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Centralising Authority: Comparing Executive Power in India and Sri Lanka

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Introduction

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

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

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

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

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

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

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

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

Designing the Indian Executive

A. The Constituent Assembly Debates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Constitution and Early Presidential Practices

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

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

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

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

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

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

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

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

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

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

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

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

The Emergency, Ordinances and Executive Power in India Today

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

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

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

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

A. Indira Gandhi and the Amendments Power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Emergency (1975-77)

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

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

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

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

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

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

C. The Post-Emergency Indian Executive

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

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

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

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

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

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

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

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

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

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

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

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

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

The Sri Lankan Executive in Comparative Context

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Delimitation Commission.[73]

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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