hot-summer/ (last accessed 16th March 2016).

they are content with the limited governance reforms; in fact there was a fundamental and entirely reasonable and legitimate expectation that devolution and power-sharing issues would be taken up in the next Parliament. Hence the importance of the constitutional reform process through the recently established Constitutional Assembly.

In this way we can see that the reform moment that began with the first signs of the revival of democratic forces against the Rajapaksas in mid-2014 would not cease with their departure, but could continue for a considerable period of time until a reasonable constitutional settlement for all the peoples of Sri Lanka can be arrived at. It is in this context that we need a deeper conceptualisation of the models of statehood that are in competition within the current reform period.

### *Two Counterposed Models of the State and Constitutional Change: Ethnocracy v. Republicanism*

Mahinda Rajapaksa and Maithripala Sirisena offered radically different visions of the polity during the presidential campaign. Cast as ideal-types, Rajapaksa's vision saw the Sri Lankan state as a Sinhala-Buddhist ethnocracy, whereas Sirisena's goal was the introduction of 'yahapalanaya.' This rather recent Sinhalese neologism is one translation of the term 'good governance' and was mostly in circulation within NGO circles before gaining mass public circulation as the common opposition's principal campaign slogan. And as keen observers have noted, in the public discourse during the election campaign, it assumed an unanticipated resonance as a distinctly moral concept of good government.[23] An associated term was 'maithri paalanaya' – 'compassionate governance' – which is both a play on Sirisena's first name as well as a reference to the Buddhist concept of 'loving kindness' ('maithreya' in Sinhala and 'metta' in Sanskrit). In Buddhist eschatology, moreover, the next Buddha, the fifth of the

[23] J. Uyangoda, '*State and Governance Reforms after Elections*', ***The Island***, 4th January 2015: http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=117127 (last accessed 16th March 2016).

bhadrakalpa, will be known as Maithri. Especially since assuming office, Sirisena himself has, at least rhetorically, infused a heavily moralistic and even paternalistic tone to his presidency by condemning alcohol use, expressing support for a total ban on tobacco, and vehemently reproaching the louche behaviour of Enrique Iglesias at a concert in Colombo as being contrary to national values. Seen in this light, therefore, the content and meaning of 'good governance' in this specific Sri Lankan context is arguably rather different from the liberal sense and international usage of the term, even though its precise contours and content remain largely inarticulate.

Whatever the spiritual and cultural connotations of these terms, it seems possible to clarify their secular political content in the light of the reforms and principles associated with the idea of yahapalanaya. I argue below that what it denoted was the restoration of an orthodox model of republican statehood, categorically against the corrupt, ethnocratic, and monarchic form of presidentialism of the post-war Rajapaksa regime. Building these stylised models helps us understand the two competing approaches, and define their differences, more sharply. They remain, however, analytical constructs and I would surmise that neither the politicians nor their intellectual exegetists would necessarily articulate their claims in exactly the same way that I set out here.

## The Rajapaksa Model: Ethnocratic Monarchical Presidentialism

An ethnocracy is a type of state that combines the practice of majoritarian democracy with the ethnicisation of politics.[24] It arises in plural polities in which one dominant ethnic group, which asserts a primacy within the historical and territorial space of the polity, and therefore claims to the ownership of the state, seeks to enforce an hierarchy of ethnic relations as the very basis of the constitutional order. It appropriates the state and uses its resources for the advancement of the dominant group, which

[24] O. Yiftachel (2006) *Ethnocracy: Law and Identity Politics in Israel/Palestine* (Philadelphia, PA: University of Pennsylvania Press): pp.295-6.

necessarily involves the subordination and sometimes the violent suppression of minority groups. The resulting resistance by minorities may perversely take an ethnocratic form itself.[25] The cultural resources of ethnicity provide the animating values of politics in ethnocracies, not secular values of constitutional democracy. They may vary in the level of oppression used against minorities, but they usually allow some forms of political representation and rights to minorities, while denying the most fundamental of the minorities' rights claims. They are not unelected dictatorships, but ethnocratic states legitimise their authoritarian control over the plural polity by recourse to ethno-cultural populism and democratic majoritarianism. Due to the fundamental injustice upon which the constitutional order is built, ethnocracies denude their own control aims by being chronically unstable and conflict-ridden.

The Rajapaksa regime displayed all these ethnocratic characteristics. Its main basis of political mobilisation and regime legitimation was a chauvinistic version of Sinhala-Buddhist nationalism.[26] The political, cultural, and historical claims of the majority nation supplanted the civic conception of an inclusive Sri Lankan nation. Secular law was increasingly replaced with ethnic politics, including monarchical traditions of political power, in the way power and authority were organised and exercised. The nation-state defined this way was constructed unambiguously against minority claims to equality and autonomy. The resulting tension and conflict-potential were addressed via increasing control and militarisation. A political constitution derived from the mytho-historical worldview of Sinhala-Buddhist nativism constantly superseded the surviving remnants of legal modernity as reflected in the text of the legal constitution. Monarchical motifs from Sinhala-Buddhist historiography were widely used to rearticulate the nature and purpose of presidential power.[27]

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[25] J. Uyangoda, '*Travails of State Reform in the Context of Protracted Civil War in Sri Lanka*' in Stokke Uyangoda (2011): Ch.2 at p.55.
[26] S,J. Tambiah (1986) *Śri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (Chicago: Chicago UP): pp.92-102.
[27] Wickramasinghe (2012); M. Roberts, '*Mahinda Rajapaksa as Modern Mahāvāsala and Font of Clemency? The Roots of Populist Authoritarianism*' in Welikala (2015): Ch.17.

The regime also went further than nationalism in its sheer extractive appetite. As noted, clientelism and corruption were pervasive, facilitated by the breakdown of the rule of law and the arbitrariness of family rule. In short, the Sri Lankan state, which despite its many limitations – including most importantly its congenital incapacity to accommodate minority claims – had maintained a formally constitutional and democratic character,[28] was transmogrified into an organised cartel for the furtherance of the economic interests of the ruling family and its clients. If the ethnocratic aspect of the regime provided it with populist legitimacy, it was this latter dimension that eroded its electoral support even within its core constituency. It is the factor of corruption and excess that mainly explains how a nationalist and populist president dissipated a majority of nearly two million votes within four years. Sirisena's programme was sufficiently attractive for a substantial segment of Rajapaksa's core constituency to desert him, and I now consider the main elements of this alternative vision of the country.

## The Sirisena Model: *Yahapalanaya* as Republicanism

Republicanism is a set of ideas and practices concerned with the common good, which is opposed to political tyranny and corruption, and which foregrounds the concept of civic virtue as the defining feature of a well-governed polity. There are three principal elements to the ideal republican state. These are: anti-monarchism and popular sovereignty; the notion of 'non-domination' as the basis of freedom; and the value of accountability and its institutional design.[29] A republic is of course the binary opposite of a monarchy as a type of state. But more normatively, republicanism represents the view that the ultimate power and authority to govern a polity – sovereignty – emanates from the people (therefore, 'popular' sovereignty) and that it is created, exercised, and reproduced in an on-going political

[28] J. Uyangoda, '*The Puzzle of State Reform during the Civil War: Contexts, Barriers and Outcomes*' in Uyangoda (2013): Ch.3.
[29] A. Tomkins (2005) ***Our Republican Constitution*** (Oxford: Hart): pp.57-65.

relationship between the people and their governing institutions.[30] It rejects the view that sovereignty vests in a hereditary office, or originates in some metaphysical source. Second, the idea of non-domination is a complex and multifaceted concept, but for our purposes what it means is the rejection of all forms of arbitrary government, the corollary of which is the assurance of accountability of government to the people.[31] The scope for arbitrariness is reduced in a republic by the provision of robust mechanisms to ensure limits on the extent of governmental power, procedures to confine and structure its exercise, and most importantly, the space for citizens to continuously have a say in the process of government. The principle of non-domination thus carries three consequences: (a) open government and freedom of information, so that government in the public interest may be ensured; (b) civic virtue, or a citizenry concerned with ensuring the common good and assuming some personal responsibility towards realising it; and (c) equality, which is again a complicated concept, but here understood as the assurance of basic legal, political, and socio-economic conditions in order that citizens can play the role expected of them by the republican ideal. Finally, there is little value in merely declaring these normative values and aims as desirable goods if there are no means by which they can be actualised. Republicanism therefore pays serious attention to how institutions might be designed so as to ensure accountability of government.

Even though it was not explicitly defended as such, it can plausibly be argued that Sirisena's manifesto quite closely conformed to the requirements of this conceptualisation of the republican ideal, and conversely and more potently, that the public hope generated by the *yahapalanaya* promise related to aspirations of this nature. The 100-day programme was entirely about institutional reforms that are aimed at realising the republican norms outlined above, and equally important is the deliberate change of leadership style. The new President has been at pains to demonstrate the public service dimension of the institution, in contrast to the ostentation and grandiloquence of

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[30] M. Loughlin (2003) ***The Idea of Public Law*** (Oxford: OUP): p.83.
[31] P. Pettit (1997) ***Republicanism: A Theory of Freedom and Government*** (Oxford: Clarendon).

his predecessor. In substantially reducing the powers of the executive presidency, the Sirisena-Wickremesinghe administration has rejected the monarchism associated with that institution. Substantively, what the pruning of presidentialism entails is the expansion of democracy, through better checks and balances, lesser arbitrariness, and more space for participation and consultation. Not only is the executive reshaped, but Parliament is also to be strengthened, by improving its scrutinising capacity through a reform of the committee system. Both political and legal accountability is the underlying aim of the proposals to remove the blanket legal immunity of the President (the Nineteenth Amendment subjects the President to the fundamental rights jurisdiction of the Supreme Court) and to make the executive responsible to Parliament. The Nineteenth Amendment has made the right to information a fundamental constitutional right, and this will be reinforced with the enactment of the proposed Right to Information Bill.

The Sirisena-Wickremesinghe administration demonstrates a commitment to some notion of republican equality in its broad economic policy, not merely because of the presence of its centre-left President, but also because its formerly neoliberal Prime Minister has made a conversion to the idea of a 'social market economy.'[32] The new government is also based on a commitment to some form of political equality, which is important in two ways. Firstly, in appealing to the notion of a political community that has the capacity for constitutional renewal and to self-correct the democratic sanction for authoritarianism, and secondly, in eschewing the ethnic hierarchy denoted by the ethnocratic model, and appealing to the minorities to join the common purpose of rebuilding the post-war nation on a basis of pluralism and equality. The latter aspect may not satisfy, indeed may be wholly inadequate, as a policy response to the sub-state nationality claim

[32] R. Kuruwita, 'UNFGG heads for Social Market Economy', ***Ceylon Today***, 24th July 2015: http://ceylontoday.lk/51-99086-news-detail-unfgg-heads-for-social-market-economy.html (last accessed 16th March 2016). See also R. Sally, '*What is a Social Market Economy?*', ***The Financial Times***, 7th October 2015: http://www.ft.lk/article/479813/What-is-a-Social-Market-Economy (last accessed 16th March 2016).

asserted by the Tamils,[33] but it does denote that at least symbolically the new government is responsive to the claims of minorities. In recognising the plural character of the Sri Lankan polity, the new dispensation impliedly recognises the validity and legitimacy of minority claims to accommodation. That is a promising start, and a decisive renunciation of Rajapaksa ethnocracy.

### *Conclusion: Continuing Challenges*

In this way we can see how sharply differentiated was the choice between the two models of polity and state that were offered by the respective presidential candidates and in the Rajapaksa and Wickremesinghe led coalitions in the parliamentary elections. It is therefore a matter of historic significance that the electorate chose to regain the dignity and self-worth of citizenship implied by the republican model, and reject the authoritarian domination, the lack of accountability, and the political injustice of an ethnocracy in a plural society represented by the Rajapaksa vision or *chintanaya*. And for reasons already canvassed, this dichotomy of models with regard to the nature of the Sri Lankan state will form the inevitable backdrop for the political contest to come in the process of constitution-making in the Constitutional Assembly and the referendum.

While the desire for *yahapalanaya* could be theorised in its best light as a democratic republican ideal as I have proposed above, in practice the implementation of the 100-day programme left much to be desired, and the record in government after the parliamentary elections might be considered even more questionable. In the first phase of constitutional reform that led to the Nineteenth Amendment, there was a lack of substantive coherence and core agreement among the coalition partners, process requirements such as transparency and public participation were often disregarded, and the programme was

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[33] A. Welikala, '*Constitutional Form and Reform in Sri Lanka: Towards a Plurinational Understanding*' in M. Tushnet & M. Khosla (Eds.) (2015) ***Unstable Constitutionalism: Law and Politics in South Asia*** (Cambridge: Cambridge University Press): Ch.11.

riven with problems of sequencing and prioritisation. Aside from these process weaknesses, there are two major political challenges to the continuing reform process, the management of which will test the new government's ability and competence to the full. These are the twin challenges to the very idea of reform posed by ethnonational extremism on both sides of the ethnic divide. These are threats to the idea of 'reform' – implying incremental, deliberate, proportionate, and negotiated politico-constitutional change – because on the one hand, Sinhala extremism resists any change whatsoever, whereas Tamil radicalism demands changes the nature of which would derail the prospect of change itself.

Mahinda Rajapaksa may have been defeated in the presidential election and forced to cede the leadership of the SLFP but he has not gone gracefully into retirement. Neither have his more zealous supporters, whose political survival depends on his active role in politics, allowed him to do so. He continues to behave in a regrettably divisive way unworthy of a former President of the Republic, both he and his supporters in politics and the press continue to question the legitimacy of his successor's election, and they have actively sought to undermine the new President and government at every turn. Among others, one of the most deleterious of these arguments has been to highlight the fact that Rajapaksa won a majority of the votes of the Sinhala majority, whereas Sirisena and Wickremesinghe won their elections only with the help of the minorities. The implication is that the latter can be expected to betray Sinhalese interests and undermine the war victory against Tamil secessionism. In this way, they seek to destroy the significance of the two 2015 elections as a unifying moment at which all of Sri Lanka's ethnic communities came together for the common purpose of restoring democracy and the rule of law, and do not concede that they were democratically defeated not once but twice by the electorate in 2015, because of the crisis of governance they created with their extreme chauvinism and corruption.

Similarly, Tamil moderates are increasingly being challenged by latent separatists and hardliners within Tamil nationalist politics, on the grounds that the moderates' willingness to work with the new government is a sell-out of Tamil interests. The new government has taken certain measures to address Tamil

grievances, including the appointment of civilian Governors for the Northern and Eastern Provinces, the release of some military-occupied land, and commencing a process of accounting for missing persons, and a review of those held under anti-terrorism laws. These are admittedly small and incremental, and their implementation is fitful at best, but the government is attempting to balance a complicated set of interests, including a foreclosure of the possibility of a Rajapaksa resurgence in the South if it is perceived as being too soft on Tamil demands. In the period after January 2015, the government's insistence that deeper constitutional issues in response to Tamil autonomy demands could only be taken up after the general election, its policy that an accountability mechanism for alleged atrocity crimes during the final stages of the war could only be domestic and not an international investigation, and its successful request to the United Nations Human Rights Council for a deferral until September of the report the Office of the High Commissioner for Human Rights Investigation on Sri Lanka, [34] all inflamed Tamil nationalists' view that their demands were being overlooked. While in essence these complaints were legitimate, the intemperate and self-defeating ways in which these vocal elements conducted their campaigns of opposition perhaps ensured their electoral humiliation by TNA moderates in the parliamentary election. It is clear that the government can do more to assuage Tamil fears and that it must ensure that both moderate Tamil opinion and leaders are strengthened against the extremists.[35] A fair and just constitutional settlement for Tamils as well as other minorities must also be transparently articulated, and openly defended within Southern politics, and it is more than likely that the moderate majority of the Sinhalese would support the government rather than the intolerant extremists.

These two challenges from both North and South, then, have the potential to destroy the reform moment. Whether Sri Lanka

[34] OHCHR Investigation on Sri Lanka: http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx (accessed 06.03.2015)
[35] R. Hoole et al, '*Internal Political Power Bashing in the Name of Justice for War Victims*', *The Island*, 6th March 2015: http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=120781 (accessed 06.03.2015)

manages to consolidate the historic gains of the two 2015 elections, and to set itself on an irreversible path of democratisation and progress with the forthcoming constitution-making process, will therefore depend very much on the skill, tact, and acumen of President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe, together with Leader of the Opposition R. Sampanthan and Sri Lanka Muslim Congress leader Rauff Hakeem, in navigating the treacherous waters of ethnonationalist politics. There can be no expectation of a more responsible and statesmanlike turn in the behaviour of the Rajapaksa-led opposition. But in a more demotic sense, it would also depend on whether the state-wide republican majority will be able to withstand the challenge from the ethnocratic majority within the Sinhala majority, and in a lesser scale, the ethnocratic minority within the Tamil minority. In other words, the crucial question in the fraught coming months would be: will the plural centre of Sri Lankan politics hold sufficiently for the democratising regime change to entrench?

# The Substantive Changes of the Nineteenth Amendment and the Future

# 5

# The Supreme Court's Determination on the Nineteenth Amendment Bill

*Shehara Athukorala*

Once the Nineteenth Amendment Bill was placed on the Order Paper of Parliament on 24th March 2015, it became susceptible to pre-enactment challenge within the terms of Article 121(1) of the constitution, read with Articles 120(a) and Article 123. The Supreme Court enjoys sole and exclusive jurisdiction in determining the constitutionality of Bills. In relation to Bills described in the long title as being for an amendment to the constitution, the constitutional review jurisdiction of the Supreme Court may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Court. Such reference or petition must be filed within one week of the Bill being placed on the Order Paper of Parliament, and a copy of the reference or petition must at the same time be delivered to the Speaker, so that parliamentary proceedings can be stayed until the Court provides its determination. In relation to this category of constitutional amendment Bills, the only question which the Court is empowered to determine is whether the Bill as a whole or any of its provisions require to be passed not only by the usual two-thirds legislative majority in Parliament but also by a referendum. A referendum would be needed if the Court decides that the provisions of the Bill impinge on any entrenched provision of the constitution specified in Article 83. The Court is also empowered to specify in its determination the nature of the amendments that would make the Bill consistent with the constitution, or in other words, to avoid a referendum.

A number of petitions were presented in relation to the Nineteenth Amendment Bill, and a bench comprising Chief Justice K. Sripavan, Justice Chandra Ekanayake, and Justice Priyasath Dep PC heard oral submissions from the Attorney General, petitioners, and intervenient counsel on 1st, 2nd and 6th April 2015.[1] The Speaker announced the findings of the Court in

[1] The determination, reproduced in Annex VI of this volume, states at p.1 that thirteen petitions were presented, whereas only twelve applications are mentioned in the determination, as follows: S.D.No.04/2015 (Dayasiri, Petitioner), S.D.No.05/2015 (Perera, Petitioner), S.D.No.06/2015 (Gammanpila, Petitioner), S.D.No.07/2015 (Weerasekera, Petitioner), S.D.No.08/2015 (Ven. Bengamuwe Nalaka Thero, Petitioner), S.D.No.09/2015 (Wanigasekera, Petitioner), S.D.No.10/2015 (Ven. Matara Ananda Sagara Thero,

Parliament on 9th April 2016 and a copy of the determination is reproduced in Hansard.[2]

The observations of the Court with regard to what was proposed in the Nineteenth Amendment Bill was politically significant inasmuch as the government would have to comply with the determination unless it was ready to override it by an appeal to the people. As with every previous amendment to the 1978 Constitution, however, the government was intent on avoiding a referendum on this occasion also, and during the judicial proceedings as well as subsequently in Parliament, the government made major amendments to its original proposals, thereby significantly diluting especially the extent of the changes to the executive presidency. A noteworthy feature of the judicial proceedings was that the Attorney General had to inform Court, on behalf of the government, of a series of amendments to be further made to the text of the Bill before Court. These amendments had been agreed in Cabinet previously in response to criticisms of the gazetted Bill. The Court therefore had to make its determination on whether or not the Bill required a referendum not only on the basis of the published Bill but also the memorandum presented by the Attorney General containing the list of changes that the government intended moving at committee stage in Parliament.[3]

At the beginning of the determination, the Court itself enumerated a list of sixteen matters as being the principal changes contemplated by the Nineteenth Amendment, including the introduction of a right to information, a reduction of the term of office of the President from six to five years, the introduction of a two-term limit on the number of terms a person can hold office as President, the imposition of additional duties on the President and changes to presidential immunity making the President's actions subject to the fundamental rights jurisdiction of the Supreme

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Petitioner), S.D.No.14/2015 (Chandrasiri, Petitioner), S.D.No.15/2015 (Warnasinghe, Petitioner), S.D.No.16/2015 (MTV Chanel (Pvt.) Ltd, Petitioner), S.D.No.17/2015 (MBC Networks (Pvt.) Ltd, Petitioner), and S.D.No.19/2015 (Jayakodi, Petitioner).

[2] ***Parliamentary Debates*** 234(3), 9th April 2015: Cols.261-284.

[3] See observations on these issues in the chapters by Niran Anketell and Aruni Jayakody and in the Editor's Introduction to this volume.

Court, the reintroduction of the Constitutional Council, the reduction of the term of Parliament from six to five years and amendments relating to the prorogation of Parliament, amendments relating to election laws,[4] changes made to Chapter VIII on Executive and the Cabinet of Ministers,[5] changes to the jurisdiction of the Supreme Court relating to disciplinary actions against Members of Parliament, the removal of the provisions relating to urgent Bills, provisions on the independent commissions, and special provisions applicable to the incumbent President. However, the substantive determination only deals with some of these matters (discussed below), and it must be assumed that the Court found all other proposed changes susceptible to amendment through a two-thirds majority and without a referendum.

### *Proposed Changes to the Executive Presidency*

The thrust of most petitions in relation to the powers and functions of the executive presidency was that the proposed changes would alter the basic structure of the constitution by reducing the scope and finality of the President's executive discretion and authority. In one submission, it was argued that changing the manner in which executive power was to be exercised, as set out in Article 4, would be a violation of the sovereignty of the people declared and entrenched by Article 3.[6]

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[4] Relating to the time period within which an election shall be held if an election is determined to be void.

[5] With regard to matters concerning the executive, the Cabinet of Ministers, the appointment of Ministers and the ceiling on the number of Ministers.

[6] The Constitution of Sri Lanka (1978): 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."
Article 4 states: "The Sovereignty of the People shall be exercised and enjoyed in the following manner:
(a) Legislative power of the People shall be exercised by parliament, consisting of elected representatives of the people and by the people at a Referendum;
(b) Executive power of the People, including the defence shall be exercised by the President of the Republic elected by the people;

The Supreme Court however disagreed that any or every change to Article 4 would amount to a violation of Article 3, given that the constitution had not entrenched Article 4 in the same manner as Article 3. More substantively, the essence of the Court's reasoning in this regard can be summarised as follows: that while under the framework of the 1978 Constitution, the President must remain the supreme executive authority (and any alienation of executive power that removed such final authority from the President would be unconstitutional), this neither meant that the President enjoyed any personal power divorced from the sovereignty of the people, nor did it mean that the President was the sole and unfettered repository of executive powers, because under the constitution not only are a number of other institutions recognised as exercising certain executive powers, but also because the exercise of the President's powers are subject to checks and balances.[7] The Court elaborated on these points in the following way.

It observed that the President's responsibility to Parliament for the exercise of executive power is established in Article 42,[8] and that Article 4(b) must be read in the light of Article 42. It is apparent to the Court from these provisions that the constitution did not

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(c) Judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions established or recognised by the Constitution or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the people may be exercised directly by parliament according to law;
(d) Fundamental rights declared and recognised in the Constitution shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied; and
(e) Franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years and who is qualified to be an elector provided his name is entered in the register of electors."

[7] Dicta in *In Re Nineteenth Amendment to the Constitution Bill* (2002) SCSD 11/02-40/02 per Silva CJ and *In Re the Thirteen Thirteenth Amendment to the Constitution Bill* (1987) 2 SLR 312 at 341 per Wanasundera J cited with approval.

[8] "The President shall be responsible to Parliament for the exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security"

intend the President to function as an unfettered repository of executive power unconstrained by the other organs of government. Similarly, Article 43 provided for a Cabinet of Ministers, of which the President was both a member and head, charged collectively with the direction and control of the government, and collectively responsible and answerable to Parliament. This again establishes that the President is not the sole repository of executive power, and that the responsibility of the executive to Parliament was reinforced by the provision that the President must appoint as Prime Minister the Member of Parliament who is most likely to command the confidence of Parliament. Thus, the constitution recognises that executive power is exercised by the President and the Cabinet of Ministers, and both are responsible to Parliament in the exercise of such powers. In addition to this institutional arrangement whereby executive powers is exercised together by the President and the Cabinet, the Court also noted that certain powers relating to the public service are vested in the Public Service Commission and Cabinet of Ministers and not concentrated on the President (Article 54 and 55).

The Court observed that sovereignty is in the people and they have made the President the head of the executive. Article 30 of the constitution entrusts the President with the exercise of executive power, and these powers must be either exercised by the President, or by someone to whom such power is delegated by the President. The transfer, relinquishment, or removal of a power conferred on one organ of government to another organ would be inconsistent with Article 3 read with Article 4, and in relation to executive functions, the authority and responsibility for ultimate acts or decision must be retained and exercised by the President. As long as the President is the head of the executive, the exercise of his powers remain supreme and others to whom such power is given must derive from the President, or exercise the President's executive power, as a delegate of the President. The President must be in a position to monitor and give directions to others with such delegated authority in relation to the exercise of his powers. The Court then considered the constitutionality of Clause 11 of the Nineteenth Amendment Bill in the light of these observations. Clause 11 sought to repeal and replace Chapter VIII of the constitution on 'The Executive: The Cabinet of Ministers' with a

range of far-reaching changes to reduce the President's executive powers and simultaneously strengthen the Cabinet of Ministers and the Prime Minister in particular. The Court identified the following propositions in Clause 11 as being potentially inconsistent with the entrenched provisions:

(i) Proposed Article 42(3): That the Prime Minister shall be the head of the Cabinet of Ministers

(ii) Proposed Article 43(1): That the Prime Minister shall determine the number of Ministers to the Cabinet, and the Ministries, assignment of subject and functions to such Ministers

(iii) Proposed Article 43(3): That the Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet. Such changes shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament

(iv) Proposed Article 44(2): That the Prime Minister shall determine the subjects and functions which are to be assigned to Ministers appointed under paragraph (1) of this Article, and the Ministries, if any, which are to be in charge of, such Ministers

(v) Proposed Article 44(3): That the Prime Minister may at any time change any assignment made under paragraph (2)

(vi) Proposed Article 44(5): That at the request of the Prime Minister, any Minister of the Cabinet may by Notification published in the Gazette, delegate to any Minister who is not a member of the Cabinet, any power or duty pertaining to any subject or function assigned to such Cabinet Minister, or any power or duty conferred or imposed on him or her by any written law, and it shall be lawful for such other Minister to exercise and perform any power or duty delegated notwithstanding anything to the contrary in the written law by which that power or duty is conferred or imposed on such Minister of the Cabinet.

In relation all these aspects, the Court noted that in the absence of any delegated authority from the President, if the Prime Minister

were to exercise the powers referred to in Clause 11, then the Prime Minister would be directly exercising powers that are reposed by the people only on the President. Within the framework of the 1978 Constitution, the President cannot handover his executive power and permit it to be exercised by another body or person without his express permission or delegated authority. This would violate Article 3. Consequently, the Court concluded that such a change could not be made without the approval of the people at a referendum, or in other words, if the government wished to proceed without a referendum, then these aspects of Clause 11 must be struck down from the Nineteenth Amendment Bill. One of the most noteworthy aspects of this part of the determination was that the Court did not find the various other aspects of Clause 11, which introduced a requirement that the President has to act on the advice of the Prime Minister, as being an unconstitutional alienation of executive power by the President. These requirements of acting on advice quite substantially curtails the President's discretion in appointing and dismissing Ministers in particular, but presumably in the Court's view this does not affect the President's ultimate authority.

### *The Right to Information*

Counsel for one of the petitioners argued that Clause 2 of the Bill,[9] which sought to introduce a new right to information as

[9] Constitution of Sri Lanka (1978): Article 14A(1): Every citizen shall have the right of access to any information held by:- (a) the State a Ministry or any Government Department or any statutory body established or created by or under any law; (b) any Ministry of a Province or any Government Department or any statutory body established or created by a statute of the Provincial Council; (c ) any local authority; and (d) any other person, being information that is required for the exercise or protection of the citizens' rights.
(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the of the judiciary.

Article 14A of the chapter on fundamental rights, would enable even foreigners to become beneficiaries of the right to information by virtue of the definition of a citizen given in Clause 2. However, the Court noted that the definition given to a 'citizen' is identical to the definition given in Article 121(1) of the constitution. The Attorney General also informed Court of the proposed the amendments the government undertook to bring at committee-stage. These amendments constricted the new right to information by restricting the application of the right from any information held by public authorities to covering only 'information that is required for the exercise or protection of the citizens' rights' held by such authorities, and by adding contempt of court and parliamentary privilege as grounds of permissible limitations of the new right. In the Court's view, Clause 2 was not inconsistent with any of the entrenched provisions of the constitution.

### *The Symbol of National Unity*

Submissions were made with regard to Clause 5 of the Bill, in which proposed Article 33(1) provided that the President shall be the symbol of national unity. Counsel brought to the notice of Court that the origin of the national flag is based on a report of the National Flag Committee. The code for the use of the national flag, prepared by a Cabinet Subcommittee, states that when 'each of us have to think more deeply of the National Flag and when we see our National Flag automatically our shoulders will strengthen, our hearts lift and our thoughts go to our motherland.' The Court agreed that 'the National Flag is the symbol of the unity of our People' in that light determined that proposed Articled 33(1) in Clause 5 be deleted.

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(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three - fourths of the members of such body are citizens.

### *The Constitutional Council*

Petitioners' argument in respect of the proposal to re-establish the Constitutional Council pertained to both its compositions and functions. It was contended that the Constitutional Council with the proposed composition would impinge on the sovereignty of the people and that it would not be representative of the people. In terms of Clause 10, the Council would consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of the Prime Minister and the Leader of the Opposition, and one person nominated by agreement of the majority of the Members of Parliament belonging to political parties other than to which the Prime Minister and the Leader of the Opposition belong. The President appoints the members who are not *ex officio* from among persons of eminence and integrity who have distinguished themselves in public or professional life, and are non-members of any political party. The Court noted that it had held *In Re the Seventeenth Amendment to the Constitution*[10] that the establishment of the Constitutional Council would not impinge on Article 3 or 4. Even though as the Court noted there is a restriction by the introduction of the Council in the exercise of the discretion vested in the President with regard to high appointments and the independent commissions, it held that such restrictions would not be an erosion of the executive power of the President in violation of Article 3 read with Article 4(b). Although the Court therefore found this proposed composition of the Constitutional Council to be constitutional, due to political hostility in Parliament to civil society members who would presumably be called upon to serve in the Council, the composition of the Council was changed at committee-stage of the Bill to reflect a political rather than a civil society majority. This potentially affects the depoliticising aims of the Nineteenth Amendment.[11]

The Court observed that the objective of the Constitutional Council is to impose safeguards in respect of the exercise of the President's discretion and to ensure appointments to important

[10] S.C. Determination 6/2001.
[11] See chapter by Dinesha Samararatne in this volume.

offices in the executive, the judiciary, and the independent commissions are made correctly. It sets out a framework for which the President will exercise his duties pertaining to appointments. The President continues to be empowered to make the appointments of chairmen and members of the independent commissions. However, such appointments are to be made on the recommendation of the Council, which is to recommend fit and proper persons to such offices. Similarly, the President makes the appointments to key offices including the judges of superior courts, but in these cases, prior to the appointments his recommendations would have to be approved by the Council. It was also noted that the Constitutional Council would obtain the views of the Chief Justice, the Minister of Justice, the Attorney General, and the President of the Bar Association of Sri Lanka, in the discharge of its functions relating to the appointment of the judges of the Supreme Court and of the Court of Appeal. The Court stated that such a consultative process can 'in no way be offensive to the exercise of the powers of appointment,' but on the contrary would 'enhance the quality of the appointments.'[12] For these reasons, provisions contained in Clause 10 were held not to violate any of the entrenched provisions. Again at committee-stage, however, political hostility to such a consultative process and especially the role of the Bar Association ensured that these provisions were removed from the Nineteenth Amendment.

### *Political Broadcasts*

Clause 26 of the Bill sought to empower the new Election Commission significantly in respect of political broadcasts during election periods, including to issue guidelines to public and private broadcasters, and crucially, to enforce those guidelines and directions through the appointment of a Competent Authority to takeover the management of such political broadcasts.[13] Two

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[12] Silva v Bandaranayake (1997) 1 SLR 93 at 95 per Mark Fernando J cited with approval.

[13] 104 B (5)(c) - Where the Sri Lanka Broadcasting Corporation (SLBC), Sri Lanka Rupavahini Corporation (SRC) or Independent Television Network (ITN) or any other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of every private broadcasting or telecasting operator, contravenes any guidelines issued

private broadcasting companies challenged these provisions, and their counsel argued that the Election Commission should not be vested with such broad power to takeover a private broadcasting and telecasting station on the basis of various subjective factors. The state taking over its own media institutions may be permitted, but if it is extended to private media institutions, it was submitted that balanced and multi-perspective news and views would be prejudiced. Moreover, the clause did not set out the qualifications and the post that a person holds in order to be appointed as a Competent Authority and this would severely affect the rights of the citizens and rights of media institutions who may well be supervised and managed by persons not eligible for such an appointment.

The Court agreed with these submissions, holding that the Election Commission has been vested with unlimited power. The eligibility of its members and in particular the Competent Authority would be of paramount consideration in the public interest. The Court noted that there was no mechanism where an aggrieved citizen could challenge an appointment of a Competent Authority, and took the view that the functions of the Competent Authority would directly affect the franchise of the people, and the process of selecting representatives of the people, which in turn would directly concern the exercise of sovereignty. Accordingly, the Court stated Clause 26 violates Article 3 and has to be approved by at a referendum.

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by the Commission under sub-paragraph (a), Commission may appoint a Competent Authority by name or by office, who shall, with effect from the date of such appointment, take over the management of such SLBC, SRC or ITN or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, insofar as such management relates to all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election, and the SLBC, SRC or ITN or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, shall not, during such period, discharge any function relating to such management which is taken over by the Competent Authority.

### *Audit Service Commission*

The Supreme Court noted that proposed Article 153C in Clause 40 of the Bill did not permit the rules framed by the proposed Audit Service Commission to be placed before Parliament. The failure to do so would undermine the parliamentary control over the rule-making powers of the Commission. The Court suggested that this paragraph be amended to enable the Commission to place its rules before the Parliament for approval.

### *Order*

Except for the matters discussed above, the Court was of the opinion no other aspect of the Bill required consideration in relation to their effect on the entrenched provisions of the constitution. Accordingly, the Supreme Court concluded that the Nineteenth Amendment Bill complied with the provisions of Article 82(1) (procedural requirements). Except for proposed Articles 42(3), 43(1), 43(3), 44(2), 44(3), and 44(5) in Clause 11 and proposed Article 104B(5)(c) in Clause 26, which were held to require a referendum in terms of Article 83, the Court held that the rest of the Nineteenth Amendment Bill could be passed by a two-thirds majority in Parliament (Article 82(5).

# 6

# Parliament and Government after the Nineteenth Amendment

*Reeza Hameed*

The Nineteenth Amendment is an important landmark in the constitutional history of Sri Lanka. Its enactment was made possible after the January 2015 presidential election, which brought in its train a significant transformation in the country's political climate. It may be seen as the initial step in the realisation of the President's professed goal to change the way in which the country shall be governed. It also affects the relationship between Parliament and the executive. The executive presidential system of government was introduced by a government that was intent on divorcing the executive from Parliament. Since its introduction, the constitution has been tinkered with time and time again to make the executive more powerful. Parliament played no small part in diminishing its own significance by enabling the executive power to be personified in the President for which it gave its approval and provided legitimacy.

### *The Proposal to Abolish the Executive Presidency*

Past presidents reneged on their promise given to abolish the executive presidency once they were elected and became ensconced in office. Parliament, too, has been an obstacle to constitutional change. The significance of the steps taken by the government led by President Sirisena at the urgings of civil society to curb the powers of the President's office has to be viewed in this light. The call to abolish the presidential system was mooted most prominently by the late Ven. Maduluwave Sobhitha Thero and it was taken up by civil society organisations and parties opposed to Mahinda Rajapaksa. Maithripala Sirisena emerged from within the then government fold as the surprise candidate to challenge Mahinda Rajapaksa. The Thero had launched a movement for the restoration of democracy with a ten point plan which was reduced to three and finally to one, namely the repeal of the executive presidency.[1]

In the campaign for the 2015 presidential election, Sirisena promised that if elected he would promote good governance and guarantee democracy. The main plank of his manifesto was his

[1] See, '*Implementing constitutional, electoral reforms: President must act decisively-Ven Sobitha*', ***The Island***, 1st March 2015.

promise to abolish the Eighteenth Amendment and, with it, the executive presidential system. He promised to restore the Seventeenth Amendment and establish independent commissions to secure the impartiality of appointments to public institutions, such as the police, which had become politicised under the *ancien regime*.

The initial draft of the Nineteenth Amendment Bill[2] envisaged having a Prime Minister with more extensive powers than before, and it sought to centralise the executive powers in him as the head of the government. It was envisaged that the President would always act on the advice of the Prime Minister,[3] except in the appointment of the Prime Minister himself, although the President could require the Prime Minister to reconsider the advice given to him as well as require Parliament to reconsider a Bill presented to him for his assent. The President would be responsible to Parliament for the due exercise of his powers and duties.[4] The Prime Minister would be the head of the Cabinet of Ministers, and he would determine the composition of the cabinet and the assignment of portfolios to the Ministers. These proposals, if adopted, would have effectively diminished the President's role in the formation of government and transformed the Prime Minister as the architect of the cabinet.

### *Opposition to the Abolition of the Executive Presidency*

The proposal to abolish the executive presidency met with strong opposition from sections of the opposition and the JHU,[5] a

[2] See '*19th Amendment President Sirisena's proposals for Constitutional reforms*', ***Ceylon Today***, 22nd February 2015; See '*Draft proposals*', ***Colombo Telegraph***, 7th March 2015.

[3] This provision was a verbatim reproduction of Clause 63 (1) of The Constitution of the Republic of Sri Lanka Bill which was presented to Parliament by G.L. Peiris MP on 3rd August 2000, when he was the Minister of Justice and Constitutional Affairs in the Chandrika Kumaratunga government.

[4] This was the position even before the Nineteenth Amendment.

[5] Not only did the JHU challenge the Nineteenth Amendment Bill in the Supreme Court but it also threatened to move amendments to the draft. The JHU leader vowed not to allow the draft to be passed in the form in which it was presented in Parliament. He was strongly opposed to the Prime Minister arrogating the functions held by the President.

government partner, forcing the government to abandon its plans.[6] It is apparent from the draft Bill that was gazetted and the final product that came out of Parliament that the government had to make significant changes to those initial proposals,[7] and compromise on its promise to abolish the executive presidency.[8] Instead of abolishing the office, the Nineteenth Amendment pruned the President's powers, reinstated the two-term limit, reduced his term to five years, and limited his powers to dissolve Parliament. The President would continue to be the Head of the Government with most of his powers intact, especially with regard to the appointment of the heads of the armed forces, and to declare war and peace. He would be responsible to Parliament, but he would not be required always to act on the advice of the Prime Minster.

### *The Supreme Court on the Nineteenth Amendment*

The Supreme Court determined that the provision in the Bill which required the President to appoint Ministers on the advice of the Prime Minister[9] did not require a referendum but the

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[6] See e.g., '*19A and electoral reforms run into a storm*', ***Ceylon Today***, 22nd March 2012.

[7] According to G.L. Peiris, the amendment started as a concept paper and was discussed by the leaders of political parties. The substance of that concept paper came under criticism. Some of its provisions were omitted but later included in the Bill that was gazetted. Parliament was specially convened on 24th March 2015, and the Bill presented by the Prime Minister. There were basic differences between the Bill that was presented and the version presented to the Supreme Court. Amendments to the gazetted Bill were presented by the Attorney General to the Counsels in Court. See G.L. Peiris, '*19a riddled with confusions, complications and contradictions*', ***Daily Mirror***, 3rd April 2015.

[8] The view that President Sirisena had promised only the dilution, rather than the total abolition, of presidential powers may find some support in his Manifesto, in which he had promised a new constitutional structure that "would be essentially an Executive *allied* with the Parliament through the Cabinet instead of the present autocratic Executive Presidential System." He had said that he would not "touch any Constitutional Article that could be changed only with the approval at a Referendum." Probably, this was not how his promise was interpreted by many people who supported Sirisena for the presidency.

[9] Constitution of Sri Lanka (1978): Article 43(2).

provision[10] that enabled the Prime Minister at any time to change the subjects and functions of Ministers without reference to the President required approval at a referendum.[11] As a result, the final version of the Nineteenth Amendment has provided that the President may consult the Prime Minister on matters relating to the composition of the Cabinet or the assignment of portfolios and the power to reshuffle the Cabinet lies with him, but a Minister shall continue to hold office and can be removed by the President only on the advice of the Prime Minister.[12] The President cannot assign himself a cabinet portfolio although in the case of President Sirisena the constitution makes special provision that he may hold three named portfolios which he may assign to himself without having the Prime Minister's approval.[13]

As observed by the Supreme Court, executive power cannot be identified with the President alone and personalised in him but resides in the people at all times. The President is not the sole depository of executive power and there cannot be a government without a Cabinet. The Cabinet is the conduit through which the executive power reposed in the President can be distributed to the other public office-bearers. The ultimate act or decision of his executive functions must stay with the President.[14] The Court opined that the constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of government and that he remained responsible to Parliament.[15] The President, said the Court, cannot relinquish his executive power and permit it to be

[10] Clause 43(3) of the Nineteenth Amendment Bill provided that the Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Following the SC's determination it is now provided that the "President may at any time change the assignments …"
[11] The Court so held because the provision in question violated Article 4, and consequently Article 3, and therefore required a referendum.
[12] Constitution of Sri Lanka (1978): Article 46(3) as amended.
[13] Nineteenth Amendment to the Constitution Act: Section 51.
[14] Constitution of Sri Lanka (1978): Article 33A (previously Article 42) made the cabinet collectively responsible and answerable to Parliament. Cf. Articles 54-55.
[15] Constitution of Sri Lanka (1978): Articles 46(2) and 91.

exercised by another body or person without his express permission or delegated authority.[16]

Despite the President continuing as head of the cabinet,[17] the Nineteenth Amendment has enhanced the functions and status of the Prime Minister who is located in Parliament. The Nineteenth Amendment has created two power-centres in the form of the President and the Prime Minister, the President directly elected by the people and the other appointed by the President but having the backing of Parliament.

### *Appointing the Prime Minister*

The appointment of a Prime Minister is one of the most important functions that the President is required to perform. The President shall appoint as Prime Minister the Member of Parliament who, in the President's opinion, is "most likely to command the confidence of Parliament."[18] The President's task of identifying the person who would command Parliament's confidence would not be difficult to discharge where an overall majority is secured by one party at the parliamentary elections. Where the elections produce a hung parliament, a broad range of procedures are possible and the task of appointing a Prime Minister becomes complicated.[19]
The requirement that the President shall appoint the person who 'commands the confidence of Parliament' is not free from ambiguity. It can refer either to the person who is the leader of the largest party or the party leader who can secure the support of the majority in Parliament. It can also mean either the person who has the support of the majority in Parliament or the person

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[16] The alienation or transfer of executive power from the President to another body violated Article 3. The Supreme Court determined that in the absence of any delegated authority from the President, the exercise by the Prime Minister of the power referred to in these clauses would be antithetical to the constitutional scheme requiring that executive power should be exercised by the President.
[17] Constitution of Sri Lanka (1978): Article 42(3). Cf. Nineteenth Amendment to the Constitution Act: Section 51.
[18] Constitution of Sri Lanka (1978): Article 42 (4).
[19] See R. Brazier (1994) ***Constitutional Practice*** (Oxford: Clarendon Press): Ch.3.

against whom there is no majority.[20] Whatever the meaning that may be imputed to the phrase 'commands the confidence of Parliament,' the leader of the largest party may not necessarily be the person who will secure the support of the majority in Parliament.

### *President's Discretion under the Constitution*

The President is not required to consult anyone in the appointment of the Prime Minister; *ex facie* his discretion is subject only to the condition that the person he picks shall command the 'confidence of Parliament.' The President might sound out the views of the Members of Parliament to ascertain who would be able to command the confidence of the majority of the members.[21] It would be politically imprudent for a President to ignore the person who has the support of the party having an overall majority in Parliament. Where no single party is able to muster an overall majority, however, the President might be better placed to play an active role in the formation of government.

Nevertheless, even before the poll was taken in the parliamentary election of August 2015, President Sirisena announced his intention not to appoint ex-President Mahinda Rajapaksa as Prime Minister even if the UPFA led by the latter were to secure a majority of seats in Parliament.[22] He reiterated his position in this regard in a letter that he sent to ex-President Rajapaksa in which he stated thus:

> "At the forthcoming elections, if the UPFA manages to reach the minimum 113 mark of seats to form a

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[20] V. Bogdanor (1996) ***The Monarchy and the Constitution*** (Oxford: Clarendon Press): p.151.
[21] See '*President seeks SLFP Parliamentarians' opinion on National Government*', ***Daily News***, 21st August 2015 reporting that the President appointed a committee headed by a member of parliament to sound out the views of the SLFP parliamentarians on the formation of a national government with the UNP and prepare a report based on its findings.
[22] '*Mahinda Rajapaksa Will Be Defeated Again: President Maithripala Sirisena*', ***Colombo Telegraph***, 14th July 2015.

> government, I believe who should be appointed as the Prime Minister is a senior member of the SLFP who so far has failed to have this opportunity."[23]

President Sirisena hinted that in the event of elections producing a near miss for the UPFA, he might intervene to form a government but in any event he will not make ex-President Rajapaksa the Prime Minister.[24] The President's pronouncements triggered a debate on the scope of his discretion in the appointment of the Prime Minister under Article 42, with those wanting the ex-President as Prime Minister insisting that the President has no discretion in the matter and that he is bound by British parliamentary conventions in this regard.[25]

### *British Conventions*

In Britain, the convention is for the sovereign to "…invite the person who appears most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government."[26] In normal circumstances, the role of the sovereign is formal and is limited to summoning the leader of the party with the overall majority to the Palace. Where there is a hung parliament, however, she might have genuine discretion to exercise.[27] Even in Britain, the sovereign is short of guidance on how she ought to exercise her discretion in picking a prime minister out of a hung parliament. In a hung parliament, the

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[23] '*Maithri Reconfirms His Stance: Mahinda Rajapakasa Won't Be PM*', ***Colombo Telegraph***, 13th August 2015. See for an English translation of this letter, '*Letter by President Maithripala Sirisena to Mahinda Rajapaksa*', ***Groundviews***, 17th August 2015.

[24] Ibid. The relevant part of his letter read: "In case, the UPFA failing to near the 113 mark and only come closer, then as the Executive President I can intervene to obtain the necessary other seats to form a government. Even in this event, who should become the Prime Minister is not you but another senior member of the party."

[25] G.L. Peiris argued that that nowhere in the constitution is it stated that a former President cannot become Prime Minister. Former Chief Justice Sarath Silva declared as untenable the argument that Rajapaksa is disqualified from acting as President simply because he has already been elected twice as the President.

[26] See UK Cabinet Office (2011) ***The Cabinet Manual***: para 2.8.

[27] Bogdanor (1996): p. 89.

sovereign would, nevertheless, not become involved[28] and it is left to the political parties to discuss between themselves "…to establish who is best able to command the confidence of the House."[29] In a hung parliament the principle that the nominee should 'command the confidence of the House' could mean either a coalition or a minority government with outside support and operating on an agreed programme.[30] There is no requirement that the Prime Minister shall secure the support of the majority in Parliament[31] and the sovereign would not require a government to command majority support.

In May 1923, Stanley Baldwin succeeded Andrew Bonar Law as Prime Minister at a time the government he led had a majority in Parliament but, six months into his office, he sought dissolution and called for elections. In the poll that followed in 1924, he was 50 seats short of an overall majority. Baldwin did not resign and hung on as Prime Minister; he revived the convention that the Prime Minister in office is not obliged to resign and may stay in office and take his chances until a confidence vote is taken.[32] His efforts at coalition-building failed, and he was defeated by the combined opposition at the King's speech. In the 1974 elections, no party won an overall majority; the Conservative Party led by Prime Minister Ted Heath was four seats short of Labour, although his party won slightly more votes than Labour. Ted Heath did not resign and spent the weekend after the elections trying to put together a coalition with the Liberals. Labour did not seek to challenge Heath knowing well that he would not succeed in putting together a coalition. Those advising the sovereign took the view that until he resigned Ted Heath remained the Prime Minister and that he should be given an opportunity to meet Parliament and produce a Queen's Speech "…and see if he could get away with it."[33] The 2010 British poll, too, resulted in a hung Parliament. It was reported at the time that there was intense wrangling between the three main parties.

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[28] ***Cabinet Manual***: para 2.13
[29] Ibid.
[30] Bogdanor (1996).
[31] Ibid: p.53.
[32] The sovereign might not have given Baldwin a second dissolution had he asked for it.
[33] P. Hennessy (2000) ***The Prime Minister*** (London: Penguin): p. 23.

Labour and Conservative parties held talks with the Liberal Democrats whose support was needed if either party was to form the government. Prime Minister Gordon Brown resigned from office instead of meeting Parliament to test his support there when it became apparent that the Liberal Democrats did not wish to do a deal with Labour.

### *Applicability of British Conventions*

British precedents seem to offer no specific solutions to the problems raised by inconclusive electoral outcomes in Sri Lanka, and the problems are not unique to Sri Lanka.[34] Being the leader of the single largest party does not necessarily mean that the leader of that party will command majority support in Parliament. If there exists in Parliament different combinations with equally credible claims of being able to secure the confidence of the majority, then the issue becomes complicated. No guidance[35] is available to the President as to the person he will have to call upon to form the government, although the President might be inclined to invite the leader of the party or a combination of parties that, in his view, would secure the support of Parliament.

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[34] Article 75(1) of the Indian Constitution provides that the Prime Minister shall be appointed by the President. The1989 elections to the Indian Lok Sabha produced no single party with an overall majority, but as Congress was the single largest party in the House, President Venkataraman invited Congress party leader Rajiv Gandhi to form a government but the latter declined. The President thereafter invited V.P. Singh, the leader of the National Front, to form the government. The May 1996 elections resulted in a hung parliament with the BJP winning the most number of seats. The then President appointed the leader of the BJP Atal Bihari Vajpayee as Prime Minister and was given two weeks to prove that he had majority support in Parliament but, unable to secure the support of the majority in Parliament, Vajpayee resigned rather than face a confidence vote.

[35] When the Indian Constitution was being drafted, its framers proposed to have written instructions in place to guide the Indian President, including the instruction that he shall "appoint a person who has been found by him most likely to command a stable majority in Parliament as the Prime Minister." The Assembly eventually dropped this idea because it was felt that the proposed instructions were likely to mislead the President.

If the convention is to appoint the Prime Minister from the party that won the most number of votes in Parliament through an election, then there is evidence that the President departed from this convention when he appointed Ranil Wickremesinghe as the Prime Minister after the presidential election in January 2015, although the latter did not have the backing of the majority in Parliament and there had been no parliamentary election immediately prior to his appointment. In fact, the Prime Minister led a minority government and the so-called opposition enjoyed a numerical majority in Parliament; yet the government survived for over six months without a majority and even mustered the two-thirds majority to pass the Nineteenth Amendment in Parliament.

Nihal Jayawickrama has argued that under each of the three constitutions that have been in operation since 1947, the power of appointing the Prime Minister has been vested in the head of state to be exercised solely in his judgement and discretion.[36] The constitution provided no guidance to the head of state on how he shall exercise his discretion except that the 1947 Constitution required him to exercise the powers and functions of his office in accordance with the conventions applicable in the United Kingdom.[37]

Lal Wijenayake[38] argued that the appointment depends on the opinion of the President and the discretion vested in the President in the appointment of a Prime Minister is almost absolute. He

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[36] N. Jayawickrama, '*The Prime Ministerial Conundrum*', ***Colombo Telegraph***, 16th August 2015. In Dr Jayawickrama's view, the President will have to identify a leader to head a government that would lend support for his 'yahapalanaya' programme: "That is his constitutional right and duty. If he is unable to do so, the Constitution in its present form does not offer a solution except resignation from the office of president, in which event parliament will elect his successor."

[37] Constitution of Ceylon (1947): Section 4 (2), which provided: "All powers, authorities and functions vested in Her Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, 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 Her Majesty"

[38] L. Wijenayake, '*Can Mahinda become the Prime Minister*', ***Colombo Telegraph***, 30th July 2015.

suggested that the President is not bound by British conventions because under the 1978 constitution we have a hybrid system which has features of a presidential as well as a parliamentary system of government, under which the President is not just a constitutional figurehead. As there are serious allegations of corruption, misuse of power, and criminality made against the ex-President and his family members,[39] President Sirisena was justified in excluding the ex-President for possible appointment; in other words, he said, Rajapaksa was not a fit person to be appointed as the Prime Minister before those allegations have been investigated.

Others have suggested in similar vein that the President may be entitled to appoint only an untainted candidate as Prime Minister.[40] Those who wish to see good governance taking root would be sympathetic to the idea that persons against whom there are serious allegations of financial impropriety and other wrongdoing shall not be appointed as Ministers.[41] Arguably, the same objection should hold with regard to the appointment of the Prime Minister. On the other hand, the hypothesis that the President has an absolute discretion in the appointment of the Prime Minister may not sit well with the declared objective of the good governance movement that propelled President Sirisena to power, particularly to abolish the executive presidency. It gives the President the power to actively meddle in the process of government formation and interfere with the choice of the electorate. The President's decision must be based on predictable criteria and he must not allow his opinion to be shaped by subjective preferences, or to create that impression in the public mind. The President is also a leader of a political party and it

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[39] Serious allegations against the ex-President and his family members are being investigated by the Bribery or Corruption Commission, Financial Criminal Investigation Division (FCID), and the Presidential Commission of Inquiry to Investigate and Inquire into Serious Acts of Fraud, Corruption, and Abuse of Power, State Resources and Privileges (PRECIFAC).

[40] See on this R. Philips, '*Can the President insist on appointing only an untainted MP as PM?*', ***Colombo Telegraph***, 9th August 2015.

[41] Ven. Muduluwave Sobhita Thero called upon the Prime Minister not to appoint anyone with allegations against them to the Cabinet of Ministers in the new government. See '*Sobhitha Thero urges Ranil Appoint a clean Cabinet*', ***Ceylon Today***, 20th August 2015.

would be difficult for him to take an objective and unbiased view. There ought to be guidance in place on how he shall exercise his discretion.

### *The Practice in Scotland*

The process is different in Scotland where a newly elected Parliament's first business would be to elect someone to preside over its proceedings and then to elect the First Minister by passing an investiture vote. Prospective candidates for the post will face a vote in Parliament. If, in the first round of voting, no candidate is able to secure an overall majority then a run off would follow and the candidate with the most votes (that is, a simple majority) would get the nomination as First Minister. His name would be submitted to the Queen, who would then appoint him.

In May 2007, the Scottish National Party (SNP) was returned to Parliament with 18 members short for an overall majority, yet its leader, Alex Salmond managed to run a minority government.[42] The SNP went into a confidence and supply arrangement with the Green Party, according to which the latter agreed to back the government on all no confidence motions and on the budget. On all other issues, the Greens took a position depending on their individual merits.

The advantage of the investiture vote is that it would resolve any doubts about who has the support of the majority in the House fairly quickly. It would save the sovereign from being drawn into any controversy and protect the sovereign from allegations of partisanship. The sovereign, it must be remembered, is expected to remain neutral. The Westminster practice governing the search for a government may not produce a stable government even after weeks of negotiations as the test for resolving any doubt will have to await a parliamentary vote.[43] On the other hand, an

[42] The SNP had 47 seats – one more than Labour – in the Scottish Parliament consisting of 129 members.
[43] Six weeks had elapsed between the date of the election and the no confidence vote that led to the defeat of Stanley Baldwin's government in 1923-24.

investiture vote would require Parliament to meet sooner than later.

The Institute for Government favoured the investiture vote as the process by which to determine who becomes Prime Minister and recommended its adoption.[44] The Institute's recommendation was taken up by the Political and Constitutional Committee of the UK House of Commons and recommended for adoption in the future. The Committee said:

> "An investiture vote of some form would give a clear signal that the person appointed as Prime Minister by the Queen would indeed have the confidence of the House and would be able to govern. Without that, the new appointment may be made on the balance of probability."[45]

### *Not Mahinda Rajapaksa*

It is the writer's view[46] that the President's discretion to appoint Mahinda Rajapaksa as Prime Minister was confined by the provisions in the constitution. In law, discretion is not boundless and the person in whom discretion is reposed shall first determine the limits within which he shall exercise the discretion. Often times, the enabling instrument would clearly identify those limits but there are limits which may be implied and can only be discovered by an objective reading of the entire instrument. Article 42 (4) cannot be read *in vacuo* and there are other provisions in the constitution that circumscribe President Sirisena's discretion under this article.[47] When they are read

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[44] A. Paun & C. Mitchell (2015) ***Westminster in the Age of Minorities*** (London: Institute of Government): p.2.
[45] UK House of Commons Political and Constitutional Reform Committee, *Government Formation Post-Election*, 26th March 2015, HC 1023 2104-15: para 61.
[46] R. Hameed, '*Mahinda Rajapaksa cannot become Prime Minister*', ***Colombo Telegraph***, 1st August 2015.
[47] Cf. Constitution of Sri Lanka (1978): Article 47 (3) as amended by the Nineteenth Amendment. If the Prime Ministership were to become vacant during the period intervening between the dissolution of Parliament and the conclusion of the general election, the President may

together the conclusion would arise as a matter of necessary implication that President Sirisena shall not exercise his discretion in favour of ex-President Rajapaksa.

The Nineteenth Amendment disqualifies a person who has been elected twice as President from seeking election for a further term.[48] Article 42 specifies one such limit, namely that the person chosen should have the confidence of the majority of MPs, but that is not the only factor that he must take into account. As the Prime Minister may, in certain circumstances, have to act as President,[49] a person who is disqualified from being elected as President cannot be appointed as Prime Minster.[50] One such instance would be when the Prime Minister may have to act for the President when the latter falls ill or is absent from Sri Lanka.[51]

As the amendment disqualifies a person who has been elected twice as President from thereafter being '*elected* to such office by

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appoint one of the ministers in the Cabinet as Prime Minister. It would, of course, be anomalous to provide that his appointee shall command the confidence of Parliament at a time when Parliament stands dissolved. It must be said that this provision is rather poorly drafted. What do the words 'the Cabinet of Ministers shall continue to function with the other Ministers of the Cabinet of Ministers as its members' in Article 47(2) mean?

[48] Constitution of Sri Lanka (1978): Article 31(2) as amended by the Nineteenth Amendment: "No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People." The importance of bringing about peaceful change through elections is recognised. It is extremely difficult to dislodge incumbents from office, and it is unhealthy for a democracy if power were to remain in the same hands even through the electoral process. The Nineteenth Amendment aims to eliminate the advantage that an incumbent generally enjoys at elections. Indeed, one of the reasons for limiting the presidential term is the advantage that an incumbent enjoys at elections. Incumbents have access to the vast resources of the state, which usually tend to be abused during elections. Incumbents have control over the agencies of government, enjoy an advantage in raising funds and have access to the media over and above his challenger. Incumbents also get to choose the timing of the poll.

[49] See e.g., Constitution of Sri Lanka (1978): Articles 31(3), 39 (2) and 40 (1).

[50] R. Hameed, '*Mahinda Rajapaksa cannot become Prime Minister*', ***Colombo Telegraph***, 1st August 2015.

[51] Constitution of Sri Lanka (1978): Article 37(1).

the People',[52] can it be argued that there is no prohibition on such a person being 'appointed' to the office? The principal objection to a person holding the office of the President for more than two terms is that it would lead to perpetuation of power in the same person and would lead to those powers being abused. It follows that the real objection is that a person cannot be entrusted with the powers of that office. Furthermore, what cannot be done directly cannot be done indirectly; and the prohibition contemplated by Article 31(2) would apply equally to a person occupying the office by a process other than election.

### *The President's Power to Remove the Prime Minister*

Does the President have the power to remove a Prime Minister? Prior to the Nineteenth Amendment, the constitution provided for his removal by the President as one of the ways in which the Prime Minister's term could come to an end.[53] This provision was repealed by the Nineteenth Amendment and it is now provided that the Prime Minister shall continue to hold office unless he (a) resigns his office by a writing under his hand addressed to the President; or (b) ceases to be a Member of Parliament.[54] Yet, for reasons that are not apparent, the constitution continues to refer to the 'removal from office' of the Prime Minister,[55] albeit there is no provision in the constitution that explicitly gives the President the power to remove him. On the contrary, except in the two instances referred to above, it is provided that the Prime Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function.[56]

Furthermore, Article 48(1) of the constitution provides for the dissolution of the Cabinet of Ministers on "the Prime Minister ceasing to hold office by death, resignation *or otherwise*". It has not been made clear as to what the circumstances are that would be caught by the words 'or otherwise', a catchall clause usually used by a lazy draftsman. The draftsman could have transposed into

[52] Ibid: Article 31 (2).
[53] Ibid: Article 47 (2).
[54] Ibid: Article 46 (2) as amended by the Nineteenth Amendment.
[55] Ibid: Article 47(2).
[56] Ibid: Article 46 (2) as amended.

Article 48 (1) the words 'removal from office' which appear in article 47(2), but he did not do so. Arguably the confusion is the product of poor drafting, a result of the horse trading that went on in Parliament when the Nineteenth Amendment Bill was debated there.

The Cabinet of Ministers will continue to function even after the dissolution of Parliament until the conclusion of the general election even if Ministers may cease to be members of Parliament. [57] The Cabinet would stand dissolved upon Parliament rejecting a Statement of Government Policy or the Appropriation Bill or upon Parliament passing a vote of no confidence in the government. It follows that on the happening of any of these eventualities the Prime Minister will cease to hold office. In contrast, the President may remove a Minister from office, albeit only on the advice of the Prime Minister.[58]

### *The President's' Power to Dissolve Parliament*

The President's power to dissolve Parliament is restricted to the last six months of its life, except where Parliament itself requests dissolution by the resolution passed with the support of no less than two-thirds of MPs in support. The requirement of a special majority for a resolution requesting dissolution sets a high threshold for Parliament to cross. It makes it difficult for a President to circumvent the constitutional bar to his power to dissolve Parliament by getting a Parliament which is aligned to him to pass such a resolution. As a result, governments may find it virtually impossible to get such a resolution adopted, short of engineering a potentially politically suicidal no confidence motion against itself.

The proviso in Article 70,[59] in which two clauses have been put together, may pose difficulties of interpretation. The new provision states (emphasis added): The President *may* by

[57] Ibid: Article 47(1) as amended.
[58] Ibid: Article 47 (3)(a).
[59] Ibid: Article 70 (1).

Proclamation, summon, prorogue and dissolve Parliament: Provided that the President *shall not* dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, *unless* Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour. The first clause qualifies the power that the President has under the main provision, which is that he *may* dissolve Parliament; the last clause beginning with the word 'unless' neutralises the first clause. Thus, an occasion may arise when a majority in Parliament opposed to the President may actually wish to trigger a poll, and may succeed in getting a resolution passed with the required majority, but it would seem that the President is not be obliged to comply with such a request.

Parliament may only *request* its dissolution and not *require* it. The President, it is provided, *may* dissolve Parliament and the proviso inhibiting his power of dissolution states that *he shall not dissolve* Parliament until after the expiry of four and a half years. This could be a source of potential conflict between Parliament and the President. In the writer's view the Nineteenth Amendment, which repealed Article 70(1) and substituted it with a new article of the same number, has removed the President's power to dissolve Parliament on the rejection by Parliament of the Statement of Government Policy.

### *The President's Responsibility to Parliament*

The Supreme Court reiterated the proposition that the constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of government. According to Article 33A[60] the President shall be *responsible* to Parliament for the due exercise, performance, and discharge of his powers, duties and functions. By comparison, the Cabinet of Ministers shall be collectively *responsible and answerable* to Parliament,[61] and that would include the Prime Minister, who after all is only *primus inter pares*. As a

[60] Previously in Article 42.
[61] Constitution of Sri Lanka (1978): Article 42(3).

member of the Cabinet, the President, too, is answerable to Parliament but *qua* President he is only responsible to Parliament. Ministers sit in Parliament and are available to answer questions raised by Members but the President does not sit in Parliament and is, therefore, not available to respond to questions that may be raised by Members. Article 32 (3) of the constitution gives the President "… the right at any time to attend, address and send messages to Parliament ..." It is a right that he may or may not choose to exercise without being required to attend Parliament to answer questions.

Is there a difference between *responsibility* and *answerability*? A committee of the UK House of Lords[62] considered the possibility of a distinction existing between these two concepts and, in the Committee's view, the concepts of constitutional responsibility, accountability and answerability are all a part of the same thing; there is no constitutional difference between the terms 'responsibility' and 'accountability'. It remains to be seen, for example, whether Parliament will hold the President to account for failing to follow his Prime Minister's advice.

### *The Right to Information*

The constitution is amended by the insertion of a new article[63] guaranteeing to every citizen the right to any information as provided for by law. The right to access information is merely spelt out in the constitution but the scope of the right awaits clarification by Parliament. The right of access is available to citizens only,[64] and access is confined to information 'that is required for the exercise or protection of a citizen's right.' The information to which a citizen is entitled to have access must be 'held by' specified bodies or institutions, and includes information held by 'the State, a Ministry or any Government Department'.

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[62] The House of Lords Constitution Committee, *The Accountability of Civil Servants* (HL 2012-13, 61): paras. 3-17.
[63] Constitution of Sri Lanka (1978): Article 14A.
[64] Cf. UK Freedom of Information Act 2000.

The amendment does not clarify whether access is available to information held by Parliament. Arguably Parliament, being an institution of the State, should fall within the article, but the Amendment is uncertain on the question whether access would be available to information held by Parliament. The term 'State' is not defined in the constitution. It follows from a construction of the various articles in which reference is made to the 'State' that it must include Parliament. The Directive Principles of State Policy are expressly stated to act as a guide to Parliament.[65] In the UK, under the Freedom of Information Act 2000,[66] a person has the right to access information held by a public authority, which is defined to include the House of Commons and the House of Lords.

Parliament does not belong to its members; it belongs to the people. The people must have access to information about the activities of their representatives, especially about what they are doing in Parliament. Media reports of parliamentary proceedings may fulfil this need to a certain extent but the people cannot rely on Parliament to inform the public about its activities. The right to information means, in effect, the 'right to seek information', which is guaranteed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Members of Parliament perform a public function and are elected at great expense to the public purse. They are also responsible for authorising the expenditure of public money by the executive. Parliament and its members should be more amenable to public scrutiny and accountable to those who elected them.

### *Concluding Remarks*

The Nineteenth Amendment that the Sirisena government delivered did not abolish the executive presidency but merely tinkered with it. President Sirisena could not muster the majority required in Parliament to carry through the promised programme of constitutional change. He could have dissolved Parliament soon after his election and appealed to the electorate to give him the

[65] Constitution of Sri Lanka (1978): Article 21 (1) and Articles 1 to 4.
[66] See UK Freedom of Information Act 2000: Schedule 1, Part 1.

necessary majority in Parliament to carry through the changes he promised.

Cynics might argue that the government's objective in having the Nineteenth Amendment enacted was to appease the opposition and to secure its support for the government to remain in power rather than to bring about significant structural change. Not only did the government retract from its promise to abolish the executive presidency altogether but it also reneged on its pledge given to the electorate to limit the size of the cabinet to thirty.[67] Notwithstanding this numerical restriction, size does not matter in Cabinet formation in the current parliament as parliament is allowed to determine on its own accord the size of the cabinet where a national government is formed.[68]

The Nineteenth Amendment set a ceiling on the size of the cabinet, implicitly acknowledging that the country could be run with a cabinet consisting of no more than thirty ministers. There is no evidence to support the idea that a larger cabinet is required for government to be run efficiently. Restoring stability to a struggling economy does not require jumbo cabinets. Ministerial portfolios have been the carrots dangled before members to engineer their crossover to shore up governments short of sufficient seats in parliament.

The power that the President presently enjoys to assign subjects and functions and to determine the composition of the Cabinet allows him to multiply ministries without any rational basis. Whether the head of government should continue to enjoy this power is a question that ought to be given serious consideration.

It must be acknowledged that President Sirisena, in keeping with his promise to whittle down the powers of his office, has, by his words and actions, opened up space for dissent and avoided being an authoritarian president. Nevertheless, so long as the powers of the office remain intact, there is the likelihood that a future

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[67] The Constitution of Sri Lanka: Article 46(1): "The total number of– (a) Ministers of the Cabinet of Ministers shall not exceed thirty; and (b) Ministers who are not members of the Cabinet of Ministers and Deputy Ministers shall not, in the aggregate, exceed forty."
[68] The Constitution of Sri Lanka: Article 46(4).

president may not be so restrained in the use of the powers of his office.

The Nineteenth Amendment has changed, to a certain degree, the balance of power between Parliament and the President. The power that the President had to dissolve Parliament after one year of its existence was a source of insecurity to Parliament and provided the President with the means to make Parliament submissive to his will. With the curtailment of that power, his ability to dictate terms to Parliament, too, has been curtailed, making the Parliament's term more secure.

The Nineteenth Amendment has repealed those provisions of the constitution that permitted the Cabinet of Ministers to designate bills as urgent in the national interest and circumvent the normal parliamentary procedure for enacting legislation. Successive governments abused the urgent bills procedure to ram through measures without adequate discussion either as to their necessity or constitutionality. The President no longer has the power[69] to submit to the people a bill rejected by Parliament for approval at a referendum in a bid to override Parliament's will.

Many of Parliament's structural weaknesses remain even after the Nineteenth Amendment. Parliament has failed to perform its core functions satisfactorily.[70] Parliament has done little during the past several years except to provide the votes for approving measures introduced by the executive. Parliament became a partisan ally of the ex-president and his faction within the majority party. Following his defeat to President Sirisena it became the forum through which the ex-President continued his rivalry with those who opposed him. Parliament needs to be reinvented and made into a body that is fit for its purpose.

The dilemma posed by the continuation of the executive presidency, albeit with reduced powers, is that the powers of that

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[69] See Constitution of Sri Lanka (1978): Article 85(2) which is now repealed by the Nineteenth Amendment.
[70] On this see further R. Hameed, '*Parliament in a Presidential System*' in A. Welikala (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): Ch. 2.

office are such that they may be abused by a future president who might not be as willing as President Sirisena to voluntarily accept restraints on the powers of his office. The solution to avoid the abuse of presidential powers is not to transfer them to the Prime Minister because those powers, in the absence of sufficient checks and balances, are equally capable of being abused by a Prime Minister.

# 7

# The Constitutional Council and the Independent Commissions: The New Framework for Depoliticising Governance

*Dinesha Samararatne*

## Overview

The last three amendments to the Second Republican Constitution of Sri Lanka all concerned the restriction or expansion of presidential power. [1] More specifically, they concerned reforms to the power of the executive president to make appointments to several high public offices and independent commissions. The Seventeenth and Nineteenth Amendments were relatively progressive in that they established a Constitutional Council (CC), which was expected to de-politicise the process of making appointments, and thereby improve the legitimacy and independence of high offices and independent commissions. The Eighteenth Amendment, which was applicable for a short time, had replaced the CC with a Parliamentary Council which had no teeth, no independence, nor expert representation. This amendment weakened the rule of law while it was in force in a drastic way.

This chapter examines these amendments with a view to understanding their impact on governance. At least two assertions are relevant here. Firstly, that the independence of public institutions in Sri Lanka has been eroded due to excessive politicisation and patronage politics. Secondly, that in order to preserve a constitutional democracy, in certain instances, processes and institutions must be separated out of the representative democratic process. These arguments are employed to justify the call to 'depoliticise' governance. However, I argue in this chapter that while constitutional reform can, in the short term, address mal-governance and ensure good governance, the sustainability of such reform requires interventions that address the root causes of mal-governance. Reform that address 'de-politicisation' is a skin-deep solution to a more fundamental

* I am grateful to Ms Azra Jiffry, undergraduate of the Faculty of Law, University of Colombo, for her research assistance.

[1] This chapter will consider three constitutional amendments and two proposed constitutional amendments. The enacted constitutional amendments are: the Seventeenth Amendment (2001), the Eighteenth Amendment (2010), and the Nineteenth Amendment (2015). The proposed amendments, which were never enacted, are the Eighteenth Amendment Bill of 2002 and the Nineteenth Amendment Bill of 2002. These constitutional amendment bills will be distinguished by indicating the year in which they were proposed.

problem in Sri Lankan society. The more deep-seated problems that plague representative democracy requires further critical inquiry which will hopefully lead to the development of more targeted solutions for such problems.

The first section in this chapter considers politicisation and political patronage as they affect public institutions in Sri Lanka and the arguments for their 'de-politicisation.' The second section reviews the political context and specific constitutional issues related to the three amendments. The third section investigates the concept of democracy more broadly in justifying the 'de-politicisation' of public institutions and appointments to those institutions. Following these discussions, I conclude this chapter by arguing that more nuanced and long-term interventions are required if the CC and independent commissions are to be a core component of the new framework for governance in Sri Lanka.

## ***Politicisation, Patronage Politics, and Public Institutions***

A turning point in the politicisation of public institutions and the institutionalisation of political patronage in Sri Lanka is the First Republican Constitution.[2] The concentration of state power in the National State Assembly and bringing the public service under the purview of the Cabinet set the stage for the negation of democratic principles and norms that had previously been observed. [3] The subsequent introduction of the Executive Presidency and a new constitution that reproduced the illiberal processes and substance of the previous constitution cemented this

[2] See e.g., R. Coomaraswamy, '*The 1972 Republican Constitution of Sri Lanka in the Postcolonial Constitutional Evolution of Sri Lanka*' in A. Welikala (Ed.) (2012) ***Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): p.128.

[3] For critical discussions on the impact of political patronage on the public service and on the state see, A. Kadirgamar, '*State Power, State Patronage and Elections in Sri Lanka*' (2010) ***Economic & Political Weekly*** 45(2): p.21; B.S. Wijeweera, '*Policy developments and administrative changes in Sri Lanka: 1948 – 1987*' (1989) ***Public Administration and Development*** 9: p.287.

state of affairs.[4] The Report of the Presidential Commission on Youth, for instance, identifies four aspects of the perception of politicisation in Sri Lanka. Those aspects are: politicisation of recruitment to public services; 'misapplication of political power' in granting licences and public contracts; undermining democratic institutions through politicisation; and political interference in public administration.[5]

The concentration of power in the presidency gradually sucked the life blood out of numerous public institutions including the judiciary, leading to a political culture in which the meaning and logic of independence, merit, and even efficiency were replaced by partiality, corruption, and nepotism.[6] The manner in which appointments were made to the higher judiciary in the 1990s is a case in point. A President of the Court of Appeal was appointed as the Attorney General in what was viewed as direct interference in the independence of both the judiciary and the office of the Attorney General.[7] This state of affairs was aggravated when this Attorney General was thereafter appointed as the Chief Justice.[8] During this same period, the appointment of an academic to the Supreme Court was perceived to be a partial appointment made based on personal and political preferences as opposed to being based on merit. Both these appointments were challenged before the Supreme Court.[9] However, the cases were dismissed on the basis that appointments to judicial office were within the discretion of the President; and that its exercise cannot be subject

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[4] See further in this regard, R. Coomaraswamy (1997) ***Ideology and the Constitution: Essays on Constitutional Jurisprudence*** (Colombo: International Centre for Ethnic Studies); 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*** (The Hague: Martinus Nijhoff): p.373.
[5] Report of the Presidential Commission on Youth, Sessional Paper I (1990): p.1.
[6] S. Gamage & S. Hettige, '*Democracy, Ethno-Nationalist Politics and Patronage Sri Lankan Style*' ***Asian Studies Review*** 21(2-3): p.144.
[7] See in this regard, International Bar Association Human Rights Institute Report, *Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary*, November 2001.
[8] Ibid.
[9] *Silva v Shirani Bandaranayake* (1997) 1 SLR 92; *Victor Ivan v SN Silva* (2001) 1 SLR 309.

to judicial review due to the immunity vested in the office of the President.[10]

The fate of the Permanent Commission to Investigate Allegations of Bribery or Corruption (CIABOC) is another example of the impact of politicisation on public institutions. Established in 1994 under an Act of Parliament that was adopted unanimously, this institution was considered to be a symbol of a new chapter in the history of governance in the country.[11] However, by 1999, due to several factors including lack of commitment on the part of the government, the Commission 'stood ineffective and defunct'.[12] Even though attempts were made revive the CIABOC subsequently, it has remained a weak institution that has been unable to effectively address bribery and corruption.

Responses to similar problems regarding governance in other jurisdictions have included the delegation of powers 'to bodies beyond the direct control or oversight of democratically elected politicians.'[13] Arguments of 'technical competence and specialist expertise' coupled with the desire to establish 'credible commitment to policy objectives' have been relied on to support such interventions (particularly in relation to the regulation of markets).[14] Conceptually, these responses carry with them the promise of 'good governance.' Good governance is a concept that recognises that 'the character of a society's political institutions to a large extent determined its economic and social development.' Good governance focuses on describing the qualities of political

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[10] Constitution of Sri Lanka (1978): Article 35 (1). It must be noted that the Nineteenth Amendment has restricted the immunity of the President. Any act of the President that violates fundamental rights can now be challenged under Article 126. The petition has to be filed against the Attorney General.

[11] Commission to Investigate Bribery and Corruption Act No 19 of 1994; Human Rights Commission Act No 21 of 1996.

[12] A. Satkunanathan, '*State Interference with Public Institutions: A Case Study of the Bribery Commission*' in (2002) ***Sri Lanka: State of Human Rights 2000*** (Colombo: Law & Society Trust): p.328. For an account of the events that effectively prevented the Commission from functioning for two years, see, pp.332-334.

[13] N. Hardiman, '*Governance and State Structures*' in D. Levi-Faur (Ed.) (2012) ***The Oxford Handbook of Governance*** (Oxford: Oxford University Press): p.230.

[14] Ibid: p.231.

institutions that best serve economic and social development. Literature in this field often refers to the indicators developed by the World Bank to measure good governance; those indicators include voice and accountability, and the rule of law.[15]

However, there is a conceptual problem in promoting good governance for the more long-term objective of strengthening and/or preserving democracy. It has been pointed out that 'there is no straightforward relationship between establishing electoral representative democracy and many features of good governance.'[16] It has also been argued that they are distinctive concepts which require equal attention if human wellbeing is to be advanced.[17] Interventions or reforms for good governance have been critiqued as undermining the democratic mandate of governments; as allowing for privileged access to political power for the elite; and also as allowing for the manipulation of public institutions for 'elite interests.'

Good governance re-emerged in significant ways recently in Sri Lankan political discourse when the joint opposition candidate for the presidential election of January 2015 launched his campaign with the promise of restoring good governance in the country. The Sinhala term *Yahapalanaya* has since then become an all encompassing expression which seems to have captured the public imagination: the term is associated by many with the revival of democracy, the restoration of the rule of law, and the preservation of the rights of the governed.[18] The introduction of the Nineteenth Amendment was seen by many as the translation of the promise of Good Governance / *Yahapalanaya* into actual practice.

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[15] The other indicators are, political stability and absence of violence; government effectiveness; regulatory quality; and control of corruption. See World Bank Good Governance Indicators, http://info.worldbank.org/governance/wgi/index.aspx#home (accessed 9th August 2015).

[16] B. Rothstein, '*Good Governance Structures*' in D.Levi-Faur (Ed.) (2012) ***The Oxford Handbook of Governance*** (Oxford: Oxford University Press): p.150.

[17] Ibid: p.151.

[18] This was apparent in the parliamentary elections of August 2015 that followed the presidential elections. Many political parties defined their election manifestoes in relation to the concept of good governance.

## *The Constitutional Council and the Independent Commissions*

### Three Successive Amendments

It has been said that Sri Lanka borrowed the idea of a CC from the Constitution of Nepal.[19] The concept of an independent commission for appointments to certain offices was proposed initially by the Presidential Commission on Youth in 1990.[20] That Commission recommended a 'Nominations Commission' that would recommend names to the President for appointment to Commissions of the Public Service. [21] The Nominations

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[19] C.S. Dattatreya, '*The Proposal for a Constitutional Council*' in D. Panditaratne & P. Ratnam (Eds.) (1998) ***The Draft Constitution of Sri Lanka Critical Aspects*** (Colombo: Law & Society Trust): p.75. Article 117 of the Constitution of the Kingdom of Nepal (now repealed) 1990, reads as follows:
(1) There shall be a Constitutional Council, for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies, which shall consist of the following as Chairman and members:
(a) the Prime Minister Chairman;
(b) the Chief Justice Member;
(c) the Speaker of the House of Representatives Member;
(d) the Chairman of the National Assembly Member; and
(e) the Leader of the Opposition in the House of Representatives Member.
(2) For the purpose of recommendation of an appointment of the Chief Justice, the Constitutional Council shall include among its members the Minister of Justice and a Judge of the Supreme Court.
(3) The functions, duties and powers of the Constitutional Council shall be as determined by this Constitution and other laws.
(4) The Constitutional Council constituted pursuant to clause (1) shall have the power to regulate its working procedures on its own.
[20] The author is grateful to Radhika Coomaraswamy for drawing the author's attention to this recommendation. Sessional Paper I (1990): pp.5-6.
[21] The Commissions that were proposed to be brought under the Nominations Commission were: the Public Service Commission; the Educational Services Commission; the Human Rights Commission; the Board of the National Youth Service Council; the Public Corporations Services Council; the Official Languages Commission; the University Grants Commission; A Commission responsible for appointments to the Security Forces; the Salaries Standardisation Commission. Four new commissions were proposed by the Youth Commission and they too were proposed to be brought under the Nominations Commission for appointments: a Commission on National Educational Policy; a

Commission itself was to comprise of ten Members of Parliament (MPs) representing political parties in Parliament and one non-voting member each to represent the Chief Justice and the Auditor General respectively. The institution was first proposed during the debates on state reforms in the 1994-2000 period. The Constitution Bill of 2000 was the first instance where the establishment of a CC was included.

The idea was mooted again as a condition in the Memorandum of Understanding (MoU) between the Peoples' Alliance and the Janatha Vimukthi Peramuna (JVP) in 2001 and was incorporated into the constitution as the Seventeenth Amendment.[22] The CC comprised of the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the President, five nominated jointly by the Prime Minister and the Leader of the Opposition, and one nominee by parties represented in Parliament other than those already represented in the CC.[23] This nominee was required to 'represent minority interests.'[24] Only three members of the CC were Members of Parliament. The others were required to be 'persons of eminence and integrity who have distinguished themselves in public life and who are not members of a political party.'[25] The Eighteenth Amendment of 2010 replaced the Council with a 'Parliamentary Council' (PC) whose recommendations were not binding on the President.[26] The PC consisted entirely of MPs: the Prime Minister, the Speaker, Leader of the Opposition, and one nominee each by the Prime Minister and the Leader of the Opposition from Parliament. The amendment stipulated that the nominees of the Prime Minister and the Leader of the Opposition should 'belong to communities which are communities other than' those represented by the *ex officio* members of the PC.[27]

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Commission on Human Resource Development; a Commission on Health Policy; and a Media Commission.
[22] See in this regard, de Silva (2011).
[23] Constitution of Sri Lanka (1978): Article 41(A) [Seventeenth Amendment].
[24] Ibid: Article 41(A) (3).
[25] Ibid: Article 41(A) (4).
[26] See e.g., Constitution of Sri Lanka (1978): Article 41(A) [Eighteenth Amendment].
[27] Ibid.

The Seventeenth Amendment has been described as a moment in Sri Lanka's political history where political parties in Parliament reached a consensus on constitutional reform for good governance. The perusal of the parliamentary debates that preceded the adoption of the amendment evidences the limits of that consensus. Political parties that were nationalist in their outlook such as the Jathika Hela Urumaya (JHU) and the Tamil United Liberation Front (TULF) opposed the amendment for reasons that were quite similar. Representatives of these parties claimed that unless a viable solution for the ethnic conflict was reached, constitutional reform was merely window dressing. These parties disagreed only in terms of how they characterised the ethnic conflict: the JHU defined it in terms of terrorism while TULF defined it in terms of historic discrimination against Tamils. The TULF walked out of the debate while the JHU declined to vote for the amendment.

During the debates the United National Party (UNP) raised the question as to whether an alternative process will be laid down to be followed in the event there is a deadlock in making nominations to the CC. Wimal Weerawansa MP (JVP) speaking on behalf of the government, argued that by design this process required political consensus. He took the view that leaders of political parties in Parliament could reasonably be expected to work towards reaching such an agreement.[28] Interestingly, a deadlock on nominations arose sooner than later: no CC was appointed after the first CC's term expired since no consensus could be arrived at regarding the nominations. The absence of clauses that addresses a deadlock in nominating the CC therefore possibly led to the failure of the amendment.[29] The Nineteenth Amendment seeks to address this gap by providing that where the President does not make the required appointments 'the persons nominated shall be deemed to have been appointed…'[30]

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[28] Parliamentary Debates, 138 (1), 24th September 2001:Cols.56-57.
[29] See further, E. Chan, '*Sri Lanka's Constitutional Council*' (2008) ***LST Review*** 18; C. Siriwardhana, '*Public Institutions and De-politicisation: Rise and Fall of the 17th Amendment*' in (2007) ***Sri Lanka: State of Human Rights 2007*** (Colombo: Law & Society Trust).
[30] Constitution of Sri Lanka (1978): Article 41(A)(6) [Nineteenth Amendment].

The adoption of the Eighteenth Amendment was problematic in terms of its substance as well as the process.[31] Apart from adopting the bill as urgent in the national interest for no apparent reason, it was also the first significant law reform by the then government after the conclusion of the armed conflict. The amendment primarily served to further strengthen an already powerful Executive President. The government obtained the required two-thirds support for the amendment in Parliament by facilitating crossovers from the opposition. There was no consultation regarding the proposed reform even among the political leadership. The manner in which the Eighteenth Amendment was adopted therefore was unacceptable from the point of view of democratic norms. The UNP did not attend the second and third reading of the amendment bill presumably in protest, while the TNA and the JVP voted against it.[32]

The incumbent President's election manifesto prioritised the repeal of the Eighteenth Amendment and the re-establishment of 'Independent Commissions to secure the impartiality of judicial, police, elections, auditing institutions and the office of the Attorney-General.'[33] The Nineteenth Amendment was adopted accordingly in May 2015. The CC at present comprises of the Prime Minister, the Speaker, Leader of the Opposition, an MP appointed by the President, five appointed jointly by the PM and the Leader of the Opposition (of which two are MPs), and one MP nominated by parties and independent groups in Parliament other than those represented by the other categories.[34]

The 2000 Constitution Bill, the Seventeenth Amendment, and the Nineteenth Amendment, envisaged two main functions for the

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[31] See in this regard, N. Anketell, '*The Executive Presidency and Immunity from Suit: Article 35 as Outlier*' in A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): p.260: R. Edirisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution Substance and Process*** (Colombo: Centre for Policy Alternatives).
[32] Parliamentary Debates, 193 (2), 8th September 2010.
[33] Maithripala Sirisena, *Compassionate Government: Maithri: A Stable Country* (Election Manifesto 2014): p.16.
[34] Constitution of Sri Lanka (1978): Article 41(A) [Nineteenth Amendment].

CC: the recommendation of appointments to independent commissions, and the approval of recommendations made by the President to several high offices. The 2000 Constitution Bill included both the Official Languages Commission and the University Grants Commission but neither of the other two amendments included those bodies under the purview of the CC. The Nineteenth Amendment includes two other bodies: the Audit Service Commission and the National Procurement Commission under the CC.[35] The Judicial Service Commission is the only Commission for which the CC had the power to approve the recommendations of the President under all three amendments.[36] The 2000 Constitution Bill additionally envisaged the CC as appointing members to the Regional Public Service Commissions and the Regional Police Commission.

### *Independent Commissions*

The governance architecture in Sri Lanka has included statutory bodies with the authority to act independently. These institutions were designed to be independent on the assumption that the technocratisation of certain public functions leads to improvement in governance. The University Grants Commission and the Legal Aid Commission are two examples.[37] Funded by the state, these bodies are financially accountable to Parliament but are independent in terms of their mandate. Placing certain public functions beyond the reach of the political interests of governments and political parties in power, providing opportunities for experts to engage in governance without involving themselves with party politics, and adopting diverse approaches to governance are some of the arguments that justify independent commissions. In the new wave of democratisation that was claimed to be ushered in after the presidential elections of 1994, the model of independent commissions was revisited.[38]

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[35] Ibid: Schedule to Article 41(B).
[36] See e.g., ibid, Article 111(D) [Seventeenth Amendment].
[37] UGC established under the Universities Act No. 16 of 1978 and the LAC established under the Legal Aid Commission Act No. 27 of 1978.
[38] L. Jayasuriya (2012) ***The Changing Face of Electoral Politics in Sri Lanka (1994-2010)*** (2nd Ed.) (Colombo: Social Scientists Association): p.46.

New commissions such as the Human Rights Commission (HRC) and the Commission to Inquire into Allegations of Bribery or Corruption (CIABOC) were established during this time.

The Constitution Bill of 2000 proposed to bring these Commissions under the CC. Even though this draft constitution was not adopted, the Constitutional Council was introduced to the Constitution in 2001. During this time, the National Police Commission and the HRC in particular, functioned in a dynamic way.[39] Only a few of the independent commissions came under the CC then, and even under the Nineteenth Amendment this remains the case. The rationale for the selection of Commissions that would come under the CC is not officially stated, but it seems to be based on an understanding of the significance attributed to the mandate of the respective commissions. For instance, even though the University Grants Commission (UGC) was included under the 2000 Constitution Bill, it was not included in the Seventeenth or the Nineteenth Amendments. State universities have suffered significantly due to politicisation and patronage politics, and the politicisation of the UGC has been a contributory factor in this institutional decline.[40] A wider debate should have preceded the adoption of the Nineteenth Amendment through which commissions that ought to be under the CC could have been identified through defined criteria. The Nineteenth Amendment includes certain provisions that seek to improve the process of appointments to the commissions. Where the CC

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[39] See further on the National Police Commission, J.C. Weliamuna, '*National Police Commission*' in (2004) ***Sri Lanka: State of Human Rights 2004*** (Colombo: Law & Society Trust): p.159; K.P. Jayawardena, '*A Promise Unfulfilled: A Critical Scrutiny of the National Police Commission of Sri Lanka*' (2007) ***LST Review*** 18: p.9. On the Human Rights Commission, M. Gomez, '*Sri Lanka' New Human Rights Commission*' (1998) ***Human Rights Quarterly*** 20 (2): p.281; B Skanthakumar, '*Atrophy and Subversion: The Human Rights Commission of Sri Lanka*' (2010) ***LST Review*** 21: p.1; B Skanthakumar, '*Embedded in the State: The Human Rights Commission of Sri Lanka*' (2012) ***LST Review*** 23: p.1; B Skanthakumar, '*Silent and Powerless: The Human Rights Commission of Sri Lanka in 2010*' (2011) ***LST Review*** 21: p.77; B Skanthakumar, '*Window Dressing? The National Human Rights Commission of Sri Lanka*' (2009) ***LST Review*** 20: p.5.

[40] See in this regard, J. Uyangoda (2015) ***University Governance in Sri Lanka: A Critique and Ideas for Reform*** (Colombo: Social Scientists Association).

makes recommendations but the President fails to make the appointments within fourteen days, the appointments are 'deemed' to have been made.[41]

The state of the HRC since 2005 epitomises the problem with independent commissions that are located in a deeply politicised society that does not appreciate the logic of independence and expertise. The HRC has been downgraded by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) due to its lack of independence.[42] The HRC has in some instances even been an apologist of the government and defended the government's rejection of international monitoring through the UN Human Rights Council. At the peak of the armed conflict, the HRC played, at most, a peripheral role, in addressing human rights issues on the ground. The experimentation with independent commissions in Sri Lanka has not been positive. Barring a few exceptions such as the HRC during certain periods, in retrospect, it is evident that independence in the appointment of the commissioners is a prerequisite for the success of these commissions. Sri Lanka is yet to develop an understanding of the notion of 'independence' of these commissions and an appreciation of the leadership given by dynamic experts to these institutions.[43]

### *Reforms introduced by the Nineteenth Amendment*

Two new commissions were created under the Nineteenth Amendment and several other progressive revisions were made to the mandate of other commissions. The Audit Service Commission and the National Procurement Commission are the two new commissions with mandates to regulate the audit service

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[41] Constitution of Sri Lanka (1978): Article 41(B)(4) [Nineteenth Amendment].
[42] As of 28th January 2014, the Sri Lanka HRC is accredited at 'B' grade – 'not fully in compliance'. The HRC has been downgraded since 2007.
[43] For a critical analysis of this point in relation to the public service, see W. McCourt '*Impartiality through Bureaucracy? A Sri Lankan Approach to Managing Values*' (2007) ***Journal of International Development*** 19: p.429.

and procurement respectively.[44] The amendment provides that the mandate of CIABOC be broadened by law to provide for the implementation of the UN Convention Against Corruption and any other related international Convention.[45] Failure by public authorities to comply with the directives of the Election Commission has been declared a punishable offence.[46] The amendment stipulates that the Chief Justice and the two most senior judges of the Supreme Court be appointed to the Judicial Service Commission.[47] These reforms seek to strengthen the institutional architecture of the independent commissions as well as broaden their scope.

However, in making judicial appointments to the appellate courts, the Nineteenth Amendment only requires the CC to consult the Chief Justice, whereas the Seventeenth Amendment required that the Attorney General's view be considered as well.[48] The gazetted Nineteenth Amendment Bill in fact required that the CC obtain views of the Minister of Justice, the Attorney General, and the President of the Bar Association. In reviewing this clause, the Supreme Court held that 'Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. In fact a consultative process will only enhance the quality of the appointments concerned.'[49] In spite of these observations of the Court, at committee stage, the CC was only required to consult the Chief Justice.

### *Composition of the Constitutional Council*

The membership of the CC changes radically from the 2000 Constitution Bill to the Seventeenth, Eighteenth, and Nineteenth Amendments. The Seventeenth Amendment included seven non-MPs, while the Eighteenth Amendment provided an all MP

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[44] Constitution of Sri Lanka (1978): Articles 153A and 156(B) [Nineteenth Amendment].
[45] Ibid: Article 156(A)(1)(c).
[46] Ibid: Article 104GG.
[47] Ibid: Article 111(D)(1).
[48] Ibid: Article 41(C)(4).
[49] *In Re the Nineteenth Amendment to the Constitution* SC (SD) 4/2015, SC Minutes, 6th April 2015: p. 15.

membership for the Parliamentary Council. The Nineteenth Amendment, as proposed, included seven non-MPs which was however brought down to three at the committee stage. The Nineteenth Amendment in that sense dilutes the CC, having increased its 'political' representation and it effectively renders negligible the 'expert' representation.

The requirement that joint nominations by the Prime Minister and the Leader of the Opposition should reflect 'minority interests' has been generally viewed positively.[50] It has been justified on the basis that it would ensure that minority interests are also considered in making appointments to independent commissions and to high offices. It has also been defended on the basis that it would ensure the legitimacy of the CC. Elsewhere, it has been argued that in the Sri Lankan context, 'the politics of recognition, as symbolic recognition of the distinct identity of ethnic groups may be more important than the specifics of power sharing for an enduring resolution of the conflict.'[51] The failures in the numerous attempts at state reform and the explicit constitutional provisions that are majoritarian have given rise to the view that specific representation of minority interests by the minorities themselves is a pre-requisite for any reform that seeks to meaningfully address the ethnic conflict. This position is premised on the idea that only a member of a minority community can effectively understand and/or represent its interests. This idea of exclusivity has often fed into the competing narratives of nationalisms in Sri Lankan society. The Seventeenth and Nineteenth Amendments, however, require only the representation of minority interests which in theory suggests that even a member of a 'majority' community could represent those interests. Interestingly, the JHU argued against this provision on the basis that even members of the 'majority' community give priority to minority community interests and therefore that the

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[50] Constitution of Sri Lanka (1978): Article 41A (4) [Seventeenth Amendment]. See for a general discussion in this regard, N. Vigneswaran, '*Minority Representation in the 17th Amendment: Nicety, Nepotism Or Necessity*' (2001) ***Moot Point*** 5: p.62.

[51] N. Tiruchelvam, '*Federalism and Diversity in Sri Lanka*' in Y. Ghai (Ed.) (2000) ***Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*** (Cambridge: Cambridge University Press): p.198.

interests of the majority will be under-represented or marginalised in the process.[52]

Theoretically, on the other hand, it has been argued that in multi-ethnic societies, solutions that address the 'identitarian problem' may in fact stand at odds with 'the essential precepts of constitutionalism.'[53] Identity politics have over-determined the fate of state formation in Sri Lanka at every stage. The primary objective of introducing the CC is to ensure the impartiality and the credibility of the process of making appointments, and to ensure accountability in the exercise of that power. Such appointments ought to be based on merit. It could be effectively argued that candidates that demonstrate the required degrees of merit and suitability would consider minority interests in their decision-making. The constitutional requirement that persons who represent minority interests be appointed to the CC therefore seems redundant and reactionist. It constitutionalises identity politics and indirectly affirms notions of exclusivity.

Representation based on ethnicity had already been included in the constitution in the establishment of the Finance Commission under the Thirteenth Amendment.[54] Three members that represent 'the three major communities' have to be appointed to this Commission and between the three of them the fields of finance, law, administration, business or learning have to be represented as well.[55] The Seventeenth and Nineteenth Amendment extended this approach to the CC, thereby arguably incorporating characteristics of consociationalism into the constitution.[56] However, constitutionalising ethnic identities is problematic for at least two reasons.[57] Firstly, it is difficult to define the membership of these ethnic communities, and often, political parties resort to the reinforcement of ethnonationalism in

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[52] ***Parliamentary Debates***, 138 (1), 24th September 2001: p.65.
[53] M. Rosenfeld (2010) ***The Constitutional Subject and Clashing Visions of Citizenship*** (New York: Routledge): p.228.
[54] Constitution of Sri Lanka (1978): Article 154R as amended.
[55] Ibid: Article 154(R)(c).
[56] See e.g., Y. Ghai '*Ethnic Identity, Participation and Social Justice: A Constitution for New Nepal?*' (2011) ***International Journal on Minority and Group Rights*** 18: pp.309, 311.
[57] Ibid: p.311 et seq.

such situations. Similarities within such ethnic groups are often foregrounded at the cost of ignoring the common grounds across different ethnic groups. Secondly, such provisions result in the eclipsing of other interests such as gender and social justice.

The nominating authorities have not been required to ensure the representation of diverse interests in making appointments to the CC. The mention of minority interests in the absence of a reference to other categories such as gender indicates a lack of sensitivity to other systemic discriminatory practices in Sri Lankan society. These concerns have been addressed in the Nineteenth Amendment to a significant degree. The joint nominations to the CC by the Prime Minister and the Leader of the Opposition are expected to reflect 'the pluralistic character of Sri Lankan society, including professional and social diversity.'[58] Furthermore, the CC is required to 'endeavour to ensure' that their recommendations for appointments to Commissions 'reflect the pluralistic character of Sri Lankan society, including gender.'[59] However, whether the spirit of these provisions will be respected in practice remains to be seen.

Furthermore, for the purpose of guaranteeing political impartiality, the nominees to the CC cannot be members of a political party.[60] They ought to be 'persons of eminence and integrity who have distinguished themselves in public life.'[61] This requirement is problematic at two levels at least. On the one hand, participation in political activities is a freedom guaranteed under the constitution and would include the freedom to obtain membership in a political party.[62] Its restriction therefore flies in the face of existing fundamental rights guarantees. This requirement envisages that 'persons of eminence and integrity who have distinguished themselves in public life' would not desire to be political to the extent of obtaining party membership. Moreover, whether an individual is a member of a political party in and of itself cannot be a measurement of the political loyalties

[58] Constitution of Sri Lanka (1978): Article 41(A)(4) [Seventeenth Amendment].
[59] Ibid: Article 41(B)(3) [Nineteenth Amendment].
[60] Ibid.
[61] Ibid.
[62] Constitution of Sri Lanka (1978): Article 14 (1) (a) – (i).

or disloyalties of such a person. Furthermore, curiously, being apolitical, is indirectly considered to be desirable and as a characteristic that informs 'eminence and integrity.'

### *Judicial Review*

The constitution recognises only pre-enactment review of proposed bills including bills to amend the constitution.[63] Any citizen can challenge such bills before the Supreme Court.[64] In relation to bills to amend the constitution, the question to be determined by the Supreme Court is whether such bill requires approval by the people at a referendum.[65] Only proposed amendments that affect the entrenched clauses of the constitution require approval at a referendum. Therefore the question to be determined by the Court is whether the proposed amendments affect the entrenched clauses of the constitution.[66] It is expressly provided that the 'determination of the Supreme Court shall be companied by the reasons therefor.'[67] However, it is evident from an examination of the Special Determinations on the various Seventeenth, Eighteenth, and Nineteenth Amendment Bills that judicial reasoning is threadbare, and often at odds with the basic norms and principles of constitutionalism.

The Seventeenth and Eighteenth Amendments were both proposed as urgent bills. The constitution permits the Cabinet to approve bills as being 'urgent in the national interest' which endorsement then requires the Supreme Court to determine the constitutionality of the bill within a shorter time: usually 24 hours or up to 3 days, as decided by the President.[68] To date the Supreme Court has not reviewed a decision of the Cabinet to identify a bill as being urgent even though there is no clause that expressly precludes the Court from doing so. As pointed out by N. Selvakkumaran, it was evident that neither of those two bills were

[63] Ibid: Articles 121 – 124.
[64] Ibid: Article 121(1).
[65] Ibid: Article 120.
[66] Ibid: see Article 83.
[67] Ibid: Article 123(1).
[68] Ibid: Article 122.

'urgent' in any reasonable sense of the term.[69] By cutting short the already very short time period for pre-enactment review, the possibilities of challenging the proposed bill are minimised and the possibilities of public debate and discussion of the proposed reform are effectively eliminated. At most, only legal experts and social activists who closely monitor the government are able to make interventions in such situations. It is commendable that the Nineteenth Amendment has repealed these provisions and Cabinet can no longer approve bills as being urgent in the national interest.[70]

Regrettably, in both instances mentioned above, the Court did not apply its mind to these implications of endorsing proposed bills as being urgent in the national interest. At least in the case of the Seventeenth Amendment, the contradiction in introducing a constitutional amendment that promotes governance and a broader understanding of democracy in an obviously *undemocratic* manner also points to the motives of the then government. It seems that the government was more concerned with fulfilling its obligations under the MoU and ensuring its stability rather than with increasing accountability and transparency in the reform process.

In reviewing the constitutionality of the proposed Seventeenth and Nineteenth Amendments, the Court held that the limitations imposed on the exercise of discretion by the President did not amount to 'an effective removal of the President's executive power in this respect.'[71] This conclusion was justified in the review of the Seventeenth Amendment on four grounds: that the President had the power to nominate one person to the CC; that the Council itself was appointed by the President; that all powers with regard to Heads of Departments remained with the President and the Cabinet; and that Heads of the Armed Forces were appointed by

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[69] N. Selvakkumaran, '*The Seventeenth Amendment to the Constitution – An Attempt towards Good Governance*' in S. Marsoof & N. Wigneswaran (Eds.) (2008) ***In the Pursuit of Justice*** (Colombo: Kamalasabayson Foundation): pp.321-322.
[70] Nineteenth Amendment to the Constitution Act: Section 30.
[71] *In Re the Seventeenth Amendment to the Constitution* SC SD 6/2001, SC Minutes, 21st September 2001, as reported in Parliamentary Debates 138 (1), 24th September 2001: Cols.3-7.

the President. The Court did not consider the fact that it was compulsory for the President to be guided by the CC in the exercise of discretion in making appointments.

It is problematic that the Court did not apply its mind to the inroads made by the Seventeenth Amendment into the powers of the President. The rubberstamping by the judiciary of the proposal by the government is regrettable. The same Court, in the review of the Nineteenth Amendment (2002), which proposed to alter the powers of the President with regard to the dissolution of Parliament, among other things, held that any such transfer, relinquishment or removal would be an 'alienation of sovereignty' and that 'the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.'[72] By implication the Court held that any substantive reform to the Executive Presidency can only be made by introducing a new constitution. This view contrasts with the judicial opinions expressed in reviewing the Seventeenth Amendment in 2001, and the Nineteenth Amendment in 2015.

In all three amendments, the perception of the governments of the time seems to have been that it should avoid seeking approval for the amendment at a referendum. The unpredictability of the outcome, delay, and also perhaps the perception that the people may reject the amendment are possible reasons for this negative attitude towards a referendum. While the pros and cons of reforming constitutions through referenda is beyond the scope of this chapter, it is noteworthy that popular will is relegated to the margins by governments even when intending to introduce progressive constitutional reform.[73]
The failure by the President to act on the recommendations made by the CC (and later the deliberate violation of the Seventeenth Amendment) led to decisions made by the President *vis-à-vis* the CC being challenged in court. In all these instances, the courts

[72] *In Re the Nineteenth Amendment to the Constitution* (2002) 3 SLR 85: pp.97-98.
[73] In fact, the election manifesto of Maithripala Sirisena promised to introduce progressive constitutional reform, that will not affect any of the entrenched clauses of the constitution and therefore will not require a referendum. Sirisena (2014): p.14.

declined to review the decisions on the basis that the President enjoyed immunity from suit. The first case was *Public Interest Law Foundation v AG.*[74] The CC had nominated a chairman and members to the Election Commission but the President had not made the appointments. The petitioner sought a writ of *mandamus* to compel the President to appoint the nominees to the Commission. The Court of Appeal was of the view that the 'blanket immunity' vested in the President prevented it from even issuing notice on the respondent.[75] At a later point, the direct appointment of members to the Public Service Commission and the National Police Commission by the President was challenged by a civil society organisation, which sought a writ of *certiorari* to quash the appointments.[76] In this instance too the Court of Appeal held that the immunity from suit of the President precluded it from reviewing the impugned decisions. The court was of the view that '… injustice, if any caused to the people as alleged … cannot be cured by this court as it is for the legislature to make necessary amendments to the Constitution.'[77]

Two fundamental rights petitions were filed in Supreme Court on the basis that the non-appointment of the CC and the appointment of an Attorney General in violation of the Seventeenth Amendment amounted to a violation of the right to equality under Article 12 (1) of the petitioner.[78] Even though the petitions were filed in 2008, the determination was made by the Court only in 2011, well after the Eighteenth Amendment had been passed. In any event, the Court upheld the preliminary objections of the respondent and dismissed the petitions on the basis of immunity from suit of the president.

The Nineteenth Amendment has restricted the scope of presidential immunity. A violation of fundamental rights by the President can be challenged before the Supreme Court by filing a

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[74] *Public Interest Law Foundation v AG*, CA 1396/2003, CA Minutes 17th December 2003.
[75] Ibid: p.21.
[76] *Visuvalingam v AG*, CA 668/2006, CA Minutes 2 June 2006.
[77] Ibid.
[78] *Sumanasiri Liyanage v Mahinda* Rajapaksa, SC (FR) 297 & 578/2009, SC Minutes 18th March 2011.

petition against the Attorney General.[79] This provision allows for some accountability of an office which had hitherto been placed above the law, and is therefore a subjection of the office to the rule of law. It is also relevant to note here that in Sri Lanka the right to equality has been interpreted to include a prohibition of any arbitrary use of public power and also as an expression of the rule of law.[80] Therefore arguably, the violation of the Nineteenth Amendment for instance, can be challenged by way of a fundamental rights petition.

### *Reforming the Constitutional Council*

In 2002, a constitutional amendment was proposed to make some modifications to the CC. These modifications included the granting of power to the CC to make rules related to its conduct; the grant of immunity from judicial review; immunity from suit; and punishment for interference with the work of the CC. In reviewing these proposed changes, the Supreme Court was of the view that these provisions undermined the sovereignty of the people and was therefore unconstitutional.[81] For instance, the rules adopted by the CC did not require approval by Parliament. It is interesting to note that the very body that was expected to usher in a new political culture of transparency, accountability, and improve deliberative and participatory democracy itself, subsequently sought to clothe itself with protections that violate those norms. In the pre-enactment proceedings, it was argued that in the context where provision has not been made for ensuring representation of majority interests, the provision for prosecution for interference with the CC would be discriminatory. It would preclude anyone from making representations to the CC regarding majority interests. The Court accepted this argument. With regard to the immunity from suit and from judicial review, the Court held that the proposed amendment will vest 'unlimited and unfettered immunity' on the CC and that 'it would in effect

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[79] Constitution of Sri Lanka (1978): Article 35(1) as amended by the Nineteenth Amendment.
[80] See for instance, *Visuvalingam v Liyanage* (1983) 1 SLR 203; *Premachandra v Jayawickrama* (1994) 2 SLR 90; *Nanayakkara v Choksy*, SC(FR) 158//2007, SC Minutes 4th June 2009.
[81] *In Re the Eighteenth Amendment to the Constitution* (2002) 3 SLR 71.

be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law.'[82]

In reviewing the reforms proposed to the Eighteenth Amendment of 2010, including the replacement of the CC, the Court held that none of those proposed amendments affected the sovereignty of the people and therefore did not require approval at a referendum but only approval by a special majority in Parliament. With regard to the repeal of the CC whose recommendations the President was required to follow in making certain appointments – and the replacement of it with a Parliamentary Council whose recommendations the President *may* follow – the Court held that it was 'only a process of redefining the restrictions that was placed on the President by the CC …'[83] The determination on the Eighteenth Amendment was issued by the then Chief Justice Bandaranayake who was subsequently impeached in early 2013. At the time of the determination, she was perceived by many to be biased given that her spouse had recently been appointed as the chairman of a state-owned bank.[84] The process and the substance of the Eighteenth Amendment therefore reflects a dark moment in Sri Lankan constitutional history where the legislature and the judiciary supported and justified the removal of the few remaining checks on an already extremely powerful Executive President.

### *Representative Democracy and 'Independence' of Public Institutions*

The call for independence of public institutions and the de-politicisation of the selection and appointment of individuals to these institutions are premised on the idea that representative democracy, in the Sri Lankan context, has failed in this regard. There are at least two factors that contribute to and justify this

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[82] Ibid: p.78.
[83] *In re the Eighteenth Amendment to the Constitution*, SC SD 1/2010, SC Minutes 31st August 2010.
[84] See e.g., '*Chief Justice or Her Husband Must Resign to Avoid Conflict of Interest Situation*', ***Transcurrents***, 4th June 2011, http://transcurrents.com/news-views/archives/1062 (accessed 11th February 2014); N. Anketell & A. Welikala (2013) ***A Systemic Crisis in Context: The Impeachment of the Chief Justice and the Rule of Law in Sri Lanka*** (Colombo: Centre for Policy Alternatives).

perception. Firstly, the election of the Executive President and its centrality in the institutional architecture of the state (including immunity from suit), leads to a situation in which the office-bearer enjoys untrammelled power. Having contested in an island-wide campaign, the winning candidate also brings into his office, obligations to different individuals and groups. Experience suggests that these factors encourage the President to abuse his discretion in making appointments to high offices. Experience further suggests that MPs in Sri Lanka have generally been partisan towards the executive in their approach to governance and have therefore failed to act as an appropriate check on the exercise of discretion by the Executive President. In such a political culture, representative democracy is incapable of guaranteeing the independence of public institutions.

The technocratisation of the appointment process is intended to curb these excesses. It must be recognised, however, that it limits and temporarily even undermines representative democracy. The CC envisaged under the Seventeenth Amendment included seven experts which meant that the CC could not arrive at a decision without the support of the independent experts. A similar arrangement was proposed in the Nineteenth Amendment Bill but was revised at committee stage, bringing down the number of experts to three. The two CCs in that sense are fundamentally different: the CC under the Seventeenth Amendment was weighted in favour of independent experts while the CC under the Nineteenth Amendment is weighted in favour of political representatives. Under the Nineteenth Amendment, decisions are to be unanimous, or supported by at least five members of the Council.[85] Therefore, in effect the opinions of the 'experts' can be disregarded in the decisions made by the CC.

However, it can be argued that democracy today has to be understood in the broader sense in relation to governance. Representative democracy is the core of the tradition of liberal democracy. In this tradition, the exercise of the ballot for representative governance is the core idea. Another tradition of democracy is the 'civic republican' tradition which foregrounds

[85] Constitution of Sri Lanka (1978): Article 41(E)(4) [Nineteenth Amendment].

direct participation of the governed.[86] Deliberative democracy and participatory democracy are ideas that emerge from the notion of civic republicanism, which seek to ensure democratisation of governance. [87] The democratisation of governance has been described as a global phenomenon: within states as being downwards to include participation by different levels of society, and internationally to increase participation by non-state actors such as victims and community-based organisations.[88] The thrust of these movements is the 'more equitable distribution of political power', which would complement the progressive features of representative democracy.[89]

The CC too can be described as an example of this broader global movement, although a very modest one. The combining of expert opinion with that of elected representatives in making nominations and in approving selections made by the Executive President achieves several objectives. Firstly, it is a welcome check on the absolute discretion that was previously enjoyed by the Executive President in making certain appointments. Secondly, it allows for participatory and deliberative democracy. The experts are unelected individuals drawn directly from society, who can be expected to bringing non-partisan views that will improve the quality of the decisions arrived at. Thirdly, it broadens the means by which the evolving aspirations and needs of the governed can be brought to bear on the decisions of the Executive President. Accordingly, 'both governance and governments will not only be more in tune with what people want but more dynamic and responsive to their ever changing needs.'[90]

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[86] B. Isakhan & S. Slaughter (Eds.) (2014) ***Democracy and Crisis: Democratising Governance in the Twenty-First Century*** (Basingstoke: Palgrave Macmillan): p.4.
[87] Ibid: p.9 et seq.
[88] Ibid: p.11 et seq.
[89] Ibid.
[90] Ibid: p.9.

### *A New Framework for Governance?*

Sri Lanka's experience with the CC and independent commissions can possibly be best expressed through the 'glass half full or half empty?' dilemma. As was argued in this chapter, the restrictions imposed on the discretionary powers of the Executive President in appointing persons to high offices and independent commissions is commendable and progressive. However, the experience under the CC and the subsequent reforms to the CC clearly suggests that the sustainability of the intervention is a serious challenge. Several factors need to be considered: the protracted armed conflict and its impact on the rule of law; a political culture that places a higher value on illiberal notions such as patronage and nepotism; a powerful Executive Presidency; and a top-down approach to constitutional reform which is neither participatory nor deliberative.

The Seventeenth Amendment failed and was eventually repealed. Only certain civil society organisations, some civil society leaders, and certain smaller political parties kept alive the call to 'bring back the Seventeenth Amendment.' The wider Sri Lankan society was not mobilised around this issue. This suggests that independence is perhaps not valued adequately as a core principle of governance in the political imagination of society. The sense of a national crisis generated by the escalated armed conflict implicitly justified the deliberate violation of the Seventeenth Amendment. In this context, the reforms introduced by the Eighteenth Amendment were the logical next step and it gave an appearance of legitimacy to the concentration of power in the Executive Presidency.

This then leads to the question as to what factors led to the adoption of the Nineteenth Amendment. It is possible to argue that political expediency remained the guiding motivation. The political consensus to adopt the Nineteenth Amendment came about only due to the need to establish a coalition that could defeat the incumbent. A former stalwart of the Sri Lanka Freedom Party, who had not been known to have opposed the approach of the former President to governance, competed against him and was elected as President. The coalition that supported him foregrounded 'good governance' as the election

pledge. The wider resonance of the phrase was evident in the manner in which 'good governance' became a prominent reference point for most candidates and their political parties during the August 2015 parliamentary elections. However, the dilution of the CC under the Nineteenth Amendment indicates that its re-introduction was less about ensuring independence in the appointment process and more about ensuring the distribution of political power among political parties in Parliament.

Since then it has been claimed that the Sri Lankan electors have rejected extremism, racism, and corruption and caused a disruption in a process of illiberalisation of society. While this optimism is justified to some degree by the quiet and unpredictable manner in which change of government took place, not too much can be read into the changes brought about by the ballot. The dilution of the CC under the Nineteenth Amendment is strong evidence of the modest progress Sri Lanka has made in its improvement of governance.

In order to allow the CC and the independent commissions to take root in Sri Lankan political society, radical reform is required. A greater appreciation must be cultivated for distribution of political power among political representatives as well as among experts in a manner that respects diversity. The sharing of power must be both vertical as well as horizontal. Even an attempt to cultivate such values is possible only if the current Executive Presidency is further reformed. Systemic discrimination based on ethnicity and other communal insecurities must be addressed through public law in a manner which leads to a new logic of citizenship. That is possible only in the context where the negative impact of nationalisms, whether of minorities or of the majority, on democratisation and on the law is acknowledged. In Sri Lanka democracy must be revamped and rebuilt. Resolution of disputes and the allocation of resources based on political patronage and nepotism must be eliminated from the public realm. Understandings of democracy in the everyday imagination of society must be broad and go beyond representational democracy: it must also include ideas of deliberation and participation. It is only in such a political culture that the new frame of governance considered in this chapter can be effective.

### *Conclusion*

The CC and independent commissions have occupied a central place in constitutional discourse over the last two decades. Attempts at constitutional reform to introduce a CC has had mixed outcomes with Sri Lanka having re-established this body in 2015. It is evident that the proposed new framework of governance addresses several problems related to the politicisation of public institutions and the abuse of the discretionary power of the President. However, the reform process, the judicial review of the reforms for their constitutionality, and certain substantive aspects of the reforms themselves, have been contrary to norms of constitutionalism and the rule of law. On the other hand, the Seventeenth and Nineteenth Amendments have probably been the two most progressive constitutional reforms under the 1978 Constitution. Nevertheless, as the experience under the Seventeenth Amendment and the adoption of the Nineteenth Amendment amply demonstrate, these progressive developments can be sustained only if the political culture within which these institutions operate are also transformed and if the process of democratisation is strengthened.

# 8

# The Right to Information as a Fundamental Right

*Gehan Gunatilleke*

## *Introduction*

Information is fundamental to the functioning of a modern democracy and is a key element of the "overall global trend towards more open government."[1] Without information, the scope for the people to exercise power through their elected representatives becomes obviously limited. The 'right to information' (RTI) accordingly emerges from the idea that popular sovereignty requires a system of governance that is transparent. Sri Lanka's Constitution of 1978 unambiguously embraces this notion of sovereignty. Article 3 states "sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise." Yet Sri Lanka's constitutional experience suggests that the articulation of popular sovereignty in the text of the constitution remains distinct from the fulfilment of this idea in practice. Transparency has scarcely featured in governance, rights jurisprudence, or elections in Sri Lanka. On the contrary, institutions have been designed to deny people information, thereby fostering a culture of secrecy as opposed to transparency.

On 15th May 2015, Parliament enacted the Nineteenth Amendment to the Constitution. The amendment aimed to restore terms limits on the presidency, restrict – to some extent – the powers of the executive president, and restore institutional independence.[2] Alongside these primary aims, the amendment introduced a new fundamental right on RTI. The introduction of this right was largely welcomed as a step in the right direction,

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[1] See T. Mendel (2014) ***Right to Information: The Recent Spread of RTI Legislation*** (Washington: World Bank): p.1.
[2] See A. Welikala, '*The Nineteenth Amendment is a constitutional milestone in Sri Lanka's ongoing political development*', The UCL Constitution Unit Blog, May 2015: http://constitution-unit.com/2015/05/21/the-nineteenth-amendment-is-a-constitutional-milestone-in-sri-lankas-ongoing-political-development (last accessed 12th March 2016); G. Gunatilleke & N. de Mel (2015) ***19th Amendment: The Wins, the Losses and the In-betweens*** (Colombo: Verité Research) for discussions on the contents of the amendment.

particularly in terms of expanding the gamut of justiciable rights. Yet the value of this expanded framework will ultimately be measured by the fruits of its practical application.

This chapter examines the constitutionalisation of RTI through the Nineteenth Amendment, and discusses its implications with respect to restoring the sovereignty of the people. The chapter is presented in three parts. The first part briefly discusses the philosophy behind RTI and the broad context within which the amendment was enacted. The second analyses the relevant text of the amendment and examines the extent to which RTI is guaranteed under the constitution. The final section discusses the need for further reform with an aim to build on the amendment and elaborate upon this newly recognised fundamental right.

## *Philosophy and Context*

### Terminology

RTI is often used interchangeably with the terms 'freedom of information' (FOI). There is, however, an important distinction in the terminology. [3] 'FOI' essentially contemplates a 'negative' right. The terminology implies the right of individuals to *access* information and the duty of the state *not to impede* such access except under specific, carefully defined circumstances. In this context, the state's obligations are framed in passive terms – similar to the framing of the state's obligations with respect to key civil and political rights, such as the freedom from torture, the freedom of

[3] Mendel (2014): p.1. The author notes: "Originally often referred to as freedom of information laws (Australia, Norway, United States) and access to information or documents laws (Canada, Colombia, Denmark), a more recent trend (starting with India in 2005) had been to use the title RTI laws, reflecting the recognition of RTI as human right."

speech and expression, and the freedom of association. A classic expression of FOI would be guarantees against censoring the media. It is argued that the people must be afforded the freedom of accessing information disseminated through the media, and that the state must refrain from unduly censoring or restricting such access.

The language of 'RTI', by contrast, implies that individuals have a right to *receive* information, and that the state has a corresponding duty to *provide* information. The terminology is similar to the 'positive' articulation of many socioeconomic rights such as the rights to health, education, and housing.[4] Thus, under RTI, the state's obligations are framed in active terms; the state is expected to fulfil the right by providing information and actively facilitating access. In India, the semantics of 'RTI' have been preferred to 'FOI' precisely for this reason.[5] Similarly, in Mexico, the constitution was amended in 1977 to provide that "access to information will be *guaranteed* by the State" (emphasis added).[6] This conception of the right permits a broader definition of information – not only as an important ingredient for public accountability, but also as a commodity over which the people have proprietary interests. The people elect public officials to represent their interests in matters of

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[4] For a useful discussion on positive and negative rights in constitutional law, see D.P. Currie, '*Positive and Negative Constitutional Rights*' (1986) ***The University of Chicago Law Review*** 53(3): pp.864-890. For a broader discussion, see J. Donnelly (2003) ***Universal Human Rights in Theory and Practice*** (Ithaca, NY: Cornell University Press): p.30.

[5] See the Right to Information Act 2005 (India). The long title of the Act describes it as "An Act to provide for the setting out of the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto." Also see R. Jenkins & A.M. Goetz, '*Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India*' (1999) ***Third World Quarterly*** 20(3): pp.603-622.

[6] Constitution of Mexico (1917): Article 6, as amended.

governance and public policy, and to run the affairs of state on their behalf. Since the people confer this authority on elected representatives and public officials, the information they deal with remain the property of the people. Therefore, information is not merely of instrumental value. It is seen as 'belonging' to the people. As rightful owners of the information held by the state, the people have a right to access such information. Therefore, despite the significant conceptual overlap between RTI and FOI, the two articulations of the right have distinct foundations.[7]

In Sri Lanka, the terminology used has largely depended on the context of the conversation. Early conversations on the subject framed the right as a negative right. For instance, in 1996, the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression [8] recommended the enactment of a 'Freedom of Information Law'. The several drafts that were produced and discussed during the late 1990s and early 2000s used the terminology of 'FOI'. In late 2014, the terminology was clearly framed in positive terms, where Maithripala Sirisena, the Common Opposition candidate for the presidential election, pledged to 'introduce a Right [to] Information Act'. [9] This terminology was retained in the draft RTI Bill that was circulated in early 2015.[10] The Nineteenth Amendment

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[7] For a further discussion on comparative experiences, see J.M. Ackerman & I.E. Sandoval-Ballesteros, '*The Global Explosion of Freedom of Information Laws*' (2006) ***Administrative Law Review*** 58(1): pp.85-130.

[8] R.K.W. Goonesekere Committee Report (1996) *Report of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression*; also see K. Pinto-Jayawardena & G. Gunatilleke, '*One Step Forward, Many Steps Back: Media Law Reform Examined*' in W. Crawly, D. Page & K. Pinto-Jayawardena (Eds.) (2015) ***Embattled Media: Democracy, Governance and Reform in Sri Lanka*** (London: Institute of Commonwealth Studies): p.188.

[9] Manifesto of the New Democratic Front (2014): p.17.

[10] The long title of the draft Right to Information Bill (L.D.O 4/2015) describes it as "An Act to provide for the right to information; specify grounds on which access may be denied;

adopts a slightly more conservative terminology, though perhaps retaining the flavour of 'RTI' as opposed to 'FOI'.

## The Campaign

By the time the Nineteenth Amendment was enacted in May 2015, several FOI/RTI campaigns had been launched by civil society and media actors in Sri Lanka. These campaigns warrant brief discussion in order to place the amendment in its proper context.

Between 1995 and 2000, there were several attempts to introduce constitutional reform, which included references to FOI. The Draft Constitution Bill of 2000 very specifically recognised FOI. Article 16(1) provided: "Every person shall be entitled to…the freedom to seek, *receive* and impart information…" (emphasis added).[11] This framing very much echoed the language of Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[12] However, due to the subsequent breakdown in talks between the two main political parties, the Sri Lanka Freedom Party and the United National Party, the Draft Constitution Bill failed upon its introduction in Parliament.

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the establishment of the Right to Information Commission; the appointment of Information Officers; setting out the procedure for obtaining information and for matters connected therewith or incidental thereto."

[11] Bill (No.372) to repeal and replace the Constitution of the Democratic Social Republic of Sri Lanka (August 2000): Article 16(1).

[12] Article 19(2) of the ICCPR provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." See UN General Assembly, International Covenant on Civil and Political Rights, 16th December 1966, United Nations, Treaty Series, vol. 999, p.171.

During the Chandrika Kumaratunga-Ranil Wickremesinghe cohabitation government of 2001-2004, civil society groups and media organisations succeeded in negotiating a draft FOI law.[13] This draft was an improvement on a previous Law Commission draft. It included whistle-blower protection and established an Information Commission, although it still fell short of international best practices.[14] A final version of Bill was then prepared by the Legal Draftsman's Department and was approved by Cabinet in January 2004. However, the collapse of the government and the dissolution of Parliament in 2004 brought an abrupt end to the campaign. The draft Bill was not presented in Parliament as a result.

Following the election of current President Maithripala Sirisena in January 2015, a new campaign to enact an RTI law was launched. The new government appointed a drafting committee comprising government officials and civil society actors and produced a revised version of the 2004 Bill. The Bill was welcomed by most, but was also criticised for including broad restrictions.[15] For instance, the Bill provided that information requests shall be refused if "the disclosure of such information would…harm the commercial interests of any person" – a restriction that was patently overreaching.[16] The new Bill, however, was not tabled in Parliament prior to its dissolution in late June 2015.

It is clear that the RTI campaign in Sri Lanka has had a reasonably long history. Thus the inclusion of the right in the Nineteenth Amendment was welcomed. In this context, the amendment may be considered the first

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[13] Pinto-Jayawardena & Gunatilleke (2015): p.207.
[14] See G. Gunatilleke (2014) ***The Right to Information: A Guide for Advocates*** (Colombo: Sri Lanka Press Institute; UNESCO): p.61, for an analysis of both drafts.
[15] See Verité Research (2015) ***Observations on the Draft Right to Information Bill***.
[16] Right to Information Bill (L.D.O. 4/2015): Section 5(1)(d).

tangible legislative victory for a campaign that had hitherto endured numerous disappointments.

## Jurisprudence

Prior to delving into the text of the Nineteenth Amendment, it may be useful to briefly discuss the fundamental rights jurisprudence relevant to RTI. The case law suggests that the Sri Lankan constitution implicitly recognises RTI. Two provisions in the fundamental rights chapter of the constitution are relevant in this regard. Article 10 guarantees to every person – including non-citizens – the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. It is possible to argue that unimpeded access to information is implicit in the freedom of thought. Thus every person within the territory of Sri Lanka has an implicit right to the information necessary for the full exercise of other freedoms such as the freedom of thought.

It is appreciated that the argument that all persons have an implicit right to information by virtue of their absolute freedom of thought can appear tenuous. However, there is judicial precedent to suggest that the argument has some merit. In *Fernando v. the Sri Lanka Broadcasting Corporation* (1996) Justice Mark Fernando observed – albeit *obiter* – that "information is the staple food of thought, and that the right to information … is a corollary of the freedom of thought guaranteed by Article 10." [17] He added that under the constitution, "no restrictions are permitted in relation to freedom of thought,"[18] thereby implying that a broad unrestricted conception of RTI was conceivable under the constitution. Unfortunately, the case before the Supreme Court was not specifically under Article 10, and no further pronouncement was possible.

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[17] (1996) 1 SLR 157: p.171.
[18] Ibid: p.179.

Meanwhile, there is ample jurisprudence which confirms that Article 14(1)(a) of the constitution implicitly guarantees FOI – and to an extent RTI – to Sri Lankan citizens. Article 14(1)(a) guarantees the freedom of speech and expression including publication. It is noted that, unlike Article 10, the rights under Article 14(1)(a) are subject to limitations. These restrictions must be defined by law and must be related to or in the interest of racial and religious harmony, parliamentary privilege, contempt of court, defamation or incitement to an offence, or national security.[19] Nevertheless, the courts have been willing to recognise that the express guarantees under Article 14(1)(a) require implied guarantees pertaining to FOI/RTI.

Early cases adopted a more cautious view of implied guarantees under Article 14(1)(a). In *Visuvalingam v. Liyanage* (1984), the Supreme Court observed:

> "Public discussion is not a one-sided affair. Public discussion needs for its full realisation the recognition, respect and advancement, by all organs of government, of the right of the person who is the recipient of information as well. Otherwise, the freedom of speech and expression will lose much of its value."[20]

The Court in this case advanced the notion of a negative right, as it recognised the legal standing of newspaper

[19] See Constitution of Sri Lanka (1978): Article 15(7), which provides: "The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."

[20] (1984) 2 SLR 123: p.131.

readers to challenge the state's decision to ban a newspaper called *The Saturday Review*. Thus the Court was willing to conceive of FOI insofar as the state had a duty not to unduly restrict information. The Court held that the constitution implicitly contained FOI *vis-à-vis* Article 14(1)(a), although it eventually dismissed the application on its merits.

In the aforementioned case of *Fernando v. the Sri Lanka Broadcasting Corporation*, the Supreme Court further substantiated the relationship between express and implied guarantees of fundamental rights in the constitution. It held that express guarantees extended to and included implied guarantees necessary to make the express guarantees meaningful.[21] Hence it was held that elements relating to FOI, such as the "right to obtain and record information," were implied guarantees that made the express guarantee of the freedom of speech and expression meaningful.[22] The Court, however, stopped short of recognising RTI *simpliciter* as part of the freedom of speech and expression.[23] Thus the judgement is not sufficient to advance the view that Sri Lankan citizens – by virtue of their freedom of speech and expression – also have RTI, which the state is constitutionally bound to fulfil.

In the later case of *Environmental Foundation Limited v. Urban Development Authority* (2005),[24] also known as the *Galle Face Green Case*, the Court expanded the scope of the implied right. The case involved the Urban Development Authority's (UDA) decision to alienate state-owned property to a private company without the knowledge of the public. The Court held that, although there is no explicit reference to RTI in the constitution, the freedom of speech and expression including publication guaranteed by the constitution under Article 14(1)(a)

[21] (1996) 1 SLR 157: p.179.
[22] Ibid.
[23] Ibid.
[24] SC (F.R.) Application No. 47/2004, judgment dated 28th November 2005.

includes the right to receive information on matters of public interest. In his seminal judgment, Chief Justice Sarath N. Silva observed:

> "[T]he 'freedom of speech and expression including publication' guaranteed by Article 14(1)(a) to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweigh[s] the confidentiality that attach to affairs of State and official communication."[25]

Crucially, the Court was inclined to draw a nexus between the implicit right to secure relevant information and Article 4(d) of the constitution, which articulates "the manner in which the sovereignty of the People shall be exercised in relation to fundamental rights."[26] The Court, for the first time, acknowledged the nexus between popular sovereignty and RTI, and the necessary obligation of the state to fulfil this right. It held:

> "The UDA is an organ of Government and is required by the provisions of Article 4(d) to secure and advance the fundamental rights that are guaranteed by the Constitution. It has an obligation under the Constitution to ensure that a person could effectively exercise the freedom of speech, expression and publication in respect of a matter that should be in the public domain. Therefore a bare denial of access to official information … amounts to an infringement of the Petitioner's fundamental rights as guaranteed by Article 14(1)(a) of the Constitution."[27]

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[25] Ibid: p.6.
[26] Ibid.
[27] Ibid: p.7.

Therefore, the Supreme Court recognised RTI *simpliciter*, to the extent that the information sought was in the public interest. The corresponding obligation of the state was therefore acknowledged as 'positive' in that it contemplated a duty to provide the relevant information to the public. The *Galle Face Green Case* accordingly marks an important departure from the conservative approach previously adopted by the courts. In fact the judgment set the stage for the constitutional recognition of RTI and the process through which RTI could be fulfilled. However, this opportunity was not seized, as the then government under President Mahinda Rajapaksa was instead more interested in plunging the country into a deep and pervasive culture of secrecy.[28] It was not until January 2015 that the campaign for RTI was reignited and the prospects of constitutional and statutory reform became once again plausible.

## *The Text and its Failings*

### Article 14A

The Nineteenth Amendment introduced Article 14A into the fundamental rights chapter of the Sri Lankan constitution, which provides:

> "(1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-
> (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
> (b) any Ministry of a Minster of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;
> (c) any local authority; and

[28] See Pinto-Jayawardena & Gunatilleke (2015).

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph."

At the outset, it should be noted that the right envisaged by Article 14A only extends to Sri Lankan citizens. Thus its reach is narrower that that of Articles 10, 11, 12 and 13, which apply to 'persons.'

A textual reading of Article 14A suggests that it contains three limbs. The first limb suggests that access to information under Article 14A is contingent on a pre-existing process already provided for by law. It may be reasonably assumed that the drafters of the Nineteenth Amendment contemplated a corresponding RTI law that would substantiate the fundamental right and establish a process through which citizens could access information. It was, after all, drafted at a time when an RTI Bill was also in the legislative pipeline. However, as discussed in the preceding section, the RTI Bill was not tabled in Parliament. In the absence of such supporting legislation, this limb – in isolation – is somewhat problematic, as it makes access to information dependent on a pre-existing legislative framework. It may be argued – though from a distinctly textualist standpoint – that the absence of a pre-existing legislative process through which information could be obtained precludes, in itself, such access. For example, the information sought in the *Galle Face Green Case* could not have been obtained from the UDA, as the UDA Law No. 41 of 1978 does not explicitly provide for the publication of agreements between the Authority and third parties. A citizen could, however, invoke the new Article 14A to obtain a copy of a draft development plan, which under Section 8G of the Law must be made available for public inspection. It is worth noting that a pre-existing statutory duty to provide information can in any event be canvassed through the administrative law remedies available under Article 140 of the constitution.[29]

[29] Article 140 of the constitution provides: "Subject to the provisions of the Constitution, the Court of Appeal shall have

Hence Article 14A only appears to expand the scope of remedies available to a citizen, rather than create a completely new avenue through which RTI could be vindicated.

A more purposive reading of Article 14A suggests that a citizen could invoke the fundamental rights jurisdiction of the Supreme Court to exploit pre-existing legislative frameworks that were hitherto extremely restrictive. One example that springs to mind is the Declaration of Assets and Liabilities Law No.1 of 1975 (as amended by Act No.74 of 1988), which provides a limited opportunity to a person to access a public official's assets declaration.[30] Section 5(3) of the Law provides:

> "Any person shall on payment of a prescribed fee to the appropriate authority have the right to call for and refer to any declaration of assets and liabilities and on payment of a further fee to be prescribed shall have the right to obtain that declaration."

However, Section 8(1) of the Law imposes a peculiar restriction on any person who obtains information through the process defined under the Law. It provides:

> "A person shall preserve and aid in preserving secrecy with regard to all matters relating to the

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full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person."

[30] According to Section 2 of the Law, the relevant officials include Members of Parliament, Judges, Public Officers appointed by President or Cabinet Ministers, staff officers in Ministries and government departments (i.e. additional secretaries, deputy secretaries, assistant secretaries and heads of departments), chairmen, directors, board members, staff officers of public corporations, elected members and staff officers of local authorities, office bearers of 'recognised' political parties, and executives of trade unions.

> affairs of any person to whom this Law applies, or which may come to his knowledge in the performance of his duties under this Law or *in the exercise of his right under subsection (3) of section 5* (emphasis added)."

Thus the Law prevents the disclosure of an assets declaration obtained by virtue of Section 5(3). A person only appears to have a right to obtain the information, and not to share with others or publish such information, even in the public interest. On obtaining the assets declaration, a person can only refer the declaration to the appropriate authority, which could then conduct an investigation or take further action.

With the introduction of Article 14A, it is possible to argue that a citizen [31] has a right to invoke the fundamental rights jurisdiction of the Supreme Court to gain access to the assets declarations of certain public officials. The pre-existing process provided for by law, i.e. the Declaration of Assets and Liabilities Law, arguably qualifies an assets declaration to be included under Article 14A, provided it satisfies limbs two and three discussed below. In this context, it is worthwhile considering whether a citizen could invoke the fundamental rights jurisdiction of the Court *without* first seeking to obtain the asset declaration via Section 5(3) of the Law. Such an interpretation will certainly require a creative departure from the literal meaning of Article 14A. However, if such an interpretation was upheld, a citizen may no longer be bound by the restrictions of Section 8(1) of the Law, as he did not obtain the declaration by exercising his right under Section 5(3) of the Law in the first place. The citizen may therefore share or publish the assets declaration obtained through a fundamental rights application. This interpretation, though clearly optimistic,

[31] Article 14A(3) provides: "In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens."

clashes neither with Article 14A(2) nor Article 16(1) of the constitution.[32] Article 14A(2) provides:

> "No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary."

It could be argued that in the absence of any direct reliance on the Declaration of Assets and Liabilities Law, an assets declaration does not fall within any of the restrictions prescribed by law. The secrecy provisions of the Declaration of Assets and Liabilities Law do not directly refer to any of the prescribed grounds listed in Article 14A. They do, however, by their very definition, qualify as "information communicated in confidence." Yet if the asset declaration is obtained through the intervention of the Court and not through Article 5(3), it becomes difficult to maintain that the communication was confidential. Thus a petitioner could potentially argue that the Declaration of Assets and Liabilities Law does not restrict the right to access a public official's asset declaration through a fundamental rights application.

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[32] Article 16(1) provides: "All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter." It is noted that the Declaration of Assets and Liabilities Law No.1 of 1975 (as amended) continues to be valid and operative. Article 14A will (if at all) only provide for an alternative channel through which a citizen could obtain an asset declaration of a public official.

The second limb of Article 14A stipulates that the relevant information is required for the "exercise or protection of a citizen's right." It is reasonable to assume that the terms 'citizen's right' relates to the fundamental rights recognised in the constitution. The term 'right' is not used in any other context. Thus, for example, a citizen has a right to access a particular piece of information if such information relates to his or her freedom of speech and expression including publication guaranteed by Article 14(1)(a). Similarly, under Article 14A, a citizen could seek to access information required to protect his or her right to equality guaranteed by Article 12(1).

This limb, however, restricts the scope of the right, as it attaches another prerequisite to the exercise of right. For instance, the right to housing is not explicitly recognised under the Sri Lankan constitution. Therefore, a citizen may not *ex facie* be eligible to access information held by the Ministry of Housing. The citizen concerned will need to establish that the information sought relates to his or her right to equality or some other justiciable right found in the fundamental rights chapter of the constitution in order to invoke the jurisdiction of the Supreme Court. In this context, Article 14A mainly succeeds in making express what the Supreme Court has previously held to be implied. RTI was considered to be an implied right only because it related to Articles 10 and 14(1)(a). By restricting the scope of its application to instances where another right is involved, Article 14A entrenches the principle enunciated by the Supreme Court. To its credit, however, Article 14A expands on the implied right previously recognised by the Court. As one might recall, the Court in the *Galle Face Green Case* opined that the implied right only extends to information required for the exercise of rights under Article 14(1)(a) in the *public interest.* Article 14A appears to dispense with the public interest prerequisite and also includes information that is only relevant to the exercise or protection of an individual citizen's rights.

In the case of assets declarations, it could be argued that information on the assets of a government department head, or a chairperson of a public corporation is relevant to the exercise of a citizen's freedom of speech and expression including publication. If, for example, a journalist required such information for an article, such information could potentially be sought through a fundamental rights application naming the Secretary to the relevant Ministry as a respondent.[33]

The third and final limb of Article 14A concerns the actor or institution in possession of the information. Article 14A(1) requires that the relevant information be in the possession of certain specified institutions, or 'any other person' in possession of information relating to a specified institution. Article 14A(1)(a), however, makes an explicit reference to the 'state.' The 'state' is not specifically defined in the Sri Lankan constitution. Therefore, such reference must be interpreted to mean 'agents' of the state, including all state functionaries and officials.[34] It remains to be seen whether the definition of 'state' would be limited to officials exercising executive and administrative action. Regardless of the precise definition of the term, Article 17 provides that a fundamental rights application would lie only if the infringement of Article 14A was by 'executive or administrative action.'[35] Thus relief could be sought against a private actor in possession of relevant information provided the actor falls within the scope of 'executive or administrative action.' It is noted that the jurisprudence of the Court has extended the

[33] See Section 4(d) of the Declaration of Assets and Liabilities Law No.1 of 1975 (as amended).
[34] See *Wickremratne v. Jayaratne* (2001) 3 SLR 161: p.176. The Court of Appeal observed that the "State … has necessarily to act through its officials or functionaries". Also see *Peter Leo Fernando v. The Attorney* General (1985) 2 SLR 341.
[35] Article 17 of the Constitution of Sri Lanka (1978) provides: "Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which I such person is entitled under the provisions of this Chapter."

scope of 'executive or administrative action' to include private entities that act as agents of the state.[36] However, Article 14A casts a much wider net, as it applies to anyone in possession of certain types of information. In this context, it would be interesting to discover the Court's approach to reconciling what appears to be an incongruence between Article 14A and Article 17.

Once again, in the case of assets declarations, the relevant information is bound to be in the possession of a state functionary or official, thereby falling within the ambit of Article 14A. For example, in the case of assets declarations of office-bearers of recognised political parties, the relevant information would be in the possession of the Commissioner of Elections.[37] Thus a citizen could potentially file a fundamental rights application to compel the Commissioner to release an assets declaration, which the citizen argues is required for the exercise or protection of another fundamental right.

**Weaknesses in the New Framework**

The aforementioned limbs of Article 14A are extremely restrictive. In the absence of existing laws that provide for access, Article 14A would be virtually inapplicable. Even where laws exist – such as the Declaration of Assets and Liabilities Law – a creative interpretation of Article 14A would ultimately be necessary for it to be useful in vindicating RTI. Thus, from a rights perspective, Article 14A appears to be a disappointment. Three key weaknesses in Article 14A may be highlighted.

First, it is worth noting that the original version of Article 14A as per the draft Nineteenth Amendment Bill was far better than the final version that was enacted. Only one of the three aforementioned restrictive limbs was included

[36] See *Leo Samson v. Sri Lankan Airlines* (2001) 1 SLR 94; *Jayakody v. Sri Lanka Insurance and Robinson Hotel* (2001) 1 SLR 365.
[37] Declaration of Assets and Liabilities Law, No.1 of 1975 (as amended): Section 4(Ia).

in the version that was first tabled in Parliament.[38] The original version only included the prerequisite that the relevant information be required for the exercise or protection of a citizen's right. Yet the original version made no reference to a prerequisite that access must be "as provided for by law." A citizen would not have been required to first establish that the access he or she sought was already provided for by existing legislation. Thus, in the absence of supporting RTI legislation, Article 14A's potency appears to be limited. Moreover, the original version did not restrict the terms "any other person" to those who had in their possession information related to a specified institution. Instead, a citizen could seek access to any information held by *any* person, provided that the information was required for the exercise or protection of a citizen's rights.

Second, the final version of Article 14A included more restrictions on the right. The original version of the Article did not include the prevention of contempt of court and the protection of parliamentary privilege. Therefore, amending provisions to existing laws (or new laws) that specifically restrict RTI on the basis of preventing the contempt of court and protecting parliamentary privilege may be enacted in the future. In the context of the freedom of speech and expression, both these grounds for restriction have been viewed with deep suspicion. For instance, the Law Commission of Sri Lanka observed that "[t]oo harsh a law on contempt can act as a barrier to the development of a healthy and vibrant jurisprudence." [39] Similarly, the R.K.W. Goonesekere Committee concluded that constitutional provisions that made parliamentary privilege a ground for restricting free speech were "wholly inconsistent with Sri

[38] See Nineteenth Amendment to the Constitution (L.D.O. 20/2015): Section 2.
[39] The Law Commission of Sri Lanka, *Draft Contempt of Court Bill proposed by the Law Commission of Sri Lanka* (2008), http://lawcom.gov.lk/web/images/stories/reports/draft_contempt_of_court_bill_2008.pdf (last accessed 13th March 2016): p.5.

Lanka's obligations under international law."[40] It is no doubt reasonable to extend these apprehensions to RTI.

Finally, Article 14A is arguably impracticable, as it places a heavy burden on the Supreme Court to monitor compliance with its orders granting access to information. The Court would not be unaccustomed to its 'just and equitable' jurisdiction under Article 126(4) of the constitution. Such a jurisdiction often requires regular compliance monitoring. Yet the Court is still likely to be severely inconvenienced by the prospect of directing respondents to grant access to information and thereafter dealing with complaints on non-compliance. Questions of compliance may be better left to a dedicated body such as an Information Commission with a specific mandate to hear complaints regarding the denial of information requests. The Nineteenth Amendment does not establish such a body, nor does it name such a body as one of the institutions falling within the purview of the re-established Constitutional Council.[41] The Council was specifically re-established under the Nineteenth Amendment to depoliticise public institutions and restore institutional independence. Therefore, even if an Information Commission is later established through appropriate legislation, there are no constitutional guarantees pertaining to its independence.

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[40] Pinto-Jayawardena & Gunatilleke (2015): p.204. Also see R.W.K. Goonesekere Committee Report (1996): pp.13-14.

[41] Article 41B(1) provides: "No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council." The Schedule comprises: (a) The Election Commission (b) The Public Service Commission (c) The National Police Commission (d) The Audit Service Commission (e) The Human Rights Commission of Sri Lanka (f) The Commission to Investigate Allegations of Bribery or Corruption (g) The Finance Commission (h) The Delimitation Commission and (i) The National Procurement Commission.

### *Conclusion: The Challenge Ahead*

The foregoing analysis reveals that the Nineteenth Amendment fails to meaningfully constitutionalise RTI. Three concluding observations may be offered in this respect. These observations may also be useful in terms of setting the agenda for future reform.

First, it is crucial that the Sri Lankan state and citizenry view RTI as a multifaceted right. It is important that the right is viewed both as a negative right and as a positive right. Individuals must be guaranteed both the right to freely access information and the right to easily receive information. In this context, the state has corresponding duties *not to unduly restrict* access to information and to *provide* information to individuals. Establishing a culture of transparency will therefore require a conceptualisation of RTI that is holistic; and a holistic conception of the right will need to be reflected in the text of the constitution. In this context, the relevant provisions in the fundamental rights chapter ought to frame the right in the broadest sense possible, with minimal prerequisites and restrictions. For instance, the restrictive language analysed in the preceding discussion would need to be removed from the current text of Article 14A. Additionally, it may be necessary to explicitly recognise the negative aspect of RTI by expanding the scope of Article 14(1)(a). The current language pertaining to the freedom of speech and expression could be expanded to include a right to 'seek, receive and impart information' in line with Article 19 of the ICCPR. If these reforms are treated as high on the constitutional reform agenda, and are introduced in the short to mid term, it is possible to conceive of a deeper constitutionalisation of the right.

Second, the constitutionalisation of RTI must be supplemented by legislation that elaborates upon the fundamental right. The current RTI Bill is worth noting in this context. The Bill sets out a reasonably sound process through which a citizen could apply for and access information in the possession of a public authority.

The term 'public authority' includes private entities or organisations "carrying out a statutory or public function or a statutory or public service ... but only to the extent of activities covered by that statutory or public function or that statutory or public service."[42] Moreover, the Bill contains a prevalence clause. Section 4(1) of the Bill provides:

> "The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law, and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail."

This clause is encouraging, as it sets out the basis on which the future RTI Act could supersede older laws that are designed to restrict access to information. The Act would effectively trump laws such as the Official Secrets Act No.32 of 1955, which exerts considerable pressure on officials to withhold information that may be considered sensitive, and the Sri Lanka Press Council Law No.5 of 1973, which restricts the publication of information that may "adversely affect the economy."[43] The prevalence clause may also empower public servants constrained by non-disclosure provisions in the Establishments Code.[44]

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[42] Right to Information Bill (L.D.O. 4/2015): Section 46.
[43] See Sri Lanka Press Council Law No.5 of 1973: Section 16(4). Other laws that restrict access to particular types of information include the Profane Publication Act No.41 of 1958, the Public Performance Ordinance No.7 of 1912, the Obscene Publications Ordinance No.4 of 1927, and the Prevention of Terrorism Act No.48 of 1979.
[44] See Establishments Code of Sri Lanka: Section 3 of Chapter XXX1 of Volume 1 and Section 6 of Chapter XLVII of Volume 2. The Code provides: "No information even when confined to statement of fact should be given where its publication may embarrass the government, as a whole or any government department, or officer. In cases of doubt the Minister concerned should be consulted."

Third, a process of conscientisation[45] ought to take place to ensure that the people understand the nature and extent of their RTI and acknowledge its inherent relationship to their sovereignty. Constitutional and statutory reform must be followed by a long-term strategy that aims to create a RTI consciousness among the people. The experience in India suggests that such a process may take years, particularly as individuals become more accustomed to the RTI processes in place and begin to understand their use. Moreover, the culture of secrecy entrenched within state institutions will take years to unravel. It will no doubt take several years of trial and error and institutional learning before the state begins to effectively fulfil RTI. In this context, legal reform will by no means be a sufficient indication of progress.

It would appear that the new Sri Lankan government that was installed after the general elections of August 2015 is confronted with a threefold challenge. It must first expand on the constitutional articulation of the right in order to ensure that the constitutionalisation of RTI is meaningful. Moreover, it must meet the public's expectations of an effective statutory framework that elaborates on the right by enacting an RTI Act sooner rather than later. Finally, it must embark on a programme of action that transforms the culture of secrecy that presently plagues state institutions and actors. It is only through such a holistic approach to RTI that the people's sovereignty – that constitutional first principle – might find meaningful expression in Sri Lanka.

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[45] "Conscientisation" is a concept developed by Brazilian educator Paulo Freire. It is usually defined as "[t]he process of developing a critical awareness of one's social reality through reflection and action." See "Concepts used by Paulo Freire", http://www.freire.org/component/easytagcloud/118-module/conscientization/ (last accessed 12th March 2016). Also see P. Freire (2000) ***Pedagogy of the Oppressed: 30th Anniversary Edition*** (New York: Continuum).

# 9

# Public Administration and the Nineteenth Amendment: Prospects for the Future

*C. Narayanasuwami*

## *Introduction*

Public administration has played a pivotal role in moulding the destinies of developing countries in the decolonised world because the concept of a welfare state, good governance, and democratisation of power-sharing have accentuated the need for increased state activity and intervention in all spheres of public life. The traditional concepts of public administration, including the classical Weberian type of bureaucracy popular in the 20th century, has given way to development-oriented administration that concentrates on good governance and results orientation. Ordinarily, a good public administration is said to include components such as managerial competence, organisational capacity, reliability and integrity, predictability, transparency and accountability, and financial sustainability. The characteristics of good public administration are determined by historical and political trajectories.[1] Good governance as enunciated by the current government encapsulates the importance of transparency, predictability, accountability, the rule of law, anti-corruption, the independence of the judiciary, and active people's participation in decision-making. A relook at the public sector in Sri Lanka is necessary to understand the existing framework for public administration, its strengths and weaknesses, and the way forward in the context of the Nineteenth Amendment.

## *Background*

The genesis of the Nineteenth Amendment has to be traced to the constitution-making saga of the Mahinda Rajapaksa government. Both the 1972 and 1978 republican constitutions did not provide for an independent public service, as the Cabinet of Ministers was held responsible for matters relating to the public

[1] National Audit Office (UK), *An International Comparison of the United Kingdom's Public Administration*, October 2008.

service. The need for reform in this regard resulted in some modifications to the 1978 Constitution through the Seventeenth Amendment, which sought to guarantee a degree of independence to the public service. The promulgation of the Eighteenth Amendment virtually nullified the improvements made under the Seventeenth Amendment. It gave unfettered powers to the President over all key public service appointments and had virtually removed the semblance of independence granted to public service under the Seventeenth Amendment. The Eighteenth Amendment replaced the Constitutional Council of the Seventeenth Amendment with a weaker mechanism designated as the Parliamentary Council. Substantial arbitrary powers vested in the Cabinet of Ministers and the President opened the doors for maladministration and negation of the rule of law concepts. This in turn altered the character of public sector management, specifically the development of an impartial, independent, and creative public sector that would cater to the emerging demands of a growing middle-income country.

The change in government following the presidential election in January 2015 and the priority accorded to good governance resulted in early action being taken to address blatant violations of the rule of law, restoration of media freedom, strengthened transparency, the maintenance of law and order, and effective administration of the principles of natural justice. This gave hope of a return to democratic principles of good governance and removal of the culture of impunity, which was pervasive before the new government came into office. Confirming the interest in the fundamental values upheld in the Seventeenth Amendment, the new government introduced the Nineteenth Amendment, which was passed in parliament with several not so encouraging modifications. The thrust of the Nineteenth Amendment was the reestablishment of the principles of good governance which included the repeal of the Eighteenth Amendment and establishment of independent commissions, including the public service

commission, that would ensure the independence, integrity, and impartiality of the public service and the judiciary. This chapter examines the extent to which the changes introduced under the Nineteenth Amendment provide support to the concept of an impartial and independent public administration.

## *A Brief Historical Perspective of the Public Service in Sri Lanka*

The origins of the modern public sector in Sri Lanka date back to the British period. The administration of the country then was in the hands of a small hierarchy of British officials assisted by the local elite educated through the English medium. It was not until constitutional change got under way after the first World War that Ceylonese in any numbers entered the higher civil service.[2] The higher civil servants were recruited through the medium of a competitive examination held simultaneously in London and Colombo. The lower civil servants, the clerks, were recruited locally mainly through competitive examination. With the grant of independence in 1948, Ceylon continued to recruit civil servants at higher and lower levels through competitive examinations. Recruitment to the higher civil service was governed by the Civil Service Minute, which was revoked in 1963 when the Ceylon Civil Service (CCS) was abolished, and a Ceylon Administrative Service was established.

The public service remained largely independent till the early 1960s. The Soulbury Constitution, in operation from 1947 to 1972, ensured that the public service maintained its independence largely free of political interferences. The Public Service Commission (PSC) established under the constitution was responsible for recruitment, transfers, promotions and disciplinary control, and supervision. This situation changed with the

[2] S.A. Pakeman (1964) ***Ceylon*** (London: Ernest Benn Ltd).

introduction of the first republican constitution in 1972, which brought the public service under political control by providing that the Cabinet of Ministers 'shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers.'[3] This position was further reiterated in the 1978 Constitution. The compelling reasons for this change and the consequences of this change will be discussed in what follows. Suffice for us to state that the chain of events that followed thereafter took away some of the best elements of public service characteristics that overwhelmingly determined the scope and direction of public administration.

### *The Role and Character of the Public Sector Today*

The public sector today is largely focussed on broad-based development administration with substantial importance attached to the planning and implementation of projects. Over the past thirty years about 40 per cent of development projects failed to achieve their intended objectives within the stipulated timeframes or within the expected budgetary allocations, for lack of capacity to plan, implement and deliver in a coordinated and integrated manner. Some of the major factors that have impeded more effective public sector performance, including utilisation of foreign aid, could be summarised as follows:

(i) Government organisations at central level did not adhere to a results-oriented management system, thereby lacking clear objectives and understanding of the scope of inputs required and the level of outputs and outcomes expected.

(ii) The rigidity of policy and implementation structures did not lend themselves to change in line with emerging needs.

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[3] The Constitution of Sri Lanka (1972): Section 106 (i).

(iii) Plurality of institutions and overlapping roles made decision-making difficult.

The factors that contributed to decline in capacity levels included politicisation of the public service, lack of an enabling environment for improving performance, inadequate punitive strategies, lack of consistent standards of recruitment to the public services, inadequacies in the compensation and benefit packages, disproportionate expansion of the public sector, and ethnic conflict and its debilitating impact on public sector morale.

The politicisation of the public sector initially arose out of a felt need, largely driven by the desire to transform a highly elitist pro-western bureaucracy to meet growing demands of a nation that had emerged from the shackles of colonialism. However, when public servants made use of this opportunity to seek favours and ignore tradition-bound value systems and ethical conduct, a service that had built its reputation on its ability to withstand political pressures, maintain impartiality, objectivity and transparency in its dealings since the time of the British rule, began to crumble. Loyalty was linked to political parties and individuals rather than to institutions and programmes. Capacities were determined not on the basis of performance appraisals but on the basis of a public servant's political affiliations and beliefs.

Inasmuch as there were no reward systems based on performance there had also been no systematised approaches to adopting punitive measures against those who underperformed. Except when issues became complex, and serious irregularities were reported, public servants got away with indiscipline and poor performance, largely unnoticed or ignored. The inadequacies in the disciplinary framework seriously impaired the efficient functioning of the public sector. Punctuality, discipline, and commitment to work became rare commodities, partly because public servants did not have the opportunity to look up to any improvements in

their career prospects. Irregularities in promotions and transfer, including political patronage in these areas, brought about some level of demoralisation and frustration among those who had hoped to build a career within their service.

The varying standards applied to recruitment to public sector positions also contributed to some quality deterioration. Consequent to the replacement of the Ceylon Civil Service with the Ceylon Administrative Service in 1963, for example, large-scale recruitment took place for higher level positions, albeit with relatively less onerous requirements, ostensibly on the premise that larger numbers were required to fill in vacancies that had multiplied consequent to increased public sector involvement in diverse activities, including statutory undertakings. While the quality of most public servants that entered the workforce was not in any way inferior to those who were admitted earlier, the level of admission requirements and the kind of in-house training provided before they were posted to responsible positions were reported to be less intensive and inadequate to meet the levels of leadership required for discharging their functions. In-house training before substantive postings became less and less emphasised also because of the compelling need to fill public sector vacancies expeditiously in government institutions. Although the situation has shown signs of improvement in recent years, the backlog of qualitative deficiencies added to declining performance levels.

Inadequate salaries and poor working conditions have also had deleterious effects on productivity. Poor salaries could have been compensated by appropriate reward and incentive systems, but lack of such systems resulted in weakened morale and reduced commitment to perform. It is noteworthy that the new government, under President Sirisena, as one of its first initiatives increased the salaries of public servants in January 2015, thereby signifying the need for revamping the morale and efficiency of the public sector.

About three decades of ethnic conflict further added to the woes of the public service. The war situation caused anxiety, depression, and helplessness among a substantial part of the workforce, resulting in lost working hours and weakened moral strength to withstand fear syndromes caused by suicide attacks and similar war-related incidents.

The factors outlined above serve to highlight the malaise that set in over a period of over forty years, gradually eroding the commitment, dedication, and loyalty of the public servants. It should not be assumed that the situation was all-pervasive or that there were no qualitative differences. As in all situations, there were core groups among all categories of staff that continued to serve with dignity, dedication, and commitment. This loyal coterie of public servants, in fact, contributed to saving the country from falling into deeper mires such as what occurred in countries like Indonesia, Myanmar, and some of the South American countries.

### *Nineteenth Amendment and Scope for Changes in the Public Service*

One of the major changes brought about by the Nineteenth Amendment is the concept of good governance envisaged through the appointment of independent commissions to oversee appointments, transfers, and promotions and disciplinary control of the public service, the judiciary, and other arms of government administration. The overt intention to uphold press freedom, observe the rule of law, and non-interference in judicial proceedings augurs well for the future and demonstrates that the country is moving towards a new political culture and governance. The remarkable independence and integrity shown by the Elections Commissioner in the conduct of the 2015 elections illustrates the success and merits of good governance. Viewed in this light the role of the public

service under the new government of President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe is likely to undergo significant transformation.

Of the major factors outlined earlier, the principal issue of politicisation needs to be neutralised if the public sector is to regain its original position of a relatively more independent arbiter of development administration. The Nineteenth Amendment has restored more powers to the Public Service Commission by removing Cabinet control of functions related to recruitment, transfers, promotion, and disciplinary control. The PSC owes its position to the Constitutional Council on whose recommendations Commissioners and the Chairman are appointed by the President. The Constitutional Council has been empowered to recommend to the President 'fit and proper persons' for appointment as Commissioners not only to the PSC but to all other independent commissions established under the Nineteenth Amendment. The Constitutional Council consisting of nine members is therefore expected to play a major role in ensuring good governance. The composition of the Council includes the Prime Minister, the Speaker, the Leader of the Opposition in Parliament, and five persons appointed by the President on the nomination of both the Prime Minister and the Leader of the Opposition, of whom two members shall be Members of Parliament. Whether the composition constitutes the right mix of persons and whether there should have been more representation from eminent persons of dignity and integrity and civil society are issues that may warrant further discussion. It is likely that these issues may be subjected to further review by the new government.

The Nineteenth Amendment lays down that the PSC shall be responsible and answerable to the Parliament. These changes are expected to give the PSC greater independence in carrying out its functions. However, whether it would provide adequate safeguards against political interference would depend on the objective

disposition of the holder of the office of President, as he, if he so desires, could tacitly overrule recommendations of the Constitutional Council. The Constitutional Council in 2002 recommended candidates to the Election Commission; however President Kumaratunga rejected the nominee for Chairman to the Commission.[4] Whether President Kumaratunga had powers to reject a recommendation made by the Constitutional Council had not been subjected to any legal scrutiny. Therefore, how the proposed changes would be implemented in practice and how they will impact on the morale, efficiency, and effectiveness of the public service is yet to be seen. It is hoped that the composition of the Constitutional Council under the Nineteenth Amendment would provide adequate checks and balances to lessen, if not altogether eliminate, political interference in public service appointments and promotions.

Modern public administration is increasingly linked with policy-making and to that extent interventions of Ministers and their advisors in administration cannot altogether be ruled out or considered unhealthy as evident from the experience of many developed countries. Governments in developed countries tend to emphasise accountability and the new public management agenda compared private sector performance with that of the public sector and wanted the public managers to deliver the objectives set for them by governments.[5] Unlike in Sri Lanka, public managers were held accountable for results and this has been the essence of public sector practices in New Zealand, Australia, and the UK. In countries such as the UK and USA, governments use various forms of managerialist strategy to influence the ways in which civil servants carry out their tasks. Despite claims of

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[4] R. Edrisinha & A. Jayakody (Eds.) (2011) ***The Eighteenth Amendment to the Constitution: Substance and Process*** (Colombo: Centre for Policy Alternatives).
[5] R. Mulgan (2004) ***Public Sector Reform in New Zealand: Issues of Public Accountability*** (Canberra: Asia Pacific School of Economics and Government & Australian National University).

impartiality, senior civil servants are goaded into doing things on the basis of 'duty to deliver' and in the 'public interest.' The invocation of a duty to deliver under the last Labour government, for example, was intended to promote an entrepreneurial 'can do' attitude towards realising the government's objectives rather than objective analysis or debate about their merits.[6] As Christopher Pollitt and Geert Boukaert have noted, "The administrative culture of the British state is conventionally understood to be guided by the notion of the "public interest", in which government is regarded as a necessary evil that should be hedged in and held to account as much as possible"[7]. The UK, along with Australia and New Zealand, has seen more radical and rapid changes, turnarounds, and renewals in the reform of the public sector than other developed countries. This has to be understood in the emerging context of a welfare state handling several interrelated development initiatives where people, performance, and outcomes matter, and fulfilment of 'public interest' becomes crucial to the political leadership.

In reality, a more broad-based separation of politics and public administration is neither feasible nor practical as the post-second World War concept of public administration expanded to include policy-making and analysis as integral components of the governance structure. Policy-making is a ministerial function to which senior civil servants are expected to contribute and in this process the links between public servants and politicians necessarily become close. Closeness to politicians does not

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[6] R. Andrews, J. Downe & V. Guarneros-Meza (2013) Public Sector Reform in the UK: Views and Experiences from Senior Executives, Coordination for Cohesion in the Public Sector of the Future (COCOPS), Work Package 3, Country Report UK, May 2013, available at: http://www.cocops.eu/wp-content/uploads/2013/06/UK_WP3-Country-Report.pdf (last accessed 6th March 2016)

[7] C. Pollitt & G. Bouckaert (2011) ***Public Management Reform: A Comparative Analysis – New Public Management, Governance, and the Neo-Weberian State*** (Oxford: Oxford University Press).

suggest political interference but when closeness becomes a tool to manipulate decision-making it becomes interference. This is where the impartiality, judgement, and integrity of public servants are put to test. In the sixties, seventies and even in the early eighties, public servants were able to resist manipulative processes and uphold public service norms and values. The later periods however, saw a deterioration in the kind of relationships that developed between politicians and public servants leading to a breakdown of ethics and integrity in the management of government bodies. The kind of consensual decision-making between the ministers and public servants adopted in the last two decades betray in many instances lack of propriety and impartiality in the discharge of functions allocated to ministries and departments. Can this process be reversed through the changes introduced under the Nineteenth Amendment? The answer is in the affirmative if there is commitment and willingness to change public service behaviour at the highest levels through more transparent recruitment processes, principled procedures for transfers and promotions laid down through the PSC, incentive support schemes for integrity in decision-making, and adoption of elaborate evaluation criteria to determine performance levels.

Improving efficiency of the public sector is a priority area that deserves urgent attention if development plans of the government are to be executed swiftly and at least cost. In the USA, Woodrow Wilson, as far back as 1887, in an article entitled 'The Study of Administration' wrote that, "…it is the object of administrative study to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy."[8] This holds good to any country even today although over the last one and a

[8] W. Wilson, '*The Study of Administration*' (1887) ***Political Science Quarterly*** 2 (2): pp.197-222.

quarter century new concepts such as the New Public Management Concept moulded on the basis of private sector models, have evolved making public servants accountable to their actions. In New Zealand, for example, heads of departments are made accountable to ministers through performance agreements and ex-post performance assessment. Similarly, in Britain, performance agreements between ministers and chief executives of agencies are signed to ensure that success in achieving targets is measured at the end of each financial year.

The approach to public administration today is one of engaging staff on a contractual basis for short term to deliver predetermined targets and outcomes and paying commensurably based on results achieved at the end. Although career public servants may be averse to signing agreements based on short-term contracts, the emerging trend may be applicable to new institutions and old agencies where quick results are expected through improved and efficient discharge of functions. The PSC could be used as a lever to propel public servants to enter into agreements with their departments/agencies to work on programmes that have identified specific outputs and outcomes over the life of a project or programme. Countries such as Australia and the United Kingdom have introduced formal contracting and ex-post performance assessment tools as desirable measures for improving the performance of government departments. In measuring the performance of government agencies, the focus and emphasis are on outputs. Achievements could also be measured at the end of the project based on anticipated and actual outcomes that represent value for money.

Payment of salaries/allowances could be linked to performance thereby providing incentives for high achievers. This is a trend that has been in vogue in private enterprises for long and most developed countries adopt this approach in the public sector as well to

improve efficiency.[9] Political will and willingness to adopt innovative policies of public administration should be forthcoming to change work attitudes, remove existing structural impediments, including out-dated administrative policies and regulations, to move forward in the direction of an outputs/outcomes based public service.

### *The Reform Agenda*

It is recognised that a well-functioning public administration is a prerequisite for transparent and democratic governance. An effective public administration determines a government's ability to provide public services and foster the country's development agenda and competitiveness at both central and provincial levels.

In today's context, the barriers to a more effective and efficient public service are many. Firstly, even though there is awareness of the need to reform the public sector, there is a fear psychosis operating about public sector reforms. On several occasions in the past, efforts were made to document impediments to improved public service and make recommendations for restructuring and reorienting it. More often than not such recommendations were ignored or shelved because of negative feedback from public service associations or interference from vested interests. The last attempt was made during the government of Mr Ranil Wickremesinghe in 2001-2004. A committee was appointed to make recommendations for reform of the public sector. Unfortunately, due to the premature dissolution of Parliament the process was not followed through. The Nineteenth Amendment and the new government that assumed power after 17th August 2015 could provide an impetus to renew efforts at public sector

[9] Australia, New Zealand, the USA, and the UK are currently adopting such measures to improve productivity.

reform. It is understood that the government is currently thinking of establishing a committee to review public sector structures, salaries and cadres and make recommendations for reforms. Essentially, the reform process should examine the following with a view to making public administration in Sri Lanka dynamic and forward looking:

(a) Redeployment of superfluous staff in ministries and departments. The criteria for determining excess staff have to be worked out in consultation with key ministries and departments. Various approaches to staff reallocation and redeployment could be considered; *viz*., (i) there are time-honoured performance standards which could be reemphasised in redeploying staff, (ii) those who are closer to retirement may be given 'golden handshakes' with attractive benefit packages, (iii) voluntary retirement may also be encouraged to enable those unwilling or ill-prepared to conform to performance standards, (iv) some items of work could be outsourced to retired staff or private sector entities pending new recruitment, and (v) new recruitment procedures could be enunciated giving emphasis to competence, qualifications, and integrity issues.

(b) Introducing systems to measure performance through a results-based management system. This system essentially defines objectives, outlines responsibilities, and assesses performance based on outputs anticipated at every milestone of activity. Such a system helps ensure delivery of outputs in a timely and cost effective manner.

(c) Rigorous performance appraisals, which until recently were considered necessary components of a reformed public sector because of the inherent advantages that the system offers to evaluate strengths and

weaknesses of staff, are now increasingly giving way to a dynamic and interactive process of continuing assessment of performance by superiors through assessment of outputs against targets set at the beginning of a year. The objective is to work together with staff in a cooperative manner to achieve targets and make them realise that interactive processes of performance assessment would replace annual performance appraisals.

(d) Adoption of a systematic approach to provision of training to the different levels of staff based on priority needs identified through an agency's long term objectives, and apparent weaknesses in performance observed through interactive processes. In particular, training needs have arisen in the areas of (i) project preparation and planning, (ii) project implementation and management, (iii) project monitoring and evaluation, and (iv) results-based management concepts. Public sector organisations should be held accountable for results and this would be possible only if public servants are fully conversant with results-based management concepts and accountability issues.

(e) Provision of incentives/rewards to high performers among the public sector staff would help uplift the morale and enthusiasm and contribute to enhanced performance. Lack of such a system has often been highlighted as one of the factors contributing to less than satisfactory performance.

The role of the public sector in Sri Lanka to accelerate development would increase substantially in the future consequent to increased economic activity. Capacity to absorb increased aid would be largely dependent on the extent to which public service reforms are carried out, including the introduction of new results-based procedures and processes for enhanced decision-making,

and commitment to deliver. Decision-making should be based on judgments that reflect the integrity and impartiality of decision-makers.

### *The Role of Provincial Councils*

While a reformed public sector would pay dividends in the long term, immediate attention may need to be focused on improving the capacity of devolved provincial entities to carry out the programmes of reconstruction, reconciliation, and development. It would be essential to ensure that competent staff whose credentials have been suitably tested for achieving desired implementation outcomes are transferred to devolved entities, particularly the Provincial Councils.

The Provincial Councils should not only have access to funding resources but should also have the capacity to assess needs, prepare programmes of action, and implement, monitor, and evaluate them in due time. A major intervention in this respect would be to look at the current structure and capacity dimensions of the public service at provincial levels and provide leadership training to implement specialised action programmes formulated in accordance with each provincial council's development priorities. The private sector's role in this regard also needs to be redefined in the context of the on-going emphasis given to greater private sector participation.

With regard to funding resources for provincial development initiatives, in addition to allowing collection of local taxes and subsidising through central government allocations, the key intervention should be to permit external assistance without conditions as long as the central government is privy to such arrangements. The Northern and Eastern Provincial Councils particularly, because of the significant damages both to property and lives caused by the thirty-year civil conflict, should be able to seek and obtain such funding externally with the concurrence of the central government. In order to

ensure that there is legitimacy in the acquisition and use of such assistance, an action plan detailing investment priorities should be drawn up by the Provincial Councils.

### *The Need for Supplementary Management Techniques*

It is difficult to transform overnight a public sector that became heavily dependent on political patronage to adopt systems and processes that are transparent, democratic, and results oriented. The key change should be to adopt a 'can do' approach to achieve intended objectives of the organisations the public servants work for. While efforts are made to change behavioural patterns and administrative methods and practices for transacting government businesses, simultaneous attention needs to be paid to create a body of independent, trained, and professionally competent people, who could act as a 'think tank' to (i) improve strategic planning methodologies, (ii) review and modify, if required, development proposals, and (iii) provide conceptual and advisory support for enhancing implementation, monitoring and evaluation processes for more effective realisation of outputs and outcomes envisaged during project or programme preparation. This raises the need to include both, 'generalists' and 'specialists' in the 'think tank'; the generalists to understand and interpret issues from many sides, and the specialists to look at specific technical issues of central relevance to key departments and ministries.

The fundamental principle behind the creation of an additional team of 'thinkers' and 'doers' should be to recommend action plans based on the concept of doing things in the 'public interest'. In doing things in the public interest it is inevitable that flexibility may be exercised and the principle of impartiality and independence may be compromised at least in part, as it happened in the UK during the last government under David Cameron. Previously, senior civil servants under the Labour

government were under pressure to observe the principle of 'duty to deliver', which meant critiquing and analysing the merits and demerits of issues were of secondary importance. Such interpretations and flexibilities in decision-making and delivery of services are bound to occur in any democracy that is accountable to the people. But the major difference in all these interpretations is that there are no overt attempts to create a political culture of interference but isolated instances of administrative adjustments to cope with the needs of governance.

Another aspect that deserves consideration in the reform of public administration is the need to provide for checks and balances in the management of the public service. The concept of 'Ombudsman' adopted in many public sector institutions is considered appropriate in this regard because of the need to provide access to a redress mechanism for those who transact business with government institutions in the event of unfair and improper administrative decisions. As part of the reform process, reactivation of the institution of Ombudsman with more powers should be considered to ensure that the principles of fairness, impartiality, and integrity are integral to decision-making in the public service. The concept of Ombudsman is widely adopted in many developed countries, particularly the Nordic countries and countries such as Australia and New Zealand.

### *Conclusions*

The Nineteenth Amendment cannot be considered a panacea for resolving the multitude of complex managerial issues that hampered good public administration over almost four decades, although it has reopened the doors for revitalising the spirit of good governance. The mechanisms of the Constitutional Council, the PSC, and the overall oversight by Parliament have all built into the system a semblance of fair play and justice in the recruitment, transfer, and disciplinary control of the public servants. But the extent

to which the implementation of these mechanisms will prevent infringement of the principles of good governance will depend on the commitment and integrity of the Cabinet of Ministers and the President to uphold accepted norms and procedures of good management. The ultimate success in ensuring a depoliticised and transparent public service will depend on the manner in which the Constitutional Council exercises its powers in selecting and recommending Commissioners of proven integrity to the President. A question arises as to whether the role of the Constitutional Council should be further buttressed and safeguarded through a statutory provision requiring it to submit quarterly reports to the Parliament.

The lead given by the current government in conducting free and fair elections devoid of violence as well as the procedures adopted to investigate maladministration and abuses so far give credence to the belief that the principles of good governance are already in place and that the country could expect a more independent and impartial public administration. A recent editorial in *The Sunday Observer* (9th August 2015) summed up the current situation as follows, "It is the 19th amendment that restored power and administrative autonomy to the Elections Commissioner and his Department to a degree that he can notify the President – once the all-powerful office – and the President moves promptly to transfer a Ministry Secretary … Civil society groups must take note of all these little upsurges in good governance and civilized politics so creative inputs could be given to ensure that these are not momentary flashes but will become entrenched in institutions and ways of political life. Both politicians and government officials will need to absorb these 'best practices' as normal functions and not exceptional behaviour." It is with such hope that the future of public administration should be viewed, especially because there is recognition that an efficient public service would be the key driver of good governance. It is expected that the constitution itself may undergo more changes emphasising further the principles of good governance. This may include checks and

balances being restored to the management of public institutions and strengthening the powers of the PSC to withstand political pressures.

# 10

# The Nineteenth Amendment and its Impact on Law Enforcement and the Administration of Justice

*Hejaaz Hizbullah*

Law enforcement and the administration of justice are essentially the function of three types of officials. These officials are the police, the prosecutor, and the judge. Law enforcement and administration of justice in Sri Lanka encounter challenges of both omission and commission. At times the system fails to act or at other times it acts for the wrong reasons. The harassment of political opponents through arrests and prosecutions and letting go political supporters with indictments being withdrawn or light sentences are well known and well recorded. These are instances of political interference and influence on the law enforcement mechanism. However, less well known is the ethnic bias in the law enforcement mechanism. The absence of any serious prosecution in respect of the violence in Aluthgama in June 2014 is a recent example that highlights the presence of a possible ethnic bias in the law enforcement and administration of justice system. In other words, the problem has been that political and ethnic minorities have found the law enforcement system failing them in certain instances.

In relation to these grave lapses, quite apart from the qualitative issue of the competence and capacity of these officials, the cause of such failures is allegedly the lack of independence. The argument has been that if the officers are left to act on their own, that they will deliver justice without fear or favour. In terms of this argument, unfortunately, due to the extent of political involvement in the law enforcement and administration justice process, political influence prevents officials from acting independently unless they are willing to sacrifice their next promotion.

What does the Nineteenth Amendment do to address this problem? From a law enforcement and administration of justice point of view, it seeks to attain two objectives. It aims to create an environment where these officials – the police, the prosecutor and the judge – can perform their functions with a degree of independence. It also aims to make governance transparent and open to challenge. To achieve these

objectives, the Nineteenth Amendment adopts three important measures. First, it reduces the powers of the President and distributes these powers to other officials. The idea is to achieve a balance in the constitutional structure. The amendment also reduces the scope of presidential immunity and now all government action except the declaration of war and peace is open to judicial challenge in some form or other. The second measure is that it makes the right to information a fundamental right, and thirdly, it introduces reforms to the Judicial Service Commission (JSC).

In this chapter, I argue that taken as a whole the Nineteenth Amendment is a step in the right direction. It has the potential of creating a positive culture where the discharge of official functions by the police *et al* will be based purely on law and order and justice considerations. However, the Nineteenth Amendment, like all constitutional measures, only sets out a framework. As such, it is only as effective as a constitutional framework can be. The extent to which it will impact on the police sergeant on his way to making an arrest, a State Counsel contemplating an indictment, or a Magistrate deciding on a bail application, would be decided by the space that emerges through an interplay of political and social forces within the framework that the Nineteenth Amendment establishes.

## *The Mischief*

However, before examining the three measures that the Nineteenth Amendment introduces, it would be useful to look at the 'mischief' that the amendment sought to rectify. The 'mischief' in the Eighteenth Amendment, and, in fact, even before that – except for the short period when the Seventeenth Amendment was in operation – was that there was no escaping the President and his sphere of influence or interference. A public officer who decided to act against, or did not act in favour of the political regime, which was essentially the regime of the

President, would soon find him or herself relegated to pariah status within his or her department. So in order to keep one's career on track, one had to perform and produce 'results.'

For example, the Inspector General of Police was appointed by the President and he functioned under a Ministry which was invariably under the President. During the tenure of President Rajapaksa, his brother, Gotabhaya Rajapaksa, was the Secretary to the Ministry under which the Police Department functioned. The Attorney General was also appointed by the President. Again during President Rajapaksa's presidency the Attorney General's Department was brought under the purview of the Presidential Secretariat. In this context, no Inspector General or Attorney General could be expected to act independently, for they functioned in a network controlled by the President.

In respect of the judiciary, the Chief Justice and all superior court judges were appointed by the President. In *Silva v Bandaranayake*,[1] where Shirani Bandaranayake's appointment as a judge of the Supreme Court was challenged, the Supreme Court held that in making appointments the President was required to only act in 'co-operation' with the Chief Justice, but qualified even that by saying,

> "Of course, the manner, the nature and the extent of the co-operation needed are left to the President and the Chief Justice, and this may vary depending on the circumstances, including the post in question.[2]"

In this way, the Court held that the petitioners had failed to supply sufficient information of a lack of co-operation: "While all four petitioners make these allegations, they neither claim personal knowledge of the facts nor state the

[1] (1997) 1 SLR 92.
[2] Ibid: p.94.

sources or grounds of their belief."[3] In other words, unless the petitioner had personal knowledge of the lack of co-operation between the President and the Chief Justice, there was no way in which a judge's appointment could be challenged. In the case of *Victor Ivan v Hon Sarath N Silva*,[4] the Supreme Court held that the powers of the President in appointing the Chief Justice was covered by the immunity granted to official acts of the President under Article 35 of the constitution.

Both *Silva v Bandaranayake* and *Victor Ivan v Hon. Sarath N Silva* highlight two other issues that the Nineteenth Amendment sought to address. First was the immunity of the President under the previous Article 35, which kept the President outside judicial reach, and the second was the absence of a right to information, which restricted the amount of information that was available in the public domain, and thus limiting public scrutiny and challenge of governmental action. Another problem that the Nineteenth Amendment seeks to address is with regard to the JSC. Under Article 111H of the constitution, the JSC was empowered to appoint, promote, transfer, and exercise disciplinary control over judges of the minor judiciary. The Chief Justice was the chairman of the JSC. There were two other judges of the Supreme Court who acted as members who were also appointed by the President. The resultant position was that through the JSC the minor judiciary was brought within the sphere of influence of the President.

### *The Nineteenth Amendment*

The Nineteenth Amendment changes this. Appointments to the office of Inspector General of Police, the Attorney General, and the Chief Justice and judges of the Supreme Court and Court of Appeal, are now subject to an appointment process involving the Constitutional

[3] Ibid: p.96.
[4] (2001) 1 SL R 309.

Council. Furthermore, with regard to the appointment of superior court judges, the President is required to obtain the views of the Chief Justice. The Nineteenth Amendment also sets up the National Police Commission, and Public Service Commission, which will control appointments, promotion, and transfer of public officers. Another key change that the Nineteenth Amendment introduces is that it reduces the scope of the President's powers of assigning Ministries for himself arbitrarily, through the somewhat enhanced role of the Prime Minister. Thus it is possibly more difficult than before for the President to bring departments like the Police Department or the Attorney General's Department under his purview.

The amended Article 35 of the constitution takes away presidential immunity for the President's official actions, with the actions of the President at least open to scrutiny for a violation of fundamental rights under Article 126 of the constitution.[5] Article 14A(1) of the Nineteenth Amendment makes the right to information a fundamental right. The extent to which this right would be made effective remains to be seen. However, at least in principle, the right to information has become a constitutional right allowing citizens to have access to information and thereby opening the doors of government for public scrutiny.[6]

The Nineteenth Amendment also introduces critical reform to the JSC, with the amended Article 111D(1) providing that the Commission shall comprise of the Chief Justice and the most senior judges of the Supreme Court, with one judge having experience as a judge of courts of first instance. The result of this amendment is that, firstly, the President has no discretion in selecting judges of his choice to be members of the Commission.

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[5] See N. Anketell, '*The Executive Presidency and Immunity from Suit: Article 35 as Outlier*' in A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): Ch.5.
[6] Cf. chapter by Gehan Gunatilleke in this volume.

Secondly, the requirement that one judge has trial court experience ensures not only that the Commission benefits from such experience, but it also ensures that one judge would be a career judge who rose through the ranks as opposed to a judge who might have been appointed to the Supreme Court on the strength of other experience.

### *Assessment*

So does the Nineteenth Amendment really deliver on the promise with regard to law enforcement and the administration of justice? What these constitutional changes do is that no longer is the President or the Prime Minister's singular approval or support necessary for appointment or promotion. A public officer who acts independently can find security in the appointment and transfer process, which is no longer at the whim of the President or any other political actor. Furthermore, the Constitutional Council as a body, unlike an individual President, would in making appointments set precedents and develop its own set of rules which would control the Council's own approvals and recommendations, thus reducing the ability to manoeuvre or manipulate.

However, it is difficult to imagine the President's recommendations to the Constitutional Council or the Prime Minister's suggestions within the Council being rejected by the Council. Appointments to the offices in Schedule I of Article 41C(1) are on the recommendation of the President. It is the President who will name the appointee and seek Council approval. With regard to the Commissions in Schedule to Article 41B(1), it is the Constitutional Council that will make the recommendations to the President to make the appointments. Appointments to the JSC will be by the President with the approval of the Council under Article 111D(1), but this is subject to the strict qualifications set out above.

Where the President and the Prime Minister come from the same political party and the party enjoys the comfortable majority in Parliament, it is difficult to see the Nineteenth Amendment reaching its full potential. The Prime Minister could easily dominate Parliament and the Constitutional Council, and assign to himself portfolios of his choice and have his or her nominees appointed through the Constitutional Council.

The redeeming feature of the Nineteenth Amendment, then, is that it gives the Leader of the Opposition and civil society representatives in the Council a role in the appointments process. Moreover, the right to information and the removal of the immunity of the President for his official acts makes governmental actions transparent and open to challenge. Whilst the President and the Prime Minister may still get their way, it seems unlikely for example that a Former Cabinet Legal Advisor would be ratified for appointment as Chief Justice, as was the case in President Rajapaksa's appointment of Mohan Peiris.

### *Conclusion*

To the Police Sergeant, the State Counsel, and the Magistrate, the Nineteenth Amendment puts in place an institutional structure that creates a space for them to perform their functions independently. The dimensions of that space will be determined by a tug of war between the political forces in power, the opposition, and other socio-democratic forces. In this sense, the early day of the implementation of the Nineteenth Amendment is important in setting down precedents. There appears to be a healthy mix in the membership of the Constitutional Council, with the Attorney General, the Inspector General of Police, and the Chief Justice showing visible signs of independence. This impartial performance of their functions would, hopefully, likely transcend not just political lines but also ethnic lines. But this, of course, remains to be seen.

# 11

## Executive Power after the Nineteenth Amendment: The Centre and the Provinces

*Niran Anketell*

The Nineteenth Amendment to the Constitution, eventually certified into law on 15th May 2015, was in line with President Sirisena and the common opposition's general campaign theme of promoting good governance and the rule of law. What was notable about that campaign was that it skirted the vexed question of the devolution of powers, choosing instead to maintain silence on the issue. The 100-day programme did not envisage any direct attempt to address devolution either. Even the Tamil National Alliance (TNA) found this strategy agreeable, on condition that a second slew of constitutional reform efforts once the 100-day programme was over would revert to providing due attention to the 'national question.' It was in this context that the Nineteenth Amendment was drafted. This essay considers whether, despite this contrived lack of interest in questions of devolution and autonomy, the Nineteenth Amendment – its text, the jurisprudence of the Supreme Court in the Court's assessment of it, and its implementation – have any implications for devolution and power-sharing, particularly in respect of executive power. The tiered relationship between the President, the Governor, and the Chief Minister (with the Board of Ministers) characterises the constitutional scheme in respect of executive power at the provincial level. In this context, does the Nineteenth Amendment impact in any way on the nature of these interrelationships? Moreover, does the Supreme Court's treatment, or non-treatment, of the 'advice clauses' in the draft Nineteenth Amendment, as well as the text of the Nineteenth Amendment, have any relevance for the 'advice clause' found in the Thirteenth Amendment? How may presidential decision-making power be constrained at the provincial level in the same manner as it is now constrained at the central level?

It is not the object of this essay to engage in a detailed study of the provisions of the Nineteenth Amendment concerning executive power. The final text has the effect of constraining presidential power by way of re-introducing the term limit; restricting the ability of the President to dissolve Parliament at will; reintroducing the Constitutional Council; limiting the scope of presidential immunity; and importantly, stipulating that the President's choice in identifying Members of Parliament to sit on the Cabinet of Ministers is to be exercised on 'the advice of the Prime Minister.' These changes do not appear to affect the

scheme and functioning of devolution in any direct way. The increased power vested in the Prime Minister over the Cabinet of Ministers by the Nineteenth Amendment would mean that provincial executive functionaries such as the Chief Minister would be forced to interact more directly with the Prime Minister and Cabinet, rather than merely with the President. But these are largely mediated by politics, and text of the amendment by itself certainly does not appear to influence centre and province relations in any material way.

The second, and far more interesting, question is whether the Supreme Court's determination on the Nineteenth Amendment Bill as well as the final Nineteenth Amendment Act itself, have any implications – direct or otherwise – on the devolution of power. Before embarking on such an analysis, it is important to note that the final text of the amendment that found passage through Parliament was significantly different to the text initially gazetted. Further, the Attorney General informed the Supreme Court ahead of the commencement of hearings on the first day fixed for hearing challenges to the Nineteenth Amendment Bill that the government would move a number of substantive amendments to the Bill on the floor of the house of Parliament. The Court was invited to consider whether these amendments also involve any inconsistency with an entrenched provision. These amendments presented by the Attorney General included proposed Article 33A (2) and (3) which stipulated that, except with respect to the appointment of the Prime Minister 'or as otherwise required by the Constitution', the President shall act on the advice of the Prime Minister, and that while he may require the Prime Minister to reconsider his advice, he was ultimately bound by the decisions of Parliament or the Prime Minister as the case may be. These provisions would later be excluded from the Bill that eventually found passage through Parliament.

With respect to devolution, however, it is notable that the Thirteenth Amendment to the Constitution also contains two key advice clauses, in Article 154F(1) where the Governor is mandated to act on the advice of the Board of Ministers and Chief Minister, and in Item 1:3 in Appendix II of Schedule 9 of the Constitution relating to the disposition of state land.

A few introductory notes are warranted. First, the advice clause in proposed Article 33A(2) of the Bill was introduced through the set of revisions forwarded to the Court by the Attorney General, and did not feature in the gazetted Bill. Second, the Supreme Court determination does not make any specific reference to the advice clause in proposed Article 33A(2). Thus, some may claim that the Supreme Court only properly had before it the text of the gazetted version of the Bill, in which the advice clause from proposed Article 33A(2) of the Bill was absent, and that this means the Supreme Court never had opportunity to consider that advice clause. This, I argue, is untenable. What is not in dispute is that the Attorney General did bring to the notice of court a number of proposed revisions including the advice clause in proposed Article 33A(2) of the Bill. In terms of the practice of the Supreme Court when hearing Bill determinations, this was not irregular. In many such cases, suggested revisions and amendments are proposed, discussed, and considered by the Court. In fact, the Court's determination alludes to some of these revisions pertaining to the right to information.[1] Further, the determination ends with the note that the judges have "considered the remaining provisions of the Bill" and that they "do not see any other matters that would require consideration by this court in terms of Article 83 of the Constitution."[2] Thus, I claim that it reasonable to assume that, notwithstanding the absence of any specific treatment of the advice clause, the Supreme Court found that this particular advice was compatible with the entrenched clauses of the constitution.

The most notable advice clause found in the Sri Lankan constitution has continued to be that contained in Article 154F (1), introduced by the Thirteenth Amendment, which reads:

> "[t]here shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advise the Governor of a Province in the exercise of his functions. The Governor shall, in the exercise of his functions, act in accordance with such

[1] See *In Re Nineteenth Amendment to the Constitution,* SC SD 04/2015-19/2015, SC Minutes 9th April 2015: pp.13-14.
[2] Ibid: p.17.

> advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion."

Notwithstanding this clause, which on its face appears to place real executive decision-making power in the Board of Ministers and Chief Minister, Chief Justice Sharvananda's opinion in the Thirteenth Amendment Bill determination sought to limit the scope of the devolved powers. Reading into this provision the ultimate presidential control over decision-making at the provincial level, which would supersede the advice of the Board of Ministers, he wrote:

> "[U]nder the Constitution the Governor as a representative of the President is required to act in his discretion in accordance with the instructions and directions of the President. Article 154F(2) mandates that the Governor's discretion shall be on the President's directions and that the decision of the Governor as to what is in his discretion shall be final and not be called in question in any court on the ground that he ought or ought not to have acted on his discretion. So long as the President retains, the power to give directions to the Governor regarding the exercise of his executive functions, and the Governor is bound by such directions superseding the advice of the Board of Ministers and where the failure of the Governor or Provincial Council to comply with or give effect to any directions given to the Governor or such Council by the President under Chapter XVII of the Constitution will entitle the President to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the provisions of the Constitution and take over the functions and powers of the Provincial Council (Article 154K and 154L), there can be no gainsaying the fact that the President remains supreme or sovereign in the executive field and the Provincial Council is only a body subordinate to him."[3]

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[3] *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312: p.322.

Thus, Chief Justice Sharvananda appears to rely on the supposed ouster clause in Article 154F(2).[4] Notably however, Justice Wanasundera, in his main dissenting judgment, disagreed with the Chief Justice's reading of the advice clause, stating:

> [I]n regard to the substantive Executive powers falling to the lot of the governor, these constitute decisions of the Board of Ministers which he is bound in law to accept and sanction. He has no choice and is given no discretion in the matter. The Chief Minister and the other Ministers are no doubt also appointed by him as even in this instance Article 154F(4) shows that where the party system operates and a party obtains a majority in the Provincial Council elections, the governor has no option but to appoint the leader of that political party as the Chief Minister and his nominees as the other Ministers. These appointments are in fact non-governmental appointments and the Governor merely sanctions what the law has provided for. The Legislature cannot exercise the Executive power either. So in reality, the substantive Executive power exercised in a Provincial Council emanates and is created from below and does not in fact constitute a devolution of power coming from above from the President."[5]

From a simple textual reading, the effect of Article 154F (2) appears to be that while the situations in which the Governor is not bound by the advice of the Board of Ministers is limited to those in which the constitution requires him to exercise his discretion, the Governor's discretion in determining whether the constitution requires him to exercise his own discretion is final

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[4] Article 154F(2) reads: "If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted on his discretion. The exercise of the Governor's discretion shall be on the President's directions."

[5] *In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312: p.359.

and cannot be questioned in a court of law. Thus the power of the Board of Ministers to bind the Governor through their advice is not justiciable as against the Governor. Because Article 154F(2) requires the Governor to exercise his discretion on the President's directions, Chief Justice Sharvananda was led to the conclusion that the President's directions to the Governor which superseded the advice of the Board of Ministers would be legally binding, hence warranting action in terms of Article 154 (K) and (L) if the provincial administration did not comply with the President's directions. Justice Wanasundera's view, however, appears to have been that the text of Article 154F(1) required the Governor to act on the advice of the Board of Ministers, regardless of whether or not the Governor's decisions could be challenged in a court of law.

To date – unsurprisingly, because of the ouster clause in Article 154F(2) – the Supreme Court has not clarified the position with respect to the advice clause. Is the Governor legally bound to give effect to the advice of the Board of Ministers, or is he in all circumstances bound by the directions of the President?

The Supreme Court's Nineteenth Amendment Bill determination is of use in interpreting the Thirteenth Amendment's ouster clause, because it relates to the question of whether or not the vesting of actual executive power in the Prime Minister through the advice clause in the Nineteenth Amendment involved any alienation of executive powers vested with the President. If this were not the case, and the advice clause in Article 33A (2) and (3) were to be assumed legal – as it must, given the Nineteenth Amendment determination – then presumably there would no bar to the genuine divestiture of real executive power from the President to the Board of Ministers of the Province. In short, if the retention of nominal decision-making authority in the President or Governor, as the case may be, saves an advice clause from incompatibility with a constitutional bar to alienation of power, then neither Article 4(b) read with Article 3, nor Article 2, could stand in the way of the transfer of power from the President or his agent the Governor to the Prime Minister and Board of Ministers, respectively, through advice clauses binding the President or Governor. This is why the question of whether or not the

Supreme Court considered and cleared the advice clause in proposed Article 33A (2) and (3) is of such vital importance.

There is yet another way, in this case the text of the Nineteenth Amendment Act, could affect the practice of devolution. As I have discussed earlier, the Governor's discretion in determining the limits of his own discretion – his *compétence de la competence* – is the subject of an ouster clause. However, his discretion is always to be exercised on the President's directions. Thus, the effective decision-maker in respect of the Governor's discretion is the President and not the Governor. Nevertheless, the President is not covered by the ouster clause in Article 154F(2). Thus, presidential directions to the Governor are not beyond judicial review. Despite this, the ouster clause in Article 35 of the constitution preventing the initiation of suits against the President closed the door to direct challenge of such presidential directions.[6] That was until the passage of the Nineteenth Amendment. The proviso to Article 35(1) introduced by the Nineteenth Amendment now permits the initiation of fundamental rights petitions to the Supreme Court against the President. As such, there is no reason as to why presidential directions to the Governor – either to exercise his discretion on a certain subject notwithstanding the advice of the Board of Ministers, or to exercise his discretion in some other manner – cannot be subjected to judicial review. Such a challenge would not attract the ouster clause in Article 154F(2) because the decision-maker being challenged is the President and not the Governor.

The resulting position in view of this analysis is that the Nineteenth Amendment determination by the Supreme Court, as

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[6] The Supreme Court has consistently read Article 35 in a way that does not exclude collateral challenges against presidential acts, provided the President is not a necessary party in such proceedings. In the case of presidential directions to the Governor, however, it would have been inconceivable as to how a collateral challenge against a presidential act designed to escape the Article 35 ouster could be framed in such a way as to also avoid impugning the Governor's acts and decisions, which are in any event ousted from the Court's jurisdiction by Article 154F(2). See N. Anketell, '*The Executive Presidency and Immunity from Suit: Article 35 as Outlier*' in A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): Ch.5.

well as the restrictions on the scope of presidential immunity in the Nineteenth Amendment, appear to have some implications for the law concerning the devolution of power in Sri Lanka under the Thirteenth Amendment. The Nineteenth Amendment process – perhaps entirely unwittingly – has altered the way in which the Thirteenth Amendment scheme could be implemented. While these observations may well become academic in light of the plans for a new constitution, or at least major constitutional amendments, that would as promised embody a new devolution settlement that goes beyond the Thirteenth Amendment, the Nineteenth Amendment also highlights the critical importance of such modifications.

The Nineteenth Amendment's imposition of procedural and substantive limitations on presidential power in respect of powers reserved to the centre was supported unanimously in Parliament and has come to be viewed as essential to strengthening Sri Lanka's democracy. The current constitutional reform process is also expected to further weaken, if not abolish outright, the presidential system of government. Despite this, and barring the implications on devolution discussed in this essay, the constitution does not constrain presidential and gubernatorial decision-making powers in the Province in the same way. The result is an imbalance in the system, due to the constriction of presidential powers at the centre while simultaneously perpetuating presidential power over the provincial government. This situation is clearly anomalous and must swiftly be addressed. Devolution of powers in the context of Sri Lanka is warranted both as tool through which to accommodate the aspiration of the Tamil and Muslim people to a greater share of state power than they now enjoy, and to deepen Sri Lanka's democracy by diffusing decision-making power more evenly throughout the country. A stronger central executive at the provincial level than there is at the central level is therefore untenable and perverse.

# 12

# The Nineteenth Amendment in Comparative Context: Classifying the New Regime-Type

*Artak Galyan*

## Introduction

The Nineteenth Amendment to the Constitution, enacted in April 2015, has considerably changed the constitutional framework of Sri Lanka. Some of the most crucial shifts have been in the nature of the executive system, with the change of the powers and the institutional relationships between the president, the cabinet, the prime minister, and the legislature. It is both useful and appropriate to consider the changes wrought by the Nineteenth Amendment through the concept of semi-presidentialism, in particular to see how it has changed the executive branch and the coordination between the executive and legislative powers. The Nineteenth Amendment has turned Sri Lanka from a 'president-parliamentary' system with sweeping presidential powers to a 'premier-presidential' system with less presidential powers.

In this regard it is important to first discuss the distinctive characteristics of semi-presidential systems, highlight their most frequently discussed problematic features, and juxtapose these to empirical cross-case evidence. Second, it is useful to build the Sri Lanka's constitutional framework established by the Nineteenth Amendment into a comparative context with other historical and contemporary cases of semi-presidentialism. Finally, it is useful to consider what the theoretical insights and empirical evidence of the existing literature tell us about the future of the new form of semi-presidentialism in Sri Lanka. It is important to note that this chapter only covers the changes introduced by the Nineteenth Amendment that relate to the structure of the executive branch and executive-legislative coordination. Other important changes introduced by the Nineteenth Amendment are consequently out of the scope of this chapter.

The chapter is structured as follows. The first section provides a short background to the concept of semi-presidentialism and its definitions, as well as the distinctiveness of semi-presidential systems from both parliamentary and presidential ones. Section 2 discusses the most commonly raised criticisms of semi-presidentialism and juxtaposes these critical arguments against the findings of the existing cross-case comparative research. This

section pays particular attention to the phenomena of cohabitation as well as divided and minority governments. The section ends with the discussion of the factors that determine formation and control of executive power in semi-presidential systems. In section 3 I briefly describe the changes that the Nineteenth Amendment has introduced to the structure of the executive power, as well as its relations with the legislative power. The final section provides a discussion of the constitutional amendment in light of the theoretical arguments and empirical findings in the existing literature.

## *Semi-presidentialism: Definitions and Constitutive Characteristics*

Reflecting on the form of government of the French Fifth Republic, Maurice Duverger was the first to identify semi-presidentialism as a distinct form of government. The early conceptualisation by Duverger, which first emerged in 1970, was further elaborated in his 1980 article. He defined semi-presidentialism as a political system where there is a popularly elected president who possesses quite considerable powers and is faced with a prime minister and a cabinet that have executive power and who stay in power as long as they enjoy the support of the parliament.[1] At the time Duverger identified seven countries meeting these criteria: Austria, Finland, France, Iceland, Ireland, Portugal, and the historical case of the German Weimar Republic.

Duverger's definition has been criticised for its combination of institutional and behavioural attributes. The behavioural attribute of 'possessing quite considerable power' has been brought up as a source of conceptual ambiguity and empirical confusion.[2] Overcoming the problems identified with the Duvergerian

[1] M. Duverger, '*A New Political System Model: Semi-Presidential Government*' (1980) ***European Journal of Political Research*** 8(2): p.166.
[2] For detailed criticism of Duverger's original definition see R. Elgie, '*The Politics of Semi-Presidentialism*' in (Ed.) (1999) ***Semi-Presidentialism in Europe*** (Oxford: Oxford University Press): pp. 4-12.

definition, Robert Elgie has suggested what is currently the most widely accepted definition. According to him semi-presidentialism is a form of government where a directly elected president is facing a prime minster and cabinet who are collectively responsible to the legislature.[3] Unlike Duverger, Elgie's definition has no behavioural attribute and is restricted solely to the institutional characteristics of semi-presidentialism.

Elgie's definition has been crucial in several respects. The first and most important contribution of the purely institutional definition has been the emergence of semi-presidentialism as a distinct form of government, rather than a hybrid system shifting between that of parliamentary and presidential properties. Elgie's definition has been useful in avoiding a lot of the confusion related to the arbitrary assignment of the label of semi-presidentialism based on the interpretation of behavioural elements of the definition in a number of separate cases. Instead the purely institutional attributes which are easily identified through a country's constitution leave little room for debate whether a country is semi-presidential or not.

Despite its obvious advantages Elgie's definition does not address another problem of semi-presidentialism – extreme heterogeneity of formal constitutional powers of actors and the often quite divergent actual behaviour they exhibit in these systems.[4] This extreme variation poses considerable difficulties for cross-case comparative empirical analysis and causal inference.[5] Several attempts have been made in accounting for the institutional and behavioural variation within semi-presidential systems through

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[3] Ibid: p.12.
[4] These authors also show that heterogeneity is also high among presumably 'pure' parliamentary and presidential systems. See e.g., J.A. Cheibub, Z. Elkins & T. Ginsburg, '*Beyond Presidentialism and Parliamentarism*' (2014) ***British Journal of Political Science***: pp.1-30.
[5] Because of this extreme diversity especially in the powers of the executive presidents, Alan Siaroff has expressed doubts whether semi-presidentialism is a distinct and coherent form of government: see A. Siaroff, '*Comparative presidencies: The inadequacy of the presidential, semi-presidential and parliamentary distinction*' (2003) ***European Journal of Political Research*** 42(3): p.307.

developing metrics of presidential power.[6] Given such extreme variation of formal powers, what is it then that makes semi-presidentialism a distinct form of government?

The distinctness of semi-presidential systems becomes evident if we think of government systems as chains of delegation of political authority from voters to politicians and state institutions. This view has been elaborated early by Matthew Shugart and John Carey[7] and further discussed by Shugart,[8] and Shugart and David Samuels,[9] as well as research that uses principal agent theory.[10] Shugart suggested that origin and survival of the executive authority is a useful angle to look from when differentiating authority patterns in semi-presidential systems.[11] In parliamentary systems both the origins and survival of the chief executive (prime minister) is fused with that of the legislature.[12] The parliamentary majority is in this case the principal of the cabinet and prime minister, which are its agents.[13] In presidential systems the origin and survival of the executive are separated from the legislature.[14] President and legislature are elected separately by the people, and both are independent of each other for their survival. Semi-presidential systems are distinct in that one part of the dual

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[6] L.K. Metcalf, '*Measuring Presidential Power*' (2000) ***Comparative Political Studies*** 33(5): pp.660-685; Siaroff (2003).
[7] M.S. Shugart & J. Carey (1992) ***Presidents and Assemblies: Constitutional Design and Electoral Dynamics*** (Cambridge: Cambridge University Press).
[8] M.S. Shugart, '*Semi-Presidential Systems: Dual Executive And Mixed Authority Patterns*' (2005) ***French Politics*** 3(3): pp.323–351.
[9] Shugart & Samuels (2010).
[10] P. Schleiter & E. Morgan-Jones, '*Party government in Europe? Parliamentary and semi-presidential democracies compared*' (2009a) ***European Journal of Political Research*** 48:5, 665–693; P. Schleiter & E. Morgan-Jones, '*Review Article: Citizens, Presidents and Assemblies: The Study of Semi Presidentialism beyond Duverger and Linz*' (2009b) ***British Journal of Political Science*** 39:4, 871; P. Schleiter & E. Morgan-Jones, '*Who's in Charge? Presidents, Assemblies, and the Political Control of Semipresidential Cabinets*' (2010) ***Comparative Political Studies*** 43(11): pp.1415-1441.
[11] Shugart (1992).
[12] Ibid: p.325.
[13] Schleiter & Morgan-Jones (2009b).
[14] Shugart (2005): p.325.

executive, the president has its origin and survival separated from the parliament, while the other component, the prime minister and cabinet have both their origin and survival fused with the parliament.[15]

Using the differentiation of origin and survival of the executive presidents, cabinets and prime ministers, and legislatures, Shugart and Carey have proposed the most widely used framework for differentiating semi-presidential systems in an analytically useful way.[16] They identified two basic variations of semi-presidential systems: premier-presidential and president-parliamentary. At the root of this differentiation is the origin and survival, as well as the relative power of the directly elected president *vis-à-vis* the assembly. The most important differentiation concerns the formation and dissolution of the cabinet and the extent of legislative powers. In the president-parliamentary systems it is the president who forms and dissolves the government at his/her own discretion. Although parliamentary confidence is still required for the survival of the cabinet, it is the sole prerogative of the president to form the cabinet. The cabinet in this case remains accountable to both the president, who can dissolve the cabinet, and to the parliament to which the cabinet is accountable and can be dismissed through a no confidence vote. In premier-presidential systems the prime minister is formally chosen by the president, but the cabinet is solely dependent and accountable to the legislature. Once the president makes the prime ministerial appointment he/she has no control mechanism over the working of the cabinet. The sole right to dissolve the cabinet resides with the legislative majority. In terms of formal constitutional powers, it is the president who assumes control of the executive government in president-parliamentary systems, while in premier-presidential systems it is the prime minister.

[15] Ibid: p.327.
[16] Shugart & Carey (1992).

### *Perils of Semi-Presidentialism? Arguments and Comparative Empirical Evidence*

The effects and consequences of semi-presidentialism has been a subject of long and heated academic debates. In the context of highlighting the deficiencies of presidentialism for democratisation Juan Linz argued that semi-presidentialism exhibits the same problematic characteristics as presidentialism. [17] Linz has particularly and recurrently stressed the tendency of presidential systems to introduce a zero-sum element in political competition, to encourage personalisation of politics, and to undermine political parties. Later Linz and Alfred Stepan developed an additional and since than a standard critique of the destabilising effect of cohabitation and intra-executive conflict especially in new and fragile democracies.[18]

Cindy Skach presented a similar critique, arguing that the combination of shared power between prime minister and executive president and their unequal legitimacy and accountability create tensions in semi-presidential countries.[19] Arend Lijphart joined the critics of semi-presidentialism by arguing that it offers only a slight improvement over presidentialism and its perils.[20] The direct election of the president keeps the zero-sum nature of the political competition in place and encourages personalisation of politics along with weakening of institutions and political parties. Moreover, Lijphart argued

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[17] J. Linz, '*Presidential Versus Parliamentary Democracy: Does It Make a Difference?*' in J. Linz & A. Valenzuela (Eds.) (1994) ***The Failure of Presidential Democracy*** (Johns Hopkins University Press); J. Linz, '*Introduction*' in T. Ray (Ed.) (1997) ***Postcommunist Presidents*** (Cambridge University Press).

[18] J. Linz & A. Stepan (1996) ***Problems of Democratic Transition and Consolidation*** (Johns Hopkins University Press): pp.278–279.

[19] C. Skach (2005) ***Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic*** (Princeton University Press).

[20] A. Lijphart, '*Constitutional Design for Divided Societies*' (2004) ***Journal of Democracy*** 15(2): pp.96-109, also available at: http://muse.jhu.edu/content/crossref/journals/journal_of_democracy/v015/15.2lijphart.html (last accessed 18th March 2016).

that depending on the outcome of elections, semi-presidential systems can easily become 'hyper-presidential' with the presidents acquiring much more sweeping powers than any president in 'pure' presidential systems.

Other scholars have been more optimistic about the consequences of semi-presidentialism. For Giovanni Sartori, the presence of two independent executives is an advantage as it allows for 'head shifting' and greater institutional flexibility.[21] Considering the record of semi-presidentialism in Western Europe, Gianfranco Pasquino praised semi-presidential systems along similar lines for their supposed greater government capability and institutional flexibility.[22] Reflecting on the experience of post-communist Central and Eastern Europe and the former Soviet Union, François Frison-Roche comes to a similar conclusion, praising the flexibility of semi-presidentialism, its ability to adapt to various contexts, and as a system that best enables rapid transition from dictatorship to democracy.[23]

These reflections on the contribution of semi-presidentialism are however based on either single country studies, or are restricted to specific regions with particular historical and political trajectories, which may prevent a fuller assessment of the impact of semi-presidentialism. Large N comparative research on the impact of semi-presidentialism has produced much less categorical conclusions. In the work of Sophia Moestrup, and Jose Antonio Cheibub and Svitlana Chernykh, the comparison of parliamentary, semi-presidential, and presidential systems found no significant difference between semi-presidential and

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[21] G. Sartori (1997) ***Comparative Constitutional Engineering: An Inquiry Into Structures, Incentives, and Outcomes*** (New York University Press).

[22] G. Pasquino, '*Semi-Presidentialism: A Political Model at Work*' (1997) ***European Journal of Political Research*** 31: pp.128-137.

[23] F. Frison-Roche, '*Semi-Presidentialism in Post-Communist Context*' in R. Elgie & S. Moestrup (Eds.) (2007) ***Semi-Presidentialism Outside Europe*** (Abingdon: Routledge): pp. 56-77.

presidential regimes.[24] Taeko Hiroi and Sawa Omori show on the other hand that semi-presidential systems outperform parliamentary systems in democratic sustenance,[25] while Milan Svolik and Ko Maeda find that semi-presidential and presidential systems are more prone to regime termination.[26] These empirical findings show that the arguments about the deadly consequences of semi-presidentialism are somewhat exaggerated, since there is no conclusive evidence on their negative consequences compared to other regime types.

The comparative research has produced much more convincing findings on the varying effects of different types of semi-presidentialism. Elgie and Petra Schleiter show that premier-presidential systems are more conducive to survival than president-parliamentary systems.[27] Similarly premier-presidential systems exhibit higher democratic performance than president-parliamentary systems.[28] Moestrup comes to similar conclusions when analysing the regime effects in young democracies.[29] Her research shows that premier-presidential systems have better record of civil liberties and democratic survival.

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[24] S. Moestrup (2007a) '*Semi-presidentialism in Niger: Gridlock and Democratic Breakdown – Learning from Past Mistakes*' and S. Moestrup (2007b) '*Semi-presidentialism in Young Democracies: Help or Hindrance?*' in R. Elgie & S. Moestrup (Eds.) (2007) ***Semi-Presidentialism Outside Europe*** (Abingdon: Routledge): pp. 105-120 and pp. 30-55; J.A. Cheibub & S. Chernykh '*Are Semi-Presidential Constitutions Bad for Democratic Performance?*' (2009) ***Constitutional Political Economy*** 20(3-4): pp.202-229.
[25] T. Hiroi & S. Omori, '*Perils of Parliamentarism? Political Systems and the Stability of Democracy Revisited*' (2009) ***Democratization*** 16(3): pp.485-507.
[26] M. Svolik, '*Authoritarian Reversals and Democratic Consolidation*' (2008) ***American Political Science Review*** 102(2): pp.153-168; K. Maeda, '*Two Modes of Democratic Breakdown: A Competing Risks Analysis of Democratic Durability*' (2010) ***The Journal of Politics*** 72(4): pp.1129-1143.
[27] R. Elgie & P. Schleiter, '*Variation in the Durability of Semi- Presidential Democracies*' in R. Elgie, S. Moestrup & Y.S. Wu (Eds.) (2011) ***Semi-Presidentialism and Democracy*** (Oxford: Oxford University Press): pp. 42-61; R. Elgie (2011) ***Semi-Presidentialism Sub-Types and Democratic Performance*** (Oxford: Oxford University Press): pp.43-49.
[28] Elgie (2011): pp.69–94.
[29] Moestrup (2007b).

## Cohabitation and Divided Government

The case against semi-presidentialism usually revolves around two situations that are said to be threatening to democracy: cohabitation and divided or minority government. Cohabitation is the situation when the executive president and the prime minister come from opposing parties, and when the president's party is not represented in the government.[30] The fear is that this will lead to intra-executive conflicts and government deadlock until such time as elections give a single party control over both the legislature and executive presidency. Elgie however shows that cohabitation mostly occurs in full democracies and all of the instances of cohabitation in full democracies survive without democracy collapsing.[31] Cohabitation is on the other hand rather rare in partial democracies. Elgie counts only three such instances Weimar Republic (1923-24; 1927), Sri Lanka (2001-2004)[32] and Niger (1995).[33] Out of these three, democracy collapsed only in Niger as a result of cohabitation, which is therefore cited as a classic example of the perils of cohabitation.[34] Meanwhile, no full democracy ever collapsed because of cohabitation and intra-executive conflicts.

Given the characterisation of cohabitation as a perilous outcome of semi-presidentialism it is important to consider factors that give rise to situations of cohabitation. First, it has been shown that cohabitation is more common in premier-presidential than in

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[30] R. Elgie & I. McMenamin, '*Explaining the onset of cohabitation under semi-presidentialism*' (2011) ***Political Studies*** 59(3): pp.618-619.
[31] R. Elgie, '*The Perils of Semi-Presidentialism. Are They Exaggerated?*' (2008) ***Democratization*** 15(1): pp.49-66.
[32] According to M.S. Shugart & D.J. Samuels (2010) ***Presidents, Parties, and Prime Ministers: How the Separation of Powers Affects Party Organiztaion and Behavior*** (Cambridge: Cambridge University Press): pp.45-46, Sri Lanka 2001-2004 is the only case of cohabitation that existed in a president-parliamentary system. All other experiences of cohabitation come from premier-presidential systems.
[33] Elgie (2008): pp. 49-66.
[34] L. Kirschke, '*Semipresidentialism and the Perils of Power-Sharing in Neopatrimonial States*' (2007) ***Comparative Political Studies*** 40(11): pp.1372-1394; Moestrup (2007a).

president-parliamentary systems.[35] Elgie and Iain McMenamin show that cohabitation arises mostly following elections and even more commonly, mid-term elections, when the majority in the parliament changes, forcing a cohabitation with the incumbent president and newly formed majority in the parliament.[36] Cohabitation is likely when there is a split of electoral preferences, either because of non-concurrent legislative and presidential elections, or vote splitting as a result of different electoral logics of parliamentary and presidential elections. In addition to showing that cohabitation on its own has no really empirically founded negative consequences, Elgie also shows that the factors that could give rise to cohabitation do not cause democratic breakdown.[37] Actors' anticipation of forthcoming cohabitation does not push them toward unconstitutional means of resolving political conflicts and democracy does not collapse. Overall, cross-case as well as case study research shows that the alleged deadly consequences of cohabitation have been exaggerated.

Minority or divided governments have been brought up as another undesirable consequence of semi-presidentialism. Minority and divided governments emerge when neither the president's party nor any other party, including those explicitly opposed to the president, can form a government with a sustainable majority in the legislature. The argument goes that these insecure majorities lead to shifting alliances and coalitions in the legislature, with recurring government deadlock and intra-executive conflicts. This in turn leads to the executive president's frequent use of decree and emergency powers and potentially to more extreme unconstitutional measures. Elgie finds that five out of 17 partial democracies collapsed in the periods of divided or minority government.[38] Even those that did not collapse experienced increased political tensions, presidents had to frequently resort to their decree powers, and in two of them,

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[35] Elgie (2008); R. Elgie, '*Semi-presidentialism, Cohabitation and the Collapse of Electoral Democracies, 1990-2008*' (2010) ***Government and Opposition*** 45(1): pp.29-49; Elgie & McMenamin (2011).
[36] Ibid.
[37] Elgie (2010).
[38] Elgie (2008).

Russia and Madagascar, the system moved towards granting more powers to the president. Similar to the case of cohabitation, however, divided and minority government led to democratic breakdown only in partial democracies, and never in full democracies. This might point to an apparent conjunctural relationship. Perils of semi-presidentialism come to the fore in absence of the wider 'safety net' that comes with fully democratic regimes, such as an independent judiciary and other independent institutions, strong civil liberties, an independent media and civil society, and so on.

## Cabinet Formation and Control

The discussion in the previous sections shows that the allegedly most problematic effects of semi-presidentialism emerge because of the conflicts between presidents and parliaments, most commonly over the formation and control of the cabinet of ministers. Since semi-presidential systems exhibit high diversity in their institutional and behavioural characteristics it is evident that there is no single pattern of government formation and control. In this context it is important to elaborate on which actors – presidents, prime ministers, parliaments or parliamentary parties – have the upper hand in cabinet formation and control. Under what circumstances does this or that actor get advantage over the others? What are the mechanisms of influence that each of these actors possesses and applies?

Several complementing theoretical accounts exist on which actors compete for formation and control over cabinet in semi-presidential systems. For Octavio Amorim Neto and Kaare Strøm cabinet formation is the outcome of a 'tug of war' between the prime minister and the executive president.[39] For Oleh Protsyk on the other hand, cabinet formation and control is an outcome of a bilateral bargaining between the executive president and

[39] O. Amorim Neto & K. Strøm, '*Breaking the Parliamentary Chain of Delegation: Presidents and Non-partisan Cabinet Members in European Democracies*' (2006) British ***Journal of Political Science*** 36(4): p.619.

parliament which (depending on the precise constitutional design) have the powers to nominate, appoint, and/or dismiss the cabinet, the prime minister and individual cabinet members.[40] Schleiter and Edwards Morgan-Jones offer a more integrative account.[41] They look at the chain of power delegation in semi-presidential systems from the perspective of a principal-agent theory. Since semi-presidential systems assume a joint control over the government by parliamentary parties (through confidence-investiture procedures) and executive president (through at least one of the three: cabinet appointment, dismissal, legislative powers), the legislative parties and the executive president are the principals of the cabinet, which is their agent.

A long-standing debate in the semi-presidentialism research has been about the relative importance of formal constitutional powers in cabinet formation and control. Several authors have argued that formal constitutional powers have little importance on actual balance of powers in semi-presidential systems.[42] Contrary to these claims, the analyses of Protsyk, Amorim Neto and Strøm, and Schleiter and Morgan-Jones, of different samples of semi-presidential systems show that formal constitutional powers do play a crucial role in determining the formation and control over executive government.[43] However, these authors also argue that despite the importance of formal constitutional powers other factors can amend the constitutional power granted to the actors.

Exactly what institutional mechanisms matter in determining cabinet formation and control, once we take for granted the finding that formal constitutional powers are crucial for cabinet formation and control? For Amorim Neto and Strøm and Protsyk

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[40] O. Protsyk, '*Prime Ministers' Identity in Semi-Presidential Regimes*' (2005) ***European Journal of Political Research*** 44(5): pp.721-748.
[41] Schleiter & Morgan-Jones (2010): pp. 1415–1441.
[42] J.A. Cheibub, '*Making Presidential and Semi-Presidential Constitutions Work*' (2008) ***Texas Law Review*** 87: pp.1375, 1398-1401; Duverger (1980): pp.179-180; Linz & Stepan (1996): p.278; Siaroff (2003): p.303.
[43] Protsyk (2005); Amorim Neto & Strøm (2006); Schleiter & Morgan-Jones (2009a); Schleiter & Morgan-Jones (2009b); Schleiter & Morgan-Jones (2010).

it is the power to nominate, confirm and dismiss cabinet members that give one or the other party bargaining advantages.[44] The power to nominate is a crucial agenda-setting mechanism while the unilateral dismissal power is a powerful tool that structures the entire negotiation process. In addition Protsyk shows that symmetric dismissal powers that give both the president and the parliament the right to dismiss the newly nominated prime minister and cabinet members provide a powerful institutional incentive for compromise and moderation since both the president and parliamentary majority know that their first preference candidates could easily be dismissed.[45] Schleiter and Morgan-Jones on the other hand argue that government formation and control emerge from both, the formal constitutional structure as well as the results of elections that grant the authority to form and control the government to the parliamentary parties and the president.[46]

As already mentioned, despite emphasising the role of formal powers these authors also argue that several intervening factors introduce considerable changes to the formal powers. Both Protsyk and Schleiter and Morgan-Jones show that actors' *de facto* powers increase when government formation is triggered and takes place immediately after elections.[47] Recent elections give both parliaments and executive presidents incentives and legitimacy to be proactive in imposing their preferred government composition. These authors show that the ability of executive presidents to influence cabinet formation and exercise control increase with the increase in the fragmentation of the legislature. In fragmented legislatures the bargaining environment is complicated by the number of veto actors. In such circumstance the executive president takes up the role of broker among several parties and can bargain the president's preferred cabinet composition irrespective of the formal constitutional powers. The Amorim Neto and Strøm study also shows that the electoral

[44] AmorimNeto and Strøm(2006); Protsyk (2005).
[45] Protsyk (2005).
[46] Schleiter & Morgan-Jones (2010).
[47] Protsyk (2005); Schleiter & Morgan-Jones (2010).

volatility of parties in parliament from one election to another increases the executive president's powers.[48] On the other hand, these authors show that cabinet's fragmentation or the size of the governing coalition decrease the executive president's ability to influence government formation, since the multiple parties in the coalition all demand a share of ministerial positions for themselves, restricting the president's opportunities to nominate his own or non-partisan members.

Beyond parliament's and the governing coalition's fragmentation, the nature of the party system is also a crucial aspect. Protsyk shows that presidents in premier-presidential systems acquire important leverage when the party system has a clientelistic nature and is characterised by frequent factional instability and floor-crossing which give the president more room in manoeuvring and finding a suitable candidate for the PM's position that would be in her/his interest.[49] In addition, S.G. Kang shows that the president's membership in a legislative party is an important factor in the executive-legislative power balance.[50] The president's *de facto* powers considerably increase when she/he is the leader or a member of a strong legislative party.

*The Nineteenth Amendment: What Has Changed?*

The Nineteenth Amendment introduced considerable changes to the Sri Lankan constitution, particularly the balance of powers between the executive president, prime minister/cabinet and parliament. The president is directly elected by the people for a term of five years. The president is the head of state, the commander-in-chief of the armed forces, and also the head of the executive. The president is elected for a term of five years renewable only once, while individuals who have already served in the post for two terms are ineligible to run for the post again.

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[48] Amorim Neto & Strøm(2006).
[49] Protsyk (2005).
[50] S.G. Kang, '*The Influence of Presidential Heads of State on Government Formation in European Democracies: Empirical Evidence*' (2009) ***European Journal of Political Research*** 48(4): pp.543-572.

The Nineteenth Amendment introduced a provision which states that the president is 'responsible to parliament' for the exercise of his/her duties and functions, although it is not entirely clear what this 'responsibility' entails.[51] The president can be impeached by parliament by a two-thirds majority.

The president appoints the prime minister from among the members of parliament at his/her own discretion. However, the prime ministerial nominee should be able to command the confidence of the parliament, essentially constraining the president's discretion with the actual distribution of power in parliament. This is given an additional twist since the term of the parliament is essentially fixed. The president has no power to dissolve parliament unless in the last six months of the lifespan of a parliament and only if two-thirds of MPs vote in favour of the resolution. This means that the president cannot dissolve parliament and call new elections in the hope that new elections will yield a parliamentary majority commensurate with the president's preferences.

The president's role in the functioning of the cabinet remains considerable. The president is a member and the head of the cabinet of ministers and consults whenever he/she finds it necessary the prime minister on the determination of the number of ministries, ministers, and the assignment of subjects and functions to such ministries. On the advice of the prime minister the president appoints the ministers and deputy ministers. The cabinet is formally collectively responsible to the parliament, but also de facto to the president who can change its composition, assignments, and functions of the ministers. However, the president cannot dismiss the prime minister, and the entire cabinet. The president can dismiss cabinet ministers only on the advice of the prime minister. The cabinet in its whole can be dissolved only if the parliament passes a no confidence vote or

[51] When outlining the legislature-cabinet relationship the amendment states that the cabinet is "responsible" and "answerable" to the Parliament. The word answerable is omitted form the description of legislature-president coordination.

rejects the statement of government policy. As such the president losses the highly powerful leverage of cabinet dismissal as the survival of the cabinet rests only with the parliament. It is here that the collective responsibility of the cabinet to the parliament is exercised. Consequently the command of the majority of the parliament by the prime minister is essential to the survival of the cabinet.

*Discussion*

Through the changes introduced by the Nineteenth Amendment Sri Lanka has moved from the president-parliamentary to premier–presidential category of semi-presidential systems. The most important change has been in the origin and survival of the cabinet. Before the Nineteenth Amendment the president and legislature had separate origin and survival. The cabinet's origin was with the president, while its survival was with the executive president, through dissolution power, and the legislature, through confidence vote. However, even in the case of no confidence vote the president had the discretion to reappoint the cabinet as he/she wished. This placed both the actual origin and survival of the cabinet with the president. With the Nineteenth Amendment the origin of the cabinet lies with the president mediated through parliamentary majority. However, and most importantly, the prime minister's and the cabinet's collective survival solely rest with the parliament. In terms of principal agent theory cabinet and the prime minister are now the agents of the parliament and through the parliament of legislative parties.

Adopting and measuring the extent of presidential powers based on the Shugart and Carey scale, the current Sri Lanka executive president scores 10 points compared to the 16 points it had in the Shugart and Carey research from 1992.[52] Table 1 below shows the power of Sri Lanka's president as measured on Shugart and Carey's scale before and after Nineteenth Amendment. As

[52] For a detailed discussion of the scale see in Shugart and Carey (1992): Ch.8 at pp.148-154.

compared to semi-presidential systems measured by Shugart and Carey, Sri Lankan president under Nineteenth Amendment has 10 points, which is below the average of 13 points of all semi-presidential regimes including both, president-parliamentary and premier-presidential systems as initially measured by Shugart and Carey. Adopting Steven Roper's[53] modification of Shugart and Carey's scale for premier-presidential regimes shows that from the point of view of formal constitutional powers the Sri Lankan president is the second strongest among premier-presidential systems as originally measured by Roper. Only the president of Iceland with 16 aggregate points has more formal powers than the president of Sri Lanka.

**Table 1: Powers of the Sri Lankan President before and after Nineteenth Amendment**

| Constitutional power | Pre 19th Amendment[1] | Post 19th Amendment |
|---|---|---|
| **Legislative Powers** | | |
| Package veto | 0 | 0 |
| Partial veto | 0 | 0 |
| Decree powers | 0 | 0 |
| Exclusive legislation | 0 | 0 |
| Budget | 0 | 0 |
| Referendum | 4 | 4 |
| **Non-legislative Powers** | | |
| Cabinet formation | 4 | 3[2] |
| Cabinet dismissal | 4 | 0 |
| Censure | 0 | 0 |
| Parliament dissolution | 4 | 3 |
| **Total** | **16** | **10** |

[53] S. D. Roper, '*Are All Semi-presidential Regimes the Same? A Comparison of Premier-Presidential Regimes*' (2002) ***Comparative Politics*** 34(2): pp.253-272

Compared to the pre-Nineteenth Amendment the president has not gained any additional legislative powers, but retained the crucial right to propose an issue to a referendum – potentially a powerful tool of agenda-setting and a check on the powers of the parliament. Importantly the president's sweeping non-legislative powers were somewhat constrained. Prior to the Nineteenth Amendment the president had full power to form and dissolve government, as well as the right to dissolve the parliament. With the Nineteenth Amendment the president still retains the nomination of the prime minister, subject to the candidate commanding support of the majority of the legislature. The president also appoints members of cabinet, but only on the advice of the prime minister, and has the right to change the composition of the cabinet, the functions and assignments of the cabinet ministers. These changes though must not alter the continuity of the cabinet and the continuity of its responsibilities to the parliament. On the other hand the president lost the power to dissolve the cabinet of ministers. The president has to an extent retained the right to dissolve the parliament. However, this dissolution power is severely constrained in time. The president can only dissolve the parliament four and a half years after the first sitting of the parliament.

As already discussed an executive president's actual powers can be considerably different from formal powers depending on a number of factors. Existing research has identified the nature of the party system, electoral volatility, the degree of parliament's as well as governing coalition's fragmentation, and the occurrence of minority government, as some of the most important such factors. In this context it is crucial to consider the impact of the electoral system. The extent of fragmentation of the legislature, and the governing coalition(s), the shape of the party system and electoral volatility are all to a great extent influenced by the electoral formula. Additionally, the design of electoral districts, in particular of district magnitude, as well as the overall cleavage structure of the society are all of important consideration in this regard. This goes back to a limited, but important stream of research that has argued of the crucial importance of studying

interactive effects of institutions rather than their separate, net effect on any given phenomenon.[54]

The existing research by Schleiter and Morgan-Jones and Amorim Neto and Strøm shows that fragmented legislatures would increase the president's role in government formation by giving him/her more space for manoeuvre and nomination of a prime minister closer to his/her preference.[55] In this context a more permissive electoral system such as proportional representation systems could be expected to fragment the legislature and provide more leverage for the executive president in cabinet formation. Given Sri Lanka's ethnic diversity, drawing electoral districts along the settlement patterns of ethnic groups will enable majoritarian systems to provide for quite extensive representation of ethnic groups and achieve a degree of fragmentation of the legislature. Legislative fragmentation will likely mean that no single party would be able to command absolute majority. Parties would need to enter into governing coalitions. The larger these coalitions, the more room would the executive president have in the appointment of the prime minister, but also less control over the appointment of ministers and other cabinet members. Legislative fragmentation and inability to form a stable majority by fewer parties could also be expected to lead to situations of minority government, again paving the way for more extensive powers of the executive president.

However, it is important to consider not only the mechanical degree of fragmentation but also the role of the executive president in the party system. As Kang shows in his research given president's nomination power the executive president's role will

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[54] T.D. Sisk (1996) ***Power Sharing and International Mediation in Ethnic Conflicts*** (United States Institute of Peace); K. Belmont, S. Mainwaring & A. Reynolds, '*Institutional Design, Conflict Management, and Democracy*' in A. Reynolds (Ed.) (2002) ***The Architecture of Democracy : Constitutional Design, Conflict Management, and Democracy*** (Oxford: Oxford University Press).

[55] Schleiter & Morgan-Jones (2009); Schleiter & Morgan-Jones (2010); Amorim Neto & Strøm (2006).

highly increase whenever he/she heads or is a member of a parliamentary party.[56] Irrespective of the formal power of the president the post is likely to continue to occupy an important role for Sri Lankan political parties. In this sense it is unlikely that the position of the president would become apolitical and solely symbolic.

Subject to the changes of the electoral system, the party system can change considerably from the current mainly two-party structure. The party system could change if the new electoral system is very permissive, encouraging and rewarding possible fragmentation of the two major parties. The party system might also evolve from the traditional two-party system if minorities consolidate around one to two parties and actively engage in electoral politics so that the minority parties' share of representation in the legislature approximate their share in the population. However, if we assume the party system does not change, then it is very likely that the post of the president will be occupied by one of the two powerful parties holding the parliamentary majority on their own or in coalition with other parties. This suggests that formal presidential powers aside, it is the presidential parties in the legislature that will be a crucial source of power for the presidential executive.

In case the party opposed to the president is holding a majority in the parliament the president's power can be considerably restricted. In case a party opposed to the president is holding an inconclusive majority in the parliament there is likely to be a cohabitation or minority government. The peculiarity of these two situations in the current Sri Lankan system is that the term of the parliament is essentially fixed. There is no constitutional provision that would allow for dissolution of the parliament unless there is a strong consensus on dissolution within the legislative parties.[57] On the one hand this locks all parties to four and a half

[56] Kang (2009).
[57] The Nineteenth Amendment requires that the resolution on dissolution of the legislature must have the support of two-thirds of MPs including those not present.

years of tense intra-executive and inter-party relations and unstable government. On the other hand the fixed parliamentary mandate is a powerful incentive for more consensual relations that can incentivise parties to compromise.

# 13

## The Need for a New Constitution for Sri Lanka

*Rohan Edrisinha*

If Sri Lanka is to consolidate the democratic gains of 2015, it is vital that President Sirisena's Sri Lanka Freedom Party (SLFP) and Prime Minister Wickremesinghe's United National Party (UNP), overcome their differences, rivalries and ideological differences and jointly provide leadership to introduce a Third Republican Constitution. A new constitution that learns from the mistakes of the 1972 and 1978 Constitutions, adapts features from international best practice and which is compatible with basic principles of constitutionalism, is vital for the introduction of good governance, the protection of human rights, and national reconciliation and unity.

***Why do we need a new Constitution?***

The first two republican constitutions were partisan, were not supreme, and suffered from the same basic flaws: they were designed to promote the political vision and ideology of the party in power; they entrenched, rather than countered, majoritarianism; and they were designed with the convenience of the executive, rather than the empowerment of the People, as their primary motivation or rationale.

The First Republican Constitution of 1972 was essentially a United Front Constitution which introduced what Neelan Tiruchelvam has called the 'instrumental' use of constitutions by governments to further their own political agendas. The Second Republican Constitution of 1978 was instrumental in introducing what its most credible critic, Chanaka Amaratunga, described as the authoritarian and *realpolitik* vision of its principal architect, J.R. Jayewardene. Both constitutions were introduced by governments that possessed two-thirds majorities in Parliament, thereby removing the need for consensus across the political and ethnic divide. Both constitutions concentrated power in a single institution (the National State Assembly under the 1972 Constitution and the office of the Executive President under the 1978 Constitution). Both were drafted and adopted with little meaningful public participation. Despite the fundamental flaws being the same, the most vocal critics of one were the principal architects of the other.

If Sri Lanka is serious about consolidating the democratic achievements of 2015, and preventing a return of the authoritarianism of a kind experienced in the country since 1982, it must introduce a new constitution that divides power, promotes effective checks and balances, and empowers the people so that their elected politicians remain accountable to them between elections. A new constitution that is a non-partisan, consensus document is essential for responsive and accountable governance.

### *The Criteria for Evaluating a Constitution*

A constitution is meant to protect the people from those who exercise political power and empower the people *vis-à-vis* the rulers. Friedrich Hayek in his seminal work, *The Constitution of Liberty*, highlighted this fundamental objective as follows:

> "The formula that all power derives from the people referred not so much to the recurrent election of representatives as to the fact that the people, organised as a constitution-making body, had the exclusive right to determine the powers of the representative legislature. The constitution was thus conceived as a protection of the people against all arbitrary action, on the part of the legislative as well as the other branches of government."[1]

If a constitution is to achieve such an objective, the people have to be actively engaged and involved in the constitution-making process. The pro-ruler and pro-executive convenience biases of the 1972 and 1978 Constitutions, which undermined their people empowerment features, existed because these constitutions were designed by the government, for the government, and of the government. It is vital that the same mistake is not repeated in 2016. The theory of constitutionalism highlights what the objectives of a constitution should be.

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[1] F.A. Hayek, (1972) ***The Constitution of Liberty*** (Chicago: Chicago University Press): p.178.

1. It should provide a *political frame* for society or the institutional architecture for the governance of the country.
2. It should protect the *freedom and autonomy of the individual* and the rights of minorities – all minorities, not just ethnic and religious minorities.
3. It should enshrine *values and principles* by which the society should be governed.

A constitution is assessed on the basis of how it achieves these three objectives. In Sri Lanka the constitutional reform debate has tended to focus almost exclusively on the first objective: the debate on whether the executive should be presidential or parliamentary; the electoral system for electing members to the legislature, should it be first-past-the-post or based on proportional representation etc. While these are significant issues, it is important to recognise the significance of the other two objectives.

Why do we need a constitution? If one looks to constitutional history one sees that the *raison d'être* for a constitution was to act as a check on majoritarianism. While it was recognised that in a democracy, decision-making by determining what the majority desired was an important working principle, it was also recognised that in relation to some matters, particularly those dealing with human rights, majoritarian decision-making was *not* appropriate as it would result in what John Stuart Mill called 'the tyranny of the majority.' It was decided that such issues should then be taken outside the scope of the majoritarian decision-making power of the legislature, removed from the jurisdiction of the elected Parliament and placed within the scope of a supreme constitution. An example would be inserting a bill of rights into the constitution to protect basic fundamental rights even from the reach of the elected representatives of the people. A constitution was therefore conceived to protect certain important matters from the reach of the legislative and executive branches of government. It was conceived in the words of Eugene Rostow, a former Dean of Harvard Law School, as a 'counter majoritarian document.'

In recent years, the norm-setting aspect of a constitution – its values and principles – has been highlighted. The 1996 Constitution of South Africa, which is still seen as one of the most progressive constitutions in the world, offers an excellent example. Article 1 of the constitution declares that 'South Africa is a republic founded on the following values' and then lists a series of them. These include human dignity. non-racialism, non sexism, the rule of law; multi-party democracy, accountability, openness, and responsiveness. Article 2 declares 'The Constitution is supreme. All law inconsistent with it is void.' The contrast between the first two articles of the South African constitution and the Sri Lankan constitution is striking. The former highlights values and principles and their supremacy. The latter is obsessed about power and who exercises power.

### *The Constitution must really be Supreme*

A constitution is the supreme law of the land. But even this basic and to many obvious first principle has been rejected by the drafters of Sri Lanka's autochthonous constitutions. The 1978 Constitution contains three provisions that not only undermine the supremacy of the constitution, but are unparalleled in constitutional democracies. These are Articles 16, 80(3) and 84 of the constitution. Article 16 basically states the opposite of Article 2 of the South African constitution. It declares that *all* existing law, written and unwritten, is valid even if it is inconsistent with the supreme law, the constitution. Article 80(3) prevents the people from challenging provisions in laws that have been enacted by the legislature on the ground that the legislature has enacted an unconstitutional law. This is a right that the people in India, Nepal, Bangladesh, Pakistan, South Africa, the USA, Canada, and all constitutional democracies have, and is a vital safeguard for the people in protecting their rights and upholding the supremacy of their constitution. This right, which existed under the Soulbury Constitution, was done away with by the framers of the 1972 Constitution and continued under the

present constitution. Article 84, believe it or not, instructs Parliament how it can introduce unconstitutional laws.

These three provisions are instructive in demonstrating the (lack of) commitment of Sri Lanka's constitutional framers to the principle of the supremacy of the constitution. If the new constitution is to be compatible with international best practice and basic principles of constitutionalism, and promote good governance and accountability, these three provisions should not be part of the new constitution.

It is not surprising that the main political parties have demonstrated little if any interest in the important issues highlighted above. These issues strengthen the powers of the people at the expense of the politicians and impose constitutionally mandated qualifications on how governmental power is exercised. The manner in which the Nineteenth Amendment to the Constitution was adopted in 2015 reminds us of the importance of continuous public engagement in the constitution-making process. The composition of the Constitutional Council under the Nineteenth Amendment is worse than under the Seventeenth Amendment. Various clauses such as those on dual citizenship were inserted without any public consultation and were politically motivated. The Members of Parliament, both from government and opposition, engaged in a process of closed door political wheeler-dealing without any sense of shame or guilt that in so doing they were violating first principles of constitution-making. Can this same Parliament be trusted with the task of leading the Third Republican Constitution making process?

## *Some Observations on Current Constitutional Issues*

### The Executive

An important lesson from the experience of the Second Republican Constitution is that a person elected by the whole country tends to have an exaggerated notion of his/her own importance, legitimacy, and authority. This was foreseen by

Dudley Senanayake who opposed presidentialism when it was discussed in the early 1970s:

> "The Presidential system has worked in the United States where it was the result of a special historic situation. It works in France for similar reasons. But for Ceylon it would be disastrous. It would create a tradition of Caesarism. It would concentrate power in a leader and undermine Parliament and the structure of political parties."[2]

As predicted, the executive presidency has, since its introduction, fostered authoritarianism, undermined other democratic institutions such as the Cabinet of Ministers, Parliament, and the judiciary, and through the device of the referendum – as was seen in 1982 – even elections and multiparty democracy. The locus of power shifted from Parliament, which, with all its shortcomings, was at least relatively open and transparent, to a closed Presidential Secretariat with unelected and powerful presidential advisors and officials. Presidential advisors who were often more powerful than Cabinet Ministers (especially during the Premadasa Presidency), were not accountable to the public.

An 'overmighty' nationally elected President also subverts coalition government and power-sharing as was seen in the brief period of co-habitation between Chandrika Kumaratunga and Ranil Wickremesinghe.[3] J.R. Jayewardene and his admirers often defended the presidential system as promoting stability. In the Sri Lankan context, stability could mean a government consisting of

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[2] Dudley Senanayake and Colvin R. de Silva were the two most persuasive critics of the presidential system when it was discussed in the early 1970s in Ceylon. See also for academic critiques essays by Chanaka Amaratunga and Chandra R. de Silva in C. Amaratunga (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy).

[3] C.R. de Silva, 'The Overnighty Executive? A Liberal Viewpoint' in Amaratunga (1989): pp.313-326; C.R. de Silva, '*The Overmighty Executive Reconsidered*' in A. Welikala (Ed.) (2015) ***Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*** (Colombo: Centre for Policy Alternatives): Ch.26.

several political parties across the ideological and ethnic divide, rather than the concentration of power in a single individual. There needs to be a more nuanced understanding of the meaning of stability in the context of Sri Lanka's political culture, for, as was seen since 1982, there is a fine line between a simplistic definition of stability and authoritarianism.

It is a matter of concern that some elements in the government are promoting the idea of a nationally elected Prime Minister who will sit in Parliament. The Prime Minister can be defeated on a vote of confidence in Parliament, but this will in turn, cause Parliament to be dissolved. This ill-conceived idea which retains the basic flaws of concentrating an unacceptable degree of power in a single person was tried unsuccessfully in Israel in the mid 1990s and subsequently abandoned.

**The Electoral System**

There was a consensus at the elections in 1994 that Sri Lanka should opt for a genuinely mixed system (Mixed Member Proportional or MMP) similar to that practiced in Germany, New Zealand, and now Scotland. Such a system combines the best features of the simple plurality system (first-past-the-post) and the cardinal principle of proportional representation that representation in Parliament should be in proportion to the votes received by parties rather than the 'winner takes all' principle that creates a mismatch between votes received by parties and the seats allocated in Parliament.[4]

The mixed system is also easy for the people to understand, easy to administer, can include mechanisms to ensure inclusion and women's representation (an important consideration given that the Sri Lankan legislature has the lowest women's representation in South Asia), and can be designed to prevent floor-crossing while ensuring that Members of Parliament also possess a degree of independence from their party leadership.

[4] See R. Edrisinha & A. Welikala (Eds.) (2008) ***The Electoral Reform Debate in Sri Lanka*** (Colombo: Centre for Policy Alternatives).

The Twentieth Amendment proposed but eventually aborted in 2015 was flawed in all these respects and should be completely discarded. It was incomprehensible even to lawyers, was designed to favour larger political parties to the disadvantage of smaller parties, and failed to provide an appropriate mix between the simple plurality system and proportional representation as it favoured the former at the expense of the latter.

**The Bill of Rights**

Sri Lanka's bill of rights falls short of international norms and standards. The basic flaws are with respect to the rights enumerated, the restriction/limitation clause that makes it too easy for the political branches to curtail such rights, and with respect to their scope and enforcement.[5] The following improvements must be made in designing the bill of rights of a Third Republican Constitution:

a) The rights and their scope need to at least be compatible with the international covenants on human rights.
b) The restriction or limitation clause (Article 15) is drafted in a manner that makes it possible for the executive and legislature to impose restrictions with no criteria of objectivity and proportionality. This weakness has been highlighted for many years including during the deliberations of the All Party Conference convened by President Premadasa in the early 1990s.
c) The First and Second Republican Constitutions both contained provisions that validated laws even though they were inconsistent with the bill of rights and the constitution (Article 16 of the present constitution). This anomalous feature that is inconsistent with first principles of constitutionalism should be removed.
d) The provision that requires a fundamental rights application for violations by executive and administrative action be filed in the Supreme Court (Article 126) is inconsistent with principles of access to justice and the

[5] See Centre for Policy Alternatives (2008) ***GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues*** (Colombo: Centre for Policy Alternatives).

rule of law. Persons living outside Colombo find it difficult to invoke the jurisdiction of the court and this provision undermines the role of the Supreme Court as the final appellate court of the country which is expected to deal with questions of law rather than fact. It also creates the anomaly of providing for no appeal in an important area of jurisprudence which could amount to a violation of the rule of law. Allowing fundamental rights applications to be made in Provincial High Courts will not only address such weaknesses but also help to mainstream human rights among the judiciary and the legal community at a broader level.

**The Independence of the Judiciary and Other Legal Institutions**

The present constitutional provisions protecting the independence of the judiciary should be strengthened particularly with respect to the disciplinary control and removal of appellate court judges. However, the damage done to this important institution over the past twenty years in particular means that it will need more than constitutional reform to restore the institution's integrity and credibility.

Another institution that lacks credibility is the Attorney General's Department. It has proved particularly incompetent in its role as a reviewer of the constitutionality of draft legislation and advising the state on the constitutional propriety of its actions. Indeed it is seen as an institution that defends and seeks to justify unconstitutional laws and actions. The reintroduction of constitutional review of legislation by the courts through the initiative of the public will not only protect the supremacy of the constitution but also serve as an incentive for the Attorney General's Department to improve its performance in this area.

**Devolution of Power in a Unitary State**

The devolution of power to the provinces under the Thirteenth Amendment to the Constitution is weak, fragile, and therefore can be undermined by the centre. Significant provisions of the

amendment remain unimplemented nearly 30 years after its introduction, which again raises the question of whether our constitution is supreme. There is something fundamentally wrong with a constitution that enables the executive to disregard constitutional provisions it views as inconvenient, and which provides no remedy for the people to ensure constitutional compliance. The shortcomings of the Thirteenth Amendment have been experienced by Provincial Councils, Chief Ministers, and Boards of Ministers throughout the country.[6] With respect to the subjects that are to be devolved, it is vital that the Provincial Councils have the power to exercise such powers without the centre undermining or reclaiming such powers as it has often done since 1987. The powers of the centre to respond effectively to any threats to the unity and territorial integrity of the country, which in my view, already exist in the constitution, should be retained.

It is vital that following the defeat of the LTTE that the roots causes of the conflict are addressed, and power-sharing and genuine devolution of power are important components of such a response. It is important to recognise that the Tamil people voted for moderation at the January and August 2015 elections, rejected Tamil hard-line nationalist parties and groups, and that a failure to respond adequately to reasonable demands for devolution and equality will ultimately strengthen the forces of Tamil extremism. Addressing the reasonable demands for genuine and secure devolution of power to the provinces by overcoming the weaknesses in the Thirteenth Amendment is the best way to generate trust and goodwill among the Sinhalese, Tamils, Muslims, and other communities in the country. Creating such inclusivity and national reconciliation through genuine power-sharing is the best guarantee against threats to the unity and territorial integrity of the country.

The most difficult challenge for the framers of the Third Republican Constitution is how to deal with the provision

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[6] See R. Edrisinha & A. Welikala (Eds.) (2008) ***Essays on Federalism in Sri Lanka*** (Colombo: Centre for Policy Alternatives).

entrenched in the constitution that declares Sri Lanka to be a unitary state. Is it possible to grant enhanced and effective devolved power to the provinces within the framework of a unitary state? It is important to remember that when the Thirteenth Amendment was introduced in 1987, several petitioners challenged the Bill on the grounds that the devolution to Provincial Councils envisaged under the amendment violated the unitary character of the constitution. The Supreme Court in a 5-4 split decision held that it did not, with the majority referring to the various provisions in the amendment that effectively ensured the dominance of the centre over the provinces.[7] The minority held that the powers devolved to the provinces were sufficient to undermine the unitary principle. Given the divided opinion on the court, it is possible to argue that what was introduced under the Thirteenth Amendment amounted to 'maximum devolution within a unitary state.' How then does one strengthen devolution, introduce 'Thirteenth Amendment Plus' that has been the minimum demand of the Tamil political leadership as well as minority groups in general, since 1995, that was proposed by the All Party Representative Committee (APRC)[8] and supported at various times both by the Rajapaksa regime and the present one, within the confines of the unitary state?

There are three reasons why, in my view, the term 'unitary' should be removed from the Third Republican Constitution. They are: (1) Historical; (2) Conceptual; and (3) Jurisprudential.

### 1) Historical Reasons

The political context in which the unitary label was introduced in the First Republican Constitution cannot be ignored. The Federal Party which had since the early 1950s emerged as the main representative of the Tamil people had on two occasions

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[7] See *In Re the Thirteenth Amendment to the Constitution* (1987) 2 SLR 312.
[8] Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran & Asanga Welikala (Eds.) (2009) ***Power Sharing in Sri Lanka: Political and Constitutional Documents 1926 – 2008*** (Colombo & Berlin: Centre for Policy Alternatives): Ch.37.

negotiated with Prime Ministers of Ceylon and agreed to political arrangements that fell short of a federal model.[9] On both occasions, the Prime Ministers had to renege on their commitments due to pressure from within their own parties and from the main opposition political party at the time. At the time of the 1970 general election, some individuals and groups had begun to question the moderate, democratic, and Gandhian approach of the leader of the Federal Party, S.J.V. Chelvanayakam, which had produced few results, and contested the Federal Party on a separatist platform. Chelvanayakam's response was to call upon the Tamil people to reject separation while affirming his and the party's commitment to a federal and united Ceylon. The Federal Party was swept to power and the separatist candidates fared so badly that they lost their deposits.[10]

When the United Front government established a Constituent Assembly to draft and adopt a new, autochthonous, republican constitution through a process that was extra-constitutional, the Federal Party agreed to support the process and participate in the assembly. However, then followed a decision that certainly with the benefit of hindsight, must be the most insensitive, short-sighted decision that had the most adverse long-term consequences for national reconciliation and unity in post independence Ceylon/Sri Lanka. The United Front government and its Minister of Constitutional Affairs, Colvin R. de Silva proposed in Basic Resolution No.2 that the new constitution should contain a clause that declared that 'Sri Lanka is a unitary state.' This was a move that was completely unnecessary as the Soulbury Constitution contained no such provision but was undoubtedly unitary in character.[11] Viewed in the context of the politics of the time and the general election result in particular, the initiative was both provocative and humiliating for the

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[9] Ibid: Chs.9, 10.
[10] A.J. Wilson (1988) ***The Break-Up of Sri Lanka: The Sinhalese-Tamil Conflict*** (London: Hurst): Ch.5.
[11] N. Jayawickrama, '*Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective*' in A. Welikala (Ed.) (2012) ***The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*** (Colombo: Centre for Policy Alternatives): Ch.1.

Federal Party. Several Federal Party leaders appealed to the Minister to withdraw the proposal, but given that the United Front government possessed a two-thirds majority in Parliament due to the distortions created by the simple plurality electoral system that existed at the time, Minister de Silva and his colleagues saw no reason to compromise. It should be noted also that the process leading to the adoption of the First Republican Constitution began the trend of governments in power drafting constitutions to enshrine and facilitate their political and ideological agendas and also to suit the convenience of the executive. However, for purposes of this chapter, it is clear that the introduction of the unitary label in the constitution was a particular affront to the moderate Tamil political leadership and the Tamil people who had overwhelmingly endorsed them at the recent elections. This historical context cannot be ignored.[12]

### 2) Conceptual Reasons

The term 'unitary' is traditionally defined as the habitual exercise of political power by one, central authority. Its Latin root *unus* – one – is significant. Power may be decentralised or devolved within a unitary constitution, but this is granted or given by the central authority and therefore can be taken back by that authority unilaterally (Note the root *unus*, again.) The power granted to the decentralised authority is therefore relatively insecure. As C.F. Strong has observed, "It does not mean the absence of subsidiary law making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority."[13]

Given the traditional definition of the term unitary outlined above, the question that arises is whether power that is secure, guaranteed, and effective can be devolved within the framework of a unitary state. The practice or implementation of the

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[12] See Edrisinha et al (2008) for more information on the history of the conflict in Ceylon/Sri Lanka and attempts to resolve the conflict through political and constitutional means.

[13] C.F. Strong (1963) ***A History of Modern Political Constitutions*** (New York: Puttnam's).

Thirteenth Amendment or maximum devolution within a unitary state supports the argument that devolution is vulnerable in such a context.[14]

### 3) Jurisprudential Reasons

The recent jurisprudence of the Si Lankan Supreme Court has provided a clear answer to the question posed above. The most unequivocal of its decisions is the case of *Solaimuthu Rasu v Superintendent, Stafford Estate, Ragala* (2013)[15] where all three judges of the court, Mohan Peiris CJ, Sripavan J, and Eva Wanasundera J, wrote separate concurring opinions, a rather uncommon practice in the Sri Lankan Supreme Court.[16] The case dealt with the interpretation of the provisions of the Thirteenth Amendment dealing with land, one of the contentious issues when the Thirteenth Amendment was negotiated and drafted with Indian facilitation. The Supreme Court had to decide whether the Court of Appeal had erred in holding that the Provincial High Court had jurisdiction to hear cases dealing with the dispossession or alienation of state lands. The Court held that the alienation of state land remained a central government responsibility. Peiris CJ used controversial and unconvincing approaches to interpretation to justify his position that the intention of the framers of the Thirteenth Amendment was to retain central control over state land. In *In re the Thirteenth Amendment* (1987) Wanasundera J cited a

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[14] Cf. N. Walker, '*Beyond the Unitary Conception of the United Kingdom Constitution*' in Welikala (2012): Ch.11; A. Welikala, '*The Sri Lankan Conception of the Unitary State: Theory, Practice and History*' in A. Amarasingham & D. Bass (Eds.) (2016) ***Sri Lanka: The Struggle for Peace in the Aftermath of War*** (London: Hurst).

[15] S.C. Appeal 21/2013, Supreme Court Minutes 26th September 2013. Judgment of Peiris CJ available at: https://www.colombotelegraph.com/wp-content/uploads/2013/09/Supreme-Court-29-09.pdf. Judgment of Sripavan J available at: http://www.supremecourt.lk/images/documents/sc_appeal_21_13sc.pdf. Judgment of Wanasundera J available at: http://www.supremecourt.lk/images/documents/sc_appeal_21_13w.pdf (all last accessed 21st March 2016).

[16] The difference in approach and emphasis among the three opinions is striking and revealing.

famous quotation from Lord Denning warning against a literal approach to interpretation and justifying filling in the gaps in the text to make sense of the enactment rather than "opening it up to destructive analysis," and then made the startling observation that "as such" the Thirteenth Amendment should be interpreted to "never pave way (sic) to destruction of any sort." Both judges adopted questionable approaches to interpretation and the citation of authority to support their view that under the Thirteenth Amendment, institutions of the centre retained overriding control over the subject of land.

Both judges, however, buttressed these arguments by referring to the term 'unitary' and its traditional definition, which had been cited by Sharvananda CJ in the majority decision in the Thirteenth Amendment judgment. Peiris CJ referred in this context to the power structure and power relationships under the Thirteenth Amendment. He stated that the term unitary implied the dominance of the centre and the subsidiary nature of the provincial councils. Wanasundera J took the view that there could be no conflict between the centre and the provinces under a unitary constitution, as the centre would always prevail in such situations.

In many of the constitutional cases dealing with the Thirteenth Amendment in the first ten years after its adoption, the Supreme Court displayed some sensitivity to the concept of devolution of power and the text of the amendment to ensure that the Provincial Councils and their representatives possessed a reasonable degree of power and autonomy. There was hardly any reference to the term 'unitary' and references instead to the linkages between provincial institutions and democracy, accountability, and participatory democracy. In the past ten years, however, the Supreme Court has displayed a lack of empathy for such values and the attitude of the court in the *Solaimuthu Rasu Case* is a culmination of a process of increasing support for the political branches' attempts to undermine the devolution of power to the provinces. While this may be part of a larger trend of the judiciary under pliant Chief Justices being willingly co-opted by the executive, the jurisprudence of the

Court which follows the traditional conceptual understanding of the term 'unitary' supports the argument that there can be no effective devolution of power within the framework of a unitary state as traditionally defined.

This will therefore be the most difficult challenge faced by the Constitutional Assembly. The term unitary should never have been introduced into the constitution and must be removed in order to ensure 'Thirteenth Amendment Plus' or meaningful devolution of power. This however will only be possible if the opposition adopts a responsible approach to the constitution-making project, and allows a rational debate on the pros and cons of retaining the unitary label in the new constitution. There are problems relating to myths and misconceptions about the term, accentuated by issues of language and translation. Since the Sinhala terms for 'united' (*eksath*) and 'unitary' (*ekeeya*) are often used interchangeably, many Sinhalese believe that for a country to be united it has to be '*ekeeya*.' If these issues can be discussed reasonably openly and an informed debate takes place on the limitations in the Thirteenth Amendment (led ideally by the Chief Ministers of all provinces and from all political backgrounds who have experienced the frustrations of trying to implement the amendment), and on the meaning of the term unitary and why deleting it from the constitution does not necessarily have any implications for the unity and territorial integrity of the country and indeed could promote unity by facilitating a durable political and constitutional settlement, then there is a chance that the Third Republican constitution will lay the foundation for a new social contract that promotes equality, dignity, and responsive governance.

### *How should a new Constitution be adopted? Challenges of Process*

The resolution requiring Parliament to sit as a Constitutional Assembly to deliberate on the new constitution was finally adopted unanimously after a long delay.[17] The delay was unnecessary and was caused by the opposition trying to insert into a resolution that was essentially about process, matters relating to substance. Another strange feature of the debate on the resolution was that several opposition leaders who took the lead in criticising the 1978 Constitution at the time of its adoption and subsequently, became the main opponents of the process to adopt a 'new' constitution.[18]

From the outset, the government made it absolutely clear that it intended to follow the procedure for constitutional reform spelled out in the existing constitution (Articles 82 and 83). Parliament would have to pass the new constitution with a two-thirds majority vote and thereafter the constitution would have to be approved by the people at a national referendum.

Given the rationale for a constitution outlined above, it is far from ideal for Parliament or a Select Committee of Parliament to draft and adopt a constitution. Parliament is a creature of the constitution and subordinate to the constitution, which is expected to reflect the will of the sovereign people and protect and empower the people from the politicians. A committee of Parliament designing a constitution without active and effective public engagement will involve a serious conflict of interest. In some countries which have been mindful of the need for a broader and more inclusive approach to constitution-making

[17] Resolution of Parliament, 9th March 2015, available at: http://www.parliament.lk/en/news-en/view/1160 (last accessed 14th March 2015)

[18] Dinesh Gunewardena and Vasudeva Nanayakkara are two MPs who were leading and persuasive critics of the Second Republican Constitution of 1978 who were part of the opposition group that were reluctant to support a resolution calling for the adoption of a new constitution.

such as South Africa and Nepal, special measures, such as the election of an inclusive Constituent Assembly to draft and adopt a new constitution, were adopted to ensure that the *sui generis* character of constitution-making was recognised. A Constituent Assembly has constitutive powers to draft and adopt a new constitution. Such an option was not available in Sri Lanka as there was no mandate sought from the people to support such an extra-constitutional process. Furthermore, notwithstanding the theoretical anomalies with respect to parliamentarians drafting constitutions, practical considerations and political realities require that Parliament, which consists of the elected representatives of the people, provide leadership in the constitution-making process. One can only hope that they recognise the special responsibilities involved in constitution-making as opposed to their normal legislative functions.

The draft resolution therefore outlined a process that sought to provide for effective public engagement in the constitution-making process, ensure that Members of Parliament recognised their special responsibility when participating in the constitution-making process, while also following the amendment and repeal procedures in the existing constitution. It provided that Parliament should sit as a Constitutional Assembly (not a Constituent Assembly) to focus exclusively on deliberation on the substance of a new constitution in a manner that facilitates maximum public scrutiny and engagement. The fact that the deliberations of the Constitutional Assembly will be recorded in Hansard and therefore made available to the public will help to overcome a basic flaw in the 1995-2000 constitution-making process where the deliberations of the Select Committee of Parliament were shielded from public scrutiny.[19]

The Constitutional Assembly will then present the draft constitution to Parliament so that Parliament can adopt the

[19] Draft Resolution, Prime Minister' s Office, available at: http://www.pmoffice.gov.lk/download/Constitutional%20Reform%20-%20Resolution%20E%2020151117.pdf (last accessed 21st March 2016).

constitution with a two-thirds majority vote. If this is done then the draft constitution will be presented to the people for their approval in a national referendum. In the circumstances, the process proposed in the resolution was fair.

The argument made by some opposition leaders and commentators that the basic features doctrine developed by the Indian Supreme Court to protect core constitutional values and principles is applicable in Sri Lanka is ludicrous. The Indian constitution was adopted after an inclusive and democratic process of constitution-making by a Constituent Assembly soon after independence. The Indian constitution was not a partisan document designed to serve the party in power at the time. It stands above party politics, is supreme, and remains broadly a consensus document. It was in such a context that the Indian Supreme Court developed the basic structure doctrine to protect the people and their constitution from their politicians. Applying the basic structure doctrine to a partisan, fundamentally flawed constitution that reflected the interests of J.R. Jayewardene's United National Party, would be utterly inappropriate and demonstrates a lack of appreciation of the fundamental rationale for the doctrine on the part of its Sri Lankan proponents.

It is also vital that the lessons of the Nineteenth Amendment be learned. The manner in which the amendment was finally adopted was unacceptable. The final version that was passed was very different from what was initially proposed to the public. Various backroom deals were negotiated by politicians in Parliament without public engagement and participation. It was not surprising therefore that the provisions relating to the composition, powers, and functions of the Constitutional Council, or the provisions relating to a 'national government,' reflected the interests of the politicians rather than the people. One can only hope that the procedure adopted by the resolution will prevent such a process from being repeated and ensure a culture of justification and accountability on the part of the members of the Constitutional Assembly and Parliament.

### *Conclusion*

A new constitution that is compatible with first principles of constitutionalism and which includes the values, principles, and substantive features outlined above can only be adopted if the President, the Prime Minister, and the Leader of the Opposition work together, and also harness the support of other sections of the opposition, minority parties, and the Janatha Vimukthi Peramuna (JVP). These parties and forces will inevitably have differences and rivalries in the next few months. They must resolve, however, to transcend such divisions with respect to the vital responsibility of providing leadership to the constitution-making process. This must coincide with a process of public education and engagement to ensure that the new constitution is not just a political deal of convenience, but rather, a genuine attempt to learn the lessons of the past, consolidate constitutionalism and democracy, and forge a new social contact that has a broad consensus among the various political, ethnic, and religious groups in the country. The process of constitutional change that commenced in 2015 and will continue in 2016 must not suffer the same fate as the process of 1995-2000 when the then opposition UNP behaved irresponsibly and effectively sabotaged the reform process. Our politicians must stop 'monkeying' with the Constitution. Sri Lanka deserves a new constitution that is truly a non-partisan, consensus, supreme law that protects and empowers its people: a constitution drafted by 'reason and choice' rather than 'accident and force.'[20]

[20] A. Hamilton, Federalist No.1 in C. Rossiter & C.R. Kesler (Eds.) (1999) ***The Federalist Papers*** (New York: Mentor).

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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.