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Bonapartism and the Anglo-American Constitutional Tradition in Sri Lanka: Reassessing the 1978 Constitution

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> I think you must trim your sails to your own country's needs and resources and forget about philosophies and theories.
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> J.R. Jayewardene interviewed by *The New Internationalist*, November 1981

The elections of 1977 saw a nation-wide disillusionment with the 'idealism gone wrong' policies of the United Front (UF) that ruled Sri Lanka from 1970-1977. The comprehensive defeat of the government parties of that era gave the centrist-right United National Party (UNP) a three-fourths majority in Parliament.[1] Under the leadership of an iron-willed strategist such as J.R. Jayewardene, the UNP was fundamentally concerned with the realities of power and the need for rapid economic development – preferably Singapore style. Experimentation was to be based on tried formulas and *ad hoc* responses to the crises of underdevelopment. There was a deliberate antagonism to the romantic visionary aspects of the old government that had, towards the later years, led to excuses for the abuse of power.

The realism that guided Jayewardene and his advisors was animated by two concerns: the need for political stability and the push for rapid modernisation. They were admires of the 'hard-headed' policies followed by Lee Kwan Yew in Singapore and General Park in South Korea – policies which had led to 10 per cent growth rates and rapid industrialisation. As Jayewardene had been an active participant in the parliamentary process since the early 1930s, he initially wished to be faithful to the concepts and practices of representative democracy, though midway through his regime he seemed to lose all those concerns. The use of a referendum to bypass general elections was an example of this excess. As a member of the privileged elite and a supporter of rapid economic growth, he was also preoccupied with the need for stability in a developing society.[2] He saw the basic mission of the 1978 Constitution as an attempt to move beyond the apparent contradiction between popular participation and stability for national development.

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[1] The UNP received 83.3 per cent of the parliamentary seats.
[2] J.R. Jayewardene, Inauguration Speech, Proceedings of Seminar on Parliamentary Processes, July 1980 (Colombo: Marga).

Despite the fact that the 1978 Constitution was not born of revolutionary exuberance, it was to radically alter the structure of government. The concern with stability was to find expression in the introduction of a presidential system of government[3] and an electoral scheme of proportional representation.[4] Jayewardene had always stated that the proper balance between democratic participation and stability for the implementation of development projects would be best realised in a presidential system of government. It was his belief that once the voters had made their choice, a strong executive that would have maximum leeway to implement its programme for development should characterise the period between elections. The president would ensure continuity in executive implementation, despite the fate of parliamentary politics and coalitions.[5] In addition, presidential elections would be based on a national electorate so that the head of state would have to appeal to all constituencies throughout the island to be elected.

Many Sri Lankan political scientists initially lauded this radical departure from the Westminster model of government. Professor A.J. Wilson in his analysis of what he termed the 'Gaullist' constitution argues that this system is the last obstacle to dictatorship in a developing society. Though it contained the 'harbinger' of authoritarianism, he claimed that it may be the only recourse to developing countries that wish to retain a semblance of democracy while uniting for growth and development.[6] The fundamental 'realist' belief that developing societies require stability and a measure of benevolent authoritarianism would naturally sanction a greater weightage of power to be granted to the political executive and a minimisation of the structures of accountability. Even in 2014 this argument was being forwarded with an insistence that an executive presidency provides for stability, continuity, and a greater ability to respond to threats to national security.

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[3] The 1978 Constitution: Articles 30-41.
[4] The 1978 Constitution: Article 99.
[5] Jayewardene (1980).
[6] A.J. Wilson (1980) ***The Gaullist System in Asia: The Constitution of Sri Lanka (1978)*** (London: Macmillan): pp.xvi, xvii, 1-9, 36-41.

Time has proven Wilson to be terribly wrong. Historical experience has shown us that in developing societies, the presidential system is not so much the last stance of democracy but the first step toward dictatorship.[7] It was Wilson's belief that the first executive president Jayewardene was a committed parliamentarian and a strong democrat.[8] He believed that Jayewardene would mould the office to embody the highest ideals, and that future presidents would be bound by the practices that he would perpetuate.[9] In fact the opposite happened. Jayewardene set the example by using the presidency to maximise his political power and the political power of the party. In a cultural context that still venerates kings, the president soon believed he could behave like a monarch with all the trappings and symbols of executive power. This led to the arbitrary and irresponsible use of state power, including for personal gain. President Rajapaksa took it to a new level with songs and programmes on national television referring to him as King Mahinda.

Custom and convention in Sri Lanka proved to be fragile defences against arbitrary acts by presidents and their coteries.[10] The concentration of power in a highly exalted office, especially in a developing society, has had disturbing consequences. The balance between stability and democratic participation that Jayewardene wanted to achieve ended as a sham. Instead of stable executive power, over time we have seen the erosion of the rule of law and governance by the whims of one man/woman/family and their followers. Though a parliamentary executive with a two-thirds majority in parliament may be tyrannical, the inherent accountability of a parliamentary executive to the collective institution of parliament as well as to backbenchers of the party is a better safeguard against too much concentration of power. In fact the recent crossover by Maithripala Sirisena in December 2014 points to the check that a parliamentary system has that an executive presidency does not. There is also an intuitive political belief that concentration of power in an institution consisting of

[7] Pakistan for e.g. chose the presidential system. After the death of Jinnah the system headed toward authoritarianism.
[8] Wilson (1980): p.50.
[9] Ibid.
[10] See chapter by Harshan Kumarasingham in this book.

many members is still more conducive to democracy than the concentration of power in the hands of a single individual. History has proven that the hopes expressed by such theorists as A.J. Wilson have been completely trumped by the fears of some of the more vocal critics of the presidential system.[11] Many, including this author, believed that as the presidential election is based on a national electorate, we would have an executive that represents all the people of the country. However, that too has not been the case. President Rajapaksa did the exact opposite – completely ignored the minorities and solidified his support among the majority Sinhala population. Given the complete abuse of this system and some of its grotesque manifestations, by 2013, an increasing number of people were convinced that the presidential system should be abolished. By the end of 2014, abolishing the presidency or greatly trimming its powers had become the main platform of a common opposition.

The second aspect of the 'stability' philosophy put forward by the 1978 Constitution is the system of proportional representation. While the rest of the democratic world appeared to be searching for dynamic devices that would help them escape the stalemate of centrist coalitions, the 1978 Sri Lankan Constitution was deliberately concerned with placing a brake on an electoral system that had resulted in a 'pendulum-swing' of governments and policies. It was felt that such extremities of choice were not conducive to rational long-term polices for economic development.

In introducing proportional representation, the drafters were under the belief that the instability resulting from pendulum swings was particularly disturbing because it was not representative of political opinion. The Report of the Select committee which drafted the 1978 Constitution points to the fact that in the 1970 general election, the Sri Lankan Freedom Party (SLFP) was able to secure 60.3 per cent of the total number of seats in Parliament with 36.9 of the total popular vote. The UNP

[11] See for e.g., N.M. Perera, '*Second Amendment to the Constitution*', ***Socialist Nation***, 21st October 1977; and also see C.R. de Silva, '*The Constitution of the Second Republic of Sri Lanka (1978) and its Significance*' (1979) ***Journal of Commonwealth and Comparative Politics*** 17(2): pp.192-209. See also the chapter by Jayampathy Wickramaratne in this book.

with 37.9 per cent of the total vote was only able to secure 11.3 per cent of the seats in Parliament. In 1977, the UNP with 50.9 per cent of the total popular vote received 83.3 per cent of the seats in Parliament, while the SLFP with 29.7 per cent of the total popular vote secured only 4.8 per cent of the total seats.[12] The electoral demarcations coupled with a system of first-past-the-post electoral votes had resulted in this large discrepancy.

Proportional representation would ensure that at least on the district level political parties would receive seats in parliament in proportion to the number of votes they collect at any given election. Judging from the past elections and past statistics, the drafters concluded that under this scheme a party would not get the two-third majority in Parliament needed for arbitrary policy-making. With a stroke of the pen, the dynamics that had characterised Sri Lankan political life for over a decade had been rendered insignificant. This radical alteration of the system of representation taken together with an executive president ensured immediate transformation of the quality of decision-making and the style of democratic participation.

With time the proportional representation system began to show its flaws. It broke the bond between the MP and his electorate. In the past the MP knew practically every person in his electorate and cultivated its growth. Now they must campaign on a district basis. An element of intra-party competition was later brought in through an amendment that allowed for preferences to be given among those contending for one party. This complicated the election process and ended up with internecine warfare, which was often worse than inter-party violence. Voters also became quite confused resulting in a large number of spoilt votes.

Jayewardene's main reason to introduce proportional representation was to stop a two-thirds majority to amend the constitution easily or to adopt drastic laws. He wanted his constitution to become a permanent one. For most of the thirty years after the adoption of his constitution, this was true. Only with the Rajapaksa presidency did a party get enough votes to get a two-thirds majority, and as the drafters feared, the first thing he

[12] See Parliament of Sri Lanka, Report of the Select Committee on the Revision of the Constitution, June 1978 (Colombo): p.90.

did was to dramatically alter the nature of the constitution. It is therefore clear that whether under a parliamentary system of government or a presidential system, the easy ability to get a two-thirds majority by a single party is a dangerous thing. The Rajapaksas for example used the two-thirds majority to introduce the Eighteenth Amendment that did away with term limits for the president as well as neutralised the independence of important public service commissions and the higher judiciary. For these reasons, an ideal electoral system for Sri Lanka would be a hybrid one that combines proportional representation with the first-past-the-post system; one that is more in touch with the people than a proportional representation system, but which does not result in easy two-thirds majorities and pendulum swings.

The 1978 Constitution was dramatically different from both the Soulbury Constitution and the 1972 Constitution for the following reasons. Firstly, the focus of 'decisional mobility' under the 1978 Constitution has been removed from a parliamentary executive enjoying a large majority in parliament to an executive president with a base of support independent of the legislature. The president is head of government, head of cabinet,[13] commander-in-chief, and is endowed with emergency powers under the Public Security Ordinance.[14] In addition, he has inherent powers that make him appear even more formidable. If through proportional representation the legislature can no longer command vast majorities, losing its definitive character by reflecting pluralistic elements in society, then it will be the president as head of the cabinet of ministers who will determine the priorities of development. He would emerge as the central figure of decision-making often facing a divided and perhaps impotent legislature. This is why in the end, the reality of political power under the 1978 Constitution eventually centred on the personality of one individual.

It has been argued theoretically that the introduction of an executive president does not enhance 'decisional mobility' but actually puts a brake on quick decisions as it brings with it an inherent system of checks and balances. There is a potential of

[13] The 1978 Constitution: Article 33.
[14] Ibid: Article 155.

deadlock and stalemate between the president and parliament, and because of the proportional representation system, deadlock and stalemate within parliament. However, the 1978 Constitution gives considerable power to the president to resolve a stalemate in his favour – he has the power of dissolution within a given period[15] and the right to defeat the Appropriation Bill.[16] He also has a right to assign ministries to himself. Yet, a stalemate could still eventuate as law-making is still vested in Parliament[17] without a presidential power to veto. In addition, parliament remains in control of appropriations and without appropriation a government cannot govern. Finally, the cabinet of ministers who guide the president must be drawn from the members of parliament who command the majority.[18]

A.J. Wilson, among the others, asserted that this possibility of stalemate is a positive factor in a society that is so divided and politicised. He saw the strategy as one that would force parties to engage in consensus politics.[19] Others have argued that the bitterness and rivalry surrounding party politics in Sri Lanka will lead to deadlock not consensus, and the confrontation between parliament and president may result in a president arrogating greater powers to himself, thus tipping the balance of government towards a greater measure of partisan authoritarianism. Though the 1978 Constitution may appear to provide a system of checks and balances that may lead to stalemate or deadlock, the strength of the executive presidency under the constitution has in fact counteracted these tendencies.

Any constitutional debate must of course be tested by the realities of power and its actual exercise within a given set of conditions. Theoretically speaking, the 1978 Constitution is superior in style, structure, and technique to the constitutions that preceded it. However, its operation in the reality of Sri Lankan politics must be analysed from a different frame of reference. It is in this light that the presidential elections and the nation-wide referendum of 1982 were of concern to those interested in constitutional law.

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[15] Ibid: Article 70, see also Article 150.
[16] Ibid: Article 150(3).
[17] Ibid: Articles 75 and 76.
[18] Ibid: Article 43.
[19] Wilson (1980): p.47.

The exercise of the franchise in 1982 provides us with an insight into the precedents and customs that eventually clothed the skeletal outlines of the 1978 Constitution.

The 1982 presidential campaign was in many ways a 'hybrid' between parliamentary politics and the presidential style. Most of the opposition candidates concentrated on party programmes and criticism of present government policy. Theirs was the style of speech that had collected votes on platforms where the 'political party' and a coalition of political parties still remained the most important aspect of political life. President Jayewardene however, introduced the new style of the 'personalised president' asking the electorate to choose the 'best leader' irrespective of political ideology. The personal qualities of the leader, his schooling, his experience, etc., were accentuated over abstract principles and party programmes. The electorate was called upon to judge the 'better man' and not the better policies.

Personality undoubtedly has played an important role in Sri Lankan politics since independence but it has done so despite the constitutional system. The 1978 Constitution, on the other hand, has made personality the most important aspect of the franchise since the election of the executive president will greatly depend of the type of image he wishes to project to the public. It could be argued, especially by those who do not accept the role of ideology in history, that this is an improvement in the style of politics as it calls for integrity and leadership ability. But experience in the U.S. has proven that the manipulation of the media and the development of 'cult' figures may obscure the important substantive political issues that are before the people

Constitutionally speaking this emphasis on personality has had an effect on the entire political culture as well as the role and importance of parliament. A president's independent base of support with its emphasis on primordial feelings of personal loyalty has always been more powerful than the legislature's base of support. The defused nature of parliamentary politics with its parochial enclaves and multiple personalities were not be able to withstand any confrontation with a strong executive president. This was in fact what happened with regard to the referendum of 1982 to extend the life of the present parliament without holding

general elections. Loyalty to Jayewardene proved to be far more important than the abstract commitment to the integrity of a constitutional body. Unlike the U.S. President, the Sri Lankan executive armed with the referendum can bypass the legislature by constant appeal to his loyal base of personal support. Though the technical structure of the constitution is not concerned with this end-result, actual experience in Sri Lanka has already proven that the entrenchment of an executive president will greatly accentuate the politics of personality and not the politics of principle. The points of concern are that while principles may be debated, evaluated, and disproved, the judgement of personality is an enterprise deeply rooted in the myths and symbols of a given civilization. As research in psychoanalysis has repeatedly taught us, these symbols are easily exploited by manipulation of words and the media.

Despite the increase of power in a presidential executive, the 1978 Constitution did envision greater curbs on certain aspects of government action that, over time, have been superseded by arbitrary action or a need to fight an insurgency. For example, the Public Security Ordinance that was part of the 1972 Constitution conferred complete power on the executive to rule by decree in a state of emergency. The 1978 Constitution added a new safeguard requiring that such broad powers be subject to legislative approval every month. As amended, the new Public Security Ordinance is more benign than its predecessor. Though judicial review plays no part, the legislature is given the unique power of checking the president. Of course, if the president's party commands a two-third majority in parliament, the requirement of legislative approval may not be an adequate safeguard.[20] At the time it was drafted the 1978 Constitution cast in a 'realist' frame of reference, and did show awareness of the need to remedy history where the Public Security Ordinance had often been the excuse for the abuse of power by successive governments. However, the restrictions placed on the police and armed forces by such measures was immediately counteracted by the government adopting the Prevention of Terrorism Act. Unlike an emergency, the PTA is permanently in the statute book and denies citizens some of the basic fundamental rights regarding

[20] The situation in Sri Lanka after 1977 elections.

arrest, detention, and trial generally recognised by the common law and international human rights. A generation of Sri Lankans both Sinhala (the JVP insurrection) and Tamil (Northern insurgency) have felt the weight of this Act.

Under the 1978 Constitution, the liberal concept of checks and balances also reappeared in the form of a strengthened judiciary. The Constitutional Court was discarded and the Supreme Court is left with exclusive jurisdiction over constitutional matters.[21] An independent Judicial Service Commission was expected to depoliticise the judiciary and grant it a measure of independence and autonomy.[22] Finally, for the first time in Sri Lanka the constitution ensured judicial review of executive action.[23] Yet, the constitution did not give the judiciary the supreme place in the constitutional structure it occupied prior to 1972. The judiciary is still at the mercy of the legislature.[24] It is parliament that exercises judicial power through the courts, denying the latter full independence. This element would be understood in full force when Chief Justice Shirani Bandaranayake was removed from office in 2013. In addition there are strange anomalies. Bills that, in the view of the cabinet of ministers, are 'urgent in the national interest' must be scrutinised by the judiciary within 24 hours,[25] not giving the judiciary time to hear different points of view to make a sound decision. Existing laws that are inconsistent with the constitution are allowed to stand.[26] This is meant to cover the system of personal, family, and religious law that existed before, and which feminists have often challenged, asking for a Uniform Civil Code in line with the Convention on the Elimination of Discrimination Against Women. Finally, there is no judicial review of *enacted* legislation and the constitution envisions only proscriptive annulment.[27] This means that the Court is not given the opportunity to evaluate a law in terms of what happens in practice when it is implemented. This positivist approach to law

[21] The 1978 Constitution: Article 120 and 125.
[22] Ibid: Article 112.
[23] Ibid: Article 126
[24] See H.W. Tambiah, '*The Independence of the Judiciary*' (1979) ***Journal of Historical and Social Studies*** 7(2): p. 68.
[25] The 1978 Constitution: Article 122.
[26] Ibid: Article 84.
[27] Ibid: Article 124.

in the European tradition has always been anathema to realist scholars who like Justice Oliver Wendell Holmes believe that we must look at the law as it is actually implemented and practised – from the point of view of the Bad Man and what he can get away with.

The 1978 Constitution like the 1972 Constitution displays in its text an unusual fear of a fully independent judiciary as a co-equal arm of government. Professor A.J. Wilson who shared the same suspicion writes, "The line between independence and non-responsibility or not being answerable ... is a thin one. It is a relevant question in politics as to whether the judiciary should be allowed to be so compartmentalised as to become a third chamber of government."[28]

This fear of the judiciary that was prevalent among policy-makers and scholars in developing societies in the 1960s and 1970s was based on past experience with regard to the right to property. There was a widespread belief that the judiciary in those times would protect vested interests and obstruct national development. Even with the right to property removed from the text of the constitution, the fear of an obstructionist Supreme Court lingered on. In fact, the fear of such a judiciary is far greater than the fear of a strong executive or an errant legislature. Strangely, the public interest movements throughout the world in the 1970s and 1980s where marginalised groups and minorities were given special protection by apex courts transformed some of the earlier negative views of the judiciary – but the fear still remains. This is in sharp contrast to Indian nationalists such as Nehru and Ambedkar – the drafters of the Indian Constitution – who made a powerful judiciary an essential element of the Indian Constitution as far back as 1948. The fact that India was a federal system may have also warranted such a role for the judiciary.

The refusal of both conservative and socialist governments to give the judiciary a prominent role in the constitution of Sri Lanka also hindered the development of a positive, activist tradition protective of fundamental rights and freedoms, which requires a self-confident, strong judiciary. The bill of rights under the 1978 Constitution, based on the International Covenant on Civil and

[28] Wilson (1980): p.125.

Political Rights (ICCPR) is far stronger than what was available under the previous constitution. Freedom from torture and freedom of belief have been made absolute.[29] The rights and restrictions are clearly enumerated and though there is a general restriction of fundamental rights based on the 'general welfare' of a democratic society, it is a recognised restriction under the ICCPR and the European Convention of Human Rights.[30]

Yet, despite the fanfare over these improvements, the bill of rights is limited in scope and application. For example there is no right to life and dignity, a provision the Indian courts have used to protect vulnerable groups in their society. The bill of rights provisions only protect the rights of criminal defendants as provided 'by law' and not by a higher 'due process' principle.[31] This has allowed for the enactment of such legislation as the Prevention of Terrorism Act[32] with draconian provisions that are akin to those provided in the old South African anti-terrorist legislation.[33] Even the Code of Criminal Procedure contains provisions that would be abhorrent to liberal lawyers trained in the Anglo-American legal tradition. The Code denies bail for a vast array of criminal arrests including arrests for the crime of 'belonging to a wandering gang of thieves.'[34] Freedom of speech is also restricted by enumerated terms in the constitution. Speech may be curtailed for such justifications as racial or religious harmony, parliamentary privilege, contempt of court, defamation, incitement, national security, public order and public health.[35] Parliament is now given the right to try and convict individuals who may have by their speech offended its integrity.[36] This process does not carry with it the safeguards of judicial rules of evidence.

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[29] The 1978 Constitution: Article 10.
[30] See for a description, C. Morrison (1978) ***The Developing European Law of Human Rights*** (Leyden: A.W. Sijthoff).
[31] The 1978 Constitution: Article 13.
[32] Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.
[33] See V. Leary (1981) ***Report on Ethnic Conflict in Sri Lanka*** (Geneva: International Commission of Jurists).
[34] See Criminal Procedure Act No. 15 of 1978.
[35] The 1978 Constitution: Article 1(1)(a)
[36] For a good account see S. Nadesan, '*Parliamentary Privilege: Striking the Right Balance*, ***The Sun***, 2nd February 1978: p.5.

The need to clearly enumerate restrictions as well as rights again displays the fear the drafters have of a potentially misguided judiciary. While in the United States and the United Kingdom, the evolution of restriction is reliant on case law, the drafters in both Sri Lanka and India were more resistant to case law processes. Again, there was a fear of placing too much decision-making in the hands of unelected, unaccountable judges.

Though the framework of the bill of rights under the 1978 Constitution did not satisfy civil rights advocates, in recent years there has emerged a 'rights consciousness' on the part of individuals supported by important civil society movements and groups. In the early days the Supreme Court did make some important decisions in the area of equal protection, and the right to vote.[37] In other areas such as the imposition of civic disabilities, freedom from torture, and the right to strike, they took a big step backward.[38] In the years that Justice A.R.B Amerasinghe and Justice Mark Fernando were on the Supreme Court, there were some very activist, rights supporting judgments, including in relation to environmental rights. These judgments in style and reasoning were on par with the judgments of any of the great common law judges. Nevertheless civil rights advocates have argued that the Court has not generally held with issues concerning human rights and under Chief Justices Sarath Silva and Mohan Peiris and the Rakapaksa regime, the apex court reached an all time low where the judges themselves blatantly engaged in flagrant, inappropriate behaviour. Rights litigation was made into a mockery though the Sri Lankan Bar and lawyers began to actively protest this state of affairs, becoming a distinct centre of agitation. The fact that judges can be given government appointments after they retire also lessens the possibility of truly independent judgments that hold government accountable. After all, as Ronald Dworkin has often noted, it could be argued that the effectiveness of any 'rights movement' will greatly depend on

[37] See for example: *Perera v. University Grants Commission*, S.C. Application No. 57/80, 4th August 1980. Also see *Thadchanamoorthi v. Attorney General*, S.C. Application 63/80, 14th August 1980. See *Wickremesinghe v. Attorney General*, S.C. Application 12/79, 27th April 1979; see also *Habeas Corpus Application*, No 12/81 judgment delivered, December 1981.

[38] See for e.g., Local Authorities (Imposition of Civic Disabilities) No. 2, Law No. 39 of 1978.

the judicial philosophy of personalities in the judiciary and particularly in the Supreme Court. Strangely it was President Jayewardene, accused of hiring thugs to throw stone at the houses of dissident judges, who said "You may have all the precautions to make a judiciary independent, but unless the men who man the judiciary are men of courage, men of wisdom, the judiciary will never be independent."[39]

Despite the drafters concern with modernisation, the 1978 Constitution was remarkably unconcerned with technological improvements, which would update the institutional processes of government. With the primacy of an executive president, fears that Parliament would become an impotent, merely rhetorical, arm of government have been largely realised. Party divisions in Sri Lanka are so bitter that the concept of 'parliamentary integrity' as a safeguard against executive abuse could not develop because there were no mechanisms for institutional cohesion. The constitution did not, for example, ensure that a sense of collective institutional responsibility is cultivated – a responsibility which requires that each Member of Parliament regardless of his party affiliation endeavours to make parliament an independent watchdog of the political executive. One strategy in which such responsibility may be cultivated would be to change the quality of parliamentary decision-making. Rhetorical one-upmanship may have to give away to a more systematic form of analysing data and receiving information.

The 1978 Constitution like the 1972 Constitution appears relatively unconcerned with the technical evaluations that must precede the enactment of legislation. Though the framework exists for the appointment of Select Committees to inquire into aspects of the bureaucracy and district administration,[40] and to hold the executive accountable, there are no clear directives as to the nature and the role of parliament in this aspect of decision-making. The Jayewardene government instituted a Select Committee on Appointments that could 'advise' the executive on the suitability of appointments to the high levels of the bureaucracy. However, in the early years, in one controversial

[39] Cited in Wilson (1980): p.125.
[40] Authority is drawn from the 1978 Constitution: Article 74(1).

case, the executive ignored the decision of the Select Committee against the flamboyant Chairman of the Free Trade Zone.[41] This sent a signal that the executive would not brook challenges to its judgment from parliamentary committees and would ignore them. In addition this same system was used to remove a sitting Chief Justice on frivolous charges because they were afraid of her independence. In the 1990s and early 2000s, the Select Committee process was used to harass and intimidate NGOs and civil society opposed to the government. Leading members of civil society were brought before committees that seemed to operate as kangaroo courts, the climax being the last sitting of the Select Committee looking into the conduct of the Chief Justice. In this sense, parliament, instead of being a watchdog of the executive, played the role of harassing those who the government felt were its enemies. The government has also instituted a framework of Consultative Committees. The aim of these committees was to the increase efficiency of the public service by establishing committees that could take a continuing interest in the execution of policy and.[42] However, for the most part, they are limited in function.

Except for these forays into a committee system, the nature of legislative scrutiny remained unchanged under the 1978 Constitution. Though Jayewardene envisaged that the select committee system would resemble the Congressional Committees in the United States,[43] such a system of scrutiny has yet to make an appearance in Sri Lanka. The concept of parliamentary hearings, with witnesses and systems for parliamentary data gathering, is still not recognised as being fundamental to the careful evaluation of legislation. Though such a system may take a longer process, if formulated with care, it may improve the quality of legislation. Such a policy would force parliament to base its decisions on empirical evidence and a careful consideration of the knowledge and evidence available in the field of discussion. Since parliament did not rise to the challenge of such an institutional role, it has been reduced to a 'talking shop' by a powerful,

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[41] The Chairman of the Free Trade Zone, Upali Wijeyawardene. See Parliament of Sri Lanka, *Report of the Select Committee on Appointments*, August 1980 (Colombo).
[42] W. Warnapala, '*Public Services and the New Constitution*' (1979) ***Ceylon Journal of Historical Studies*** 7(2): p.43.
[43] Ibid: p.43.

executive president. In addition the quality of the legislation being passed attests to the fact that parliament in many cases has not entered the 21st century where many of the issues being legislated upon have a large technical component.

A.J. Wilson in discussing the flaws of the 1978 Constitution, stated, "the higher civil service must be converted into a techno-structure for the Presidential system to come into its own ... Alternatively, the role of the Presidency might, in the hands of the uninitiated, be changed into something quite different from what it was intended to be."[44] As Wilson saw the constitution as having Gaullist origins, he was certain that its success would depend on the evolution of a French-style bureaucracy. The 1978 Constitution like its predecessor displays a fear of an independent public service as much as it fears an independent judiciary. The Public Service Commission is dependent for its power on cabinet delegation.[45] The need to move away from the 'elitist' civil service of the 1950s had led to the politicisation of the bureaucracy. Commentators have claimed that, "The Constitution of 1978 ... has established total political control over the bureaucracy."[46] Though the drafters of the 1978 Constitution are pledged to a platform of modernisation, neither parliament nor the bureaucracy have been granted the incentives to create processes that will meet the challenges of a modern nation-state.

Two decades into the 1978 Constitution as the overall framework of government made it abundantly clear that the integrity and independence of the judiciary and the public service, including the police and the newly formed Human Rights Commission was absolutely essential for the functioning of a modern democracy. As a result all parties, including smaller parties such as the Janatha Vimukthi Peramuna (JVP), acted on the recommendation of the Youth Commission and united in the 1990s to bring in the Seventeenth Amendment to the Constitution. This amendment set up a 'Constitutional Council' made up of representatives receiving the approval of all parties in Parliament. This Council that would have the trust of everyone would make the appointments to the Public Service Commission, the Human

[44] Wilson (1980): p.150.
[45] The 1978 Constitution: Article 59.
[46] Warnapala (1979): p.50.

Rights Commission, the Police Commission, as well as the higher judiciary. During the few years of existence when this system was allowed to operate it seemed to do quite well. Commentators have pointed out that during the time of an independent police commission there was very little electoral violence. However, the Constitutional Council took important power away from the executive and when President Rajapaksa came into power he scrapped the whole system returning us to the days of a highly politicised bureaucracy, police, and judiciary.

The 1978 Constitution, like its predecessors, accepted the institutions of representative democracy as the only realistic model for participation. However, the actual structures of democratic participation were fundamentally transformed. The introduction of proportional representation was to sever the bond between the Member of Parliament and his constituents. The individual personality was to be replaced by the party programme. As the choice was to be among parties and not individuals, the structure and hierarchy of the party system would become the determining factor in the quality of participation. And yet, the constitution is unconcerned with the elements of the party system. Dr Neelan Tiruchelvam argued that a democratisation process within the political party itself must precede a system of proportional representation. [47] This seemed particularly important in considering the fact that the constitution initially did not allow for Members of Parliament to crossover to other parties. However, judicial interpretation in favour of governments has now made this a common phenomenon. President Jayewardene initially envisioned a system where loyalty to the party was guaranteed unless a member wishes to resign.[48] As a result he was known to have secured undated letters of resignation.

At present political parties appear to have an organisational structure in which decision-making is concentrated in the higher echelons of the leadership. Without the democratisation of the party structure, proportional representation further alienates the voter from the electoral system. Though the introduction of

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[47] N. Tiruchelvam, '*The Making and Unmaking of Constitutions: Some Reflections on the Process*' (1979) ***Ceylon Journal of Historical and Social Studies*** 7: p.24.
[48] The 1978 Constitution: Article 99.

'preferences' in voter lists was an attempt to rebuild this bond, the system of preferences also led to a great deal of internecine conflict within parties that further obscures the issue at hand. The electoral system that Sri Lanka needs in the end is a hybrid system that takes the best of the proportional representation system and the first-past-the-post system. This should be combined with some broad principles with regard to party democracy. Without party democracy, the bond of patron-client may be replaced by the pervasive influence of party chiefs and party bureaucrats whose primary concern would be the instrumental use of political power. However it would be best if the parties are persuaded to adopt these principles on their own without state interference because there are many liberal scholars that argue that freedom of association means that those who want to create a party without internal democracy should be have the freedom to do so and it is ultimately up to the people to decide.

A unique aspect of the 1978 Constitution was the introduction of the referendum. For generations trained in the Westminster model of parliamentary democracy, the referendum is a troubling reminder of unnecessary populism or what political scientists call 'Bonapartism.' Under the 1978 Constitution, certain types of Ccnstitutional amendments with regard to religion, language, and the franchise have to be submitted to the people at a referendum. Otherwise, the president, in his discretion, may submit constitutional amendments or questions of national importance to the electors.[49] To those who have been brought up to believe that 'liberty' implies the protection of parliament, the referendum process carries invidious aspects of revolutionary despotism where the president, using his charisma will unite the people to bypass the legislature.[50] President Jayewardene using the referendum to bypass a general election in 1982 is a reminder of where this populist provision could take us.

Reacting strongly to the centralised policies of socialist administrations as well as the demand from Tamil parties in the North and East who had in 1976 adopted the Vaddukoddai resolution proposing a separate state, the policy-makers behind

[49] The 1978 Constitution: Article 85-86.
[50] Wilson (1980): p.47.

the 1978 Constitution also appeared eager to institute a scheme of decentralised participation. It was initially expected that the constitution would embody such a scheme. However, the concept of a unitary state had become a highly charged political issue. It had become a polemical aspect of the debate between the two ethnic communities. With the Tamils demanding a separate state, any scheme of decentralisation was seen by the Sinhalese mainstream as being a concession. Therefore, the constitution as enacted did not contain any structures for participation at the local levels. By 1980, mounting tension and violence between the two major ethnic groups appeared to require some type of reconciliation. Decentralisation at the constitutional level was politically infeasible for Sinhalese leaders but legislation for decentralised participation that would meet some of the demands of the Tamil minority was a possibility. Such a settlement based on District Development Councils was negotiated and instituted by the end of 1981. Because of the importance attached to it by all parties, the settlement did carry an aura of a constitutional consensus, even though, in actual fact, an Act of Parliament initiated the scheme.

The scheme reproduced the national government at the local level, but maintained strict control by the national executive and parliament. In many ways it does not appear to be a scheme that allowed for much autonomy at the local level. But, if one considers the fact that prior to 1977,[51] decentralisation was a non-negotiable political issue, the scheme does appear to be an initial foray in the direction of direct local level participation. This acceptance allowed for a period of co-operation between the leaders of the two ethnic communities resulting in the creation of the 'High-level Committee' to safeguard against the outbreak of communal violence. But the promises were broken and the elections prompted by the scheme resulted in large-scale destruction and violence including the burning of the Jaffna library. Most of the population of Jaffna continue to believe that the violence was instigated by ministers in the Jayewardene cabinet.

[51] The UF government did introduce a Political Authority but he was purely a representative of the executive, see Warnapala (1979): p. 44-47.

Though this scheme was adopted in 1981, the 1983 riots in Colombo which many again felt were instigated by the government itself and a growing militant Tamil insurgency using acts of terror with the subtle support of India soon led to all out war with devolution and decentralisation at the centre of the debate. In 1989, the provincial council system was added to the 1978 Constitution in terms of the Thirteenth Amendment pursuant to the Indo Lanka Accord and the active participation of India. The system involved the creation of provincial councils in all the provinces and the creation of lists – the reserved list where the central government had primacy of planning and the provincial council list where the provincial government had primacy. Certain powers were administered jointly – this involved land, police and finance. However, the amendment maintained the state's unitary character by allowing the centre to make national policy in all the areas and by providing for extensive provision for intervention by the centre in a situation of emergency.

In the 1990s, as the war continued unabated and Tamil demands became more strident, President Chandrika Kumaratunga working with Dr Neelan Tiruchelvam presented a set of proposals for the political resolution of the ethnic conflict which involved extensive devolution. However due to political competition between the UNP and the SLFP it was not adopted. The Thirteenth Amendment remained in place. And yet, this amendment for many years was not operational in the area for which it was created – the North and the East – because of security reasons. Today, councils in those areas exist but constant complaints about finance and administrative matters prevent them from functioning properly. Today the issues concerning the Thirteenth Amendment are still up in the air. The re-emergence of militant forms of Sinhala Buddhist nationalism after the end of the war in 2009 and the brutish behaviour of provincial councillors have resulted in many powerful voices calling for the repeal of the Thirteenth Amendment. Others, including members of the international community, remind the government that at the conclusion of the war they promised full implementation of the Thirteenth Amendment plus some further powers to be granted to the provinces. The voices of the Tamil diaspora and their local counterparts are asking for a complete re-negotiation

along the lines of a confederacy and the more extreme of the diaspora are now asking for a Scottish-style referendum. All this points to the fact that though there has been a military solution to the ethnic conflict in 2009 there has been no political solution and the 1978 Constitution therefore really remains incomplete.

The 1978 Constitution, like its predecessor, set out guidelines or Directive Principles of State Policy along with Fundamental Duties of Citizens.[52] Neither of the above is justiciable in a court of law, so most constitutional lawyers just turn the page, though some use it as persuasive with regard to certain kinds of argument. Though the constitution states that these are 'democratic socialist' principles,[53] the text leaves out the overt socialist principles found under the 1972 Constitution such as the 'creation of collective forms of property.' To a great extent the directives of state policy resemble the second chapter of the Universal Declaration of Human Rights that is concerned with economic and social issues and the International Covenant on Economic, Social and Cultural Rights. Both these instruments speak to the social welfare of the population.

Despite this pledge to create an effective social welfare system, the reality of government programmes aimed at modernisation have never really fitted the spirit of the chapter of the Directives of State Policy. The acceptance of a democratic socialist ideology is in sharp contrast to the actual projects undertaken by many of the governments since 1977. Only Article 17(2) (d), which pledges the government towards 'rapid development,' appears to capture the tenor of present and past governments' policy and programmes. Despite the realist frame of reference, the drafters of the 1978 Constitution could not move beyond a national ideology committed to socialism and democracy. Their only recourse was to institute concrete development projects that could fulfil their realist aims, despite the ideological implications of constitutional language. This gap between theory and practice has been fertile ground for much of the criticism levied against present government policy.

[52] The 1978 Constitution: Article 24-28.
[53] The 1978 Constitution: Article 27(2).

With his famous remark of 'Let the Robber Barons in'[54] J.R. Jayewardene pledged the country to full-scale development projects including the creation of a Free Trade Zone to draw in foreign investment. In some ways this was the first such foray in the South Asian region and it would become the norm throughout Asia including China. Strangely those who believe in neo-liberal economic policies would argue that Sri Lanka was the pioneer in this regard in South Asia and that India and others followed suit only much later. In such a context the Directive Principles of State Policy that still remain in the constitution seem like an anachronisms pointing to the ideology of a different era.

The drafters of the 1978 Constitution were not greatly concerned with the process that should be set up that would lead to the drafting of a socially inclusive constitution. There was no South African-style national information gathering process built on consensus and political bargaining where every citizen felt they had ownership. Unlike the 1972 Constitution, there was not even a Constituent Assembly that helped draft the 1978 Constitution. Instead there was a Select Committee of Parliament that collectively considered the text. In the end, all the opposition parties had declared their dissatisfaction with the final structure of the constitution. The new constitution was therefore adopted with only the approval of the government majority in parliament. In that sense the 1978 Constitution was not really the 'social contract' of the society where all segments had a sense of ownership. Dr Neelan Tiruchelvam argued that the 1978 Constitution like the 1972 Constitution is 'instrumental' in nature, serving the government, and is not a product of a national consensus.[55]

The 1978 Constitution, born of disillusionment with socialist dreams and pushed forward by an urgency to get things done, is in many ways unique in its combination of a variety of systems. Yet, one cannot quarrel with Professor Wilson's assertion that with regard to the role of the executive, the Fifth French Republic is a major source of inspiration. Like the Fifth French Republic, the 1978 Constitution was supposed to usher in a period of peace,

[54] The 1978 Constitution: Article 157 gives treaties on investment and agreements constitutional protection.
[55] Tiruchelvam (1979): p.18.

prosperity, and international prestige. It did not. Vincent Wright in his book on the Fifth French Republic reflects on the flaws that characterised political life under the Gaullist regime:

> "There are certainly some black spots: it has a judiciary which can be disquietingly susceptible to political pressure … it has created a radio and television network which is politically disgracefully biased; it has occasionally displayed a crass insensitivity to the aspirations of the provinces: it has tolerated property speculation of the most outrageous (and often illegal) sort; it as condoned tax evasion and avoidance by groups considered vital to its electoral survival, and it has done little to modify a tax system which is the least progressive in the Common Market; its leaders have sometimes shown a disconcerting disregard for the Constitution, and they have frequently been contemptuous of the rights of the opposition; it has allowed too much public squalor in the midst of often indecent affluence."[56]

[56] V. Wright (1978) ***The Government and Politics of France*** (London: Hutchinson): p.233.