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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Two consequences arise from this:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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