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***The Executive Presidency: A Left  
Perspective***

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

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

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

### **The Debate in the Constituent Assembly**

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

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<sup>1</sup> Constituent Assembly Debates, Vol.1, 2<sup>nd</sup> July 1971: Col.2710 (emphasis added).

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

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

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

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

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<sup>2</sup> Ibid: Col.2662.

<sup>3</sup> Ibid: Col.2661.

<sup>4</sup> Ibid: Col.2684.

<sup>5</sup> Ibid: Col.2696.

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

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

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

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

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<sup>6</sup> *Daily Mirror*, 8<sup>th</sup> October 1971, cited in R. Edrisinha & N. Selvakkumaran ‘Constitutional Change in Sri Lanka since Independence’ (1990) *Sri Lanka Journal of Social Sciences* 13 (1 & 2): pp.79, 95. See also the chapter by Rohan Edrisinha in this book.

<sup>7</sup> Constituent Assembly Debates, Vol.1, 2<sup>nd</sup> July 1971: Col.2708.

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

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

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

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<sup>8</sup> Ibid: Col.2715.

<sup>9</sup> Margaret Thatcher became Prime Minister of the United Kingdom in 1979 while Ronald Regan became U.S. President in 1981.

<sup>10</sup> Constituent Assembly Debates, Vol.1, 2<sup>nd</sup> July 1971: Col.2715.

## **Enthroning the Executive Presidency**

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

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

Dr de Silva was scathing of Jayewardene:

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

new Government, to be its Head and to preside over the Cabinet, although the U.N.P. may have lost the general election.

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

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

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

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

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<sup>11</sup> C.R. de Silva (1988) *Sri Lanka's New Capitalism and the Erosion of Democracy* (Colombo: Ceylon Federation of Labour): p.30.

<sup>12</sup> Ibid: p.34.

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

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

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

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



standards, the examples he cites only prove that the present Parliamentary system has been tested and found not wanting.”<sup>14</sup>

### **A Presidency Unparalleled**

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

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

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

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<sup>14</sup> Ibid: p.xvii.

<sup>15</sup> Article 70 (1).

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

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

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

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

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

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

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

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<sup>16</sup> Article 38 (2).

<sup>17</sup> Perera (2013): p.30.

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

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

“The presidential system of Government has endured for over 200 years in the United States of America. Its founding fathers devised a political system that was meant to function without the hated party system. The experience of the American colonies under the British Monarch with his party system was tragic and the very word was anathema to them. Yet most constitutionalists now agree that the constitutional structure based on the mistaken theory of the separation of powers propounded by Montesquieu owes its success to the very growth of the party system in the United States. Two centuries of experience have generated precedents and practices which have enabled the legislature, the executive and the judiciary to function with forbearance and understanding. The creaking and the groaning of the whole governmental machine was loudest when the President belonged to a different political party from the majority in the Congress.

Even when the same party held sway both at the White House and at the Capitol, the passage of the presidential legislative programme was not easy. A sense of independence has always pervaded the Congress. This is part of the conceptual traditions of the separation of powers. Only the astutest Presidents have been able to manipulate and manage both the Houses of Congress.

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<sup>18</sup> de Silva (1988): p.66.

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

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

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

None of the safeguards found in the American and French constitutions were incorporated into the 1978 Constitution.<sup>21</sup> In

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<sup>19</sup> Perera (2013): p.xxiii.

<sup>20</sup> *ibid.*: p.xxiv.

<sup>21</sup> See also the chapters by Suri Ratnapala and Kamaya Jayatissa in this book.

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

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

### **Strengthening the Presidency: Third and Fourth Amendments**

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

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<sup>22</sup> The Constitution of France (1958): Article 8.

<sup>23</sup> Ibid: Article 9.

<sup>24</sup> Ibid: Article 21.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid: Article 20 (3).

<sup>27</sup> Ibid: Article 20 (1), (2).

<sup>28</sup> Ibid: Article 12 (1).

<sup>29</sup> Ibid: Article 50.

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

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

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

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

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

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

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

### **Reform or Abolition?**

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

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

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<sup>30</sup> (1978-1983) I *Decisions of the Supreme Court on Public Bills* 155.

<sup>31</sup> de Silva (1988): p.133.



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

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

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

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

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

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

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

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

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<sup>32</sup> Constituent Assembly Debates, Vol.1, 2<sup>nd</sup> July 1971: Col.2714.

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

“[W]hy did our founders establish a parliamentary system? Did they blindly copy the prevailing British model without seriously considering other alternatives? Fortunately, for us, they were not as complacent as it may seem on this question. Just as the American Constitutional Convention of 1787 detested the oppressive English monarchy, our Constitutional Assembly was deeply concerned about concentrating political power in a single office. With no shortage of despotic regimes wherever they turned, Assembly members wanted desperately to avoid paving the way for a future dictator.

In a November 1948 speech, Ambedkar described our founders' dilemma with trademark eloquence. An ideal executive, he argued, must be both stable as well as responsible to the people who elected it. There was no political system in vogue that satisfied both objectives equally. The American and Swiss presidencies offered greater stability, while British cabinet governments seemed more accountable to the people. The Assembly ultimately settled for accountability over stability by establishing a structure, which more closely resembled the latter than the former. As Justice Krishna Iyer colourfully

put it: 'Not the Potomac, but the Thames, fertilises the flow of the Yamuna.'"<sup>33</sup>

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

### **1994 and After: A Golden Opportunity Missed**

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

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

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

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

The PA became the largest party in Parliament with 105 seats out of 225 and the SLMC, its ally, got seven seats. The UNP won 94. With the UPF's lone member joining it, the PA just crossed the halfway mark to form a government with Kumaratunga as Prime Minister. It also had the support of the Tamil parties mentioned, who sat in the opposition. With such a slender majority, setting up a Constituent Assembly was certainly not viable but what is difficult to understand is why the PA did not ask for a similar mandate at the presidential election that immediately followed. By this time, the Eelam People's Democratic Party (EPDP), which had nine members, had become an ally of the PA, and the Ceylon Workers' Congress (CWC), which had seven members elected on the UNP ticket, had decided not to support the UNP candidate. Kumaratunga's victory was a foregone conclusion. She obtained 63% of the votes cast and won all electoral divisions barring Mahiyangana. The highest percentages were received in the north and east, with over 96% in Jaffna district.

Constitutional revolutions are not possible after every electoral victory and the PA did not get a clear mandate for such a move at the parliamentary elections. But a clear mandate was there for the asking at the presidential elections. However, Kumaratunga's constitutional advisors faltered, not surprising given what followed. But what is surprising is that the Left, which was so involved with the earlier constitutional revolution of 1972, also did not push the issue.

The nationalist Janatha Vimukthi Peramuna (JVP) put forward a candidate at the presidential elections but after Kumaratunga gave an assurance that the executive presidency would be abolished within a year, the JVP withdrew its candidate. Looking back, this was an assurance given without much foresight. Abolishing the executive presidency was one of the two main issues before the country, the other being a political solution to the ethnic conflict. Parties with a base among the Tamil, Muslim, and Indian Tamil communities, who supported the PA either from within the government or the opposition, considered the executive presidency a safeguard for their communities and Kumaratunga being President an additional safeguard. They were willing to support the abolition of the presidency only on the condition that devolution would also be introduced at the same time. The UNP would have supported an amendment for abolition in the first year of the Kumaratunga presidency with glee. But it would not have been supported by the PA's allies as there was no agreement on a political solution between the PA and UNP.

Instead of opting for a constituent assembly process, Kumaratunga was advised to set up a Parliamentary Select Committee (PSC) without waiting even for the presidential election and this was done. The UNP skilfully manoeuvred the process and the PSC dragged on. After three years and 77 meetings, the PA government, in frustration, placed its own proposals before Parliament in October 1997. They were mostly based on the consensus achieved in respect of the many issues discussed. The whole process was badly managed for which the entire PA including the President, the Minister of Constitutional Affairs, and others involved must take collective blame. Amateurishness, astrology, malefic periods, auspicious times, and other such lunacy played their part. The PA was unable to force the UNP take up clear positions. But to the credit of the PA, it had a clear position on almost all the issues. Whenever an issue was discussed in the PSC, the Minister would make state the PA's position on the same. On some issues, a note would be circulated and sometimes even a legal draft. It was only after the presidential elections of 1999, which Kumaratunga won, that the UNP again came aboard the process. Discussions were first held within the PA and then with the Tamil parties and finally with the UNP,

which was again able to drag the discussions from February to July 2000.

On 7<sup>th</sup> July 2000, it was announced that the PA and the UNP had reached agreement on the Constitution Bill, although there were a few outstanding issues. The main outstanding issue related to the transitional provision relating to the abolition of the executive presidency. There was general agreement that there had to be a transitional period. The government's draft provided for abolition at the end of President Kumaratunga's term of office of six years counted from December 1999, but the UNP was for a much shorter period.

A major flaw in the process was that the issue of the transitional period was never seriously discussed within the PA. This writer was involved with the process and explained to several leading PA personalities that the UNP was not going to 'buy' a six-year waiting period but they were all reluctant to take up the issue with Kumaratunga.<sup>34</sup> 'Let us not raise the issue' appeared to be their common position. At initial discussions within the PA, no one suggested a shorter period and almost all, not excluding leaders from the Left, said: 'Madam, you have a mandate to go on for six years'.

Finally, after 7<sup>th</sup> July, a date was fixed to discuss the outstanding issue of the date of abolition with the UNP. A few days earlier, leaders of the PA met and discussed the issue seriously for the first time. They decided to propose that the executive presidency be abolished at the end of three years counted from President Kumaratunga's re-election and to agree to two years if the UNP insisted on a shorter period. The writer is aware that President Kumaratunga rang up senior minister Ratnasiri Wickramanayake to ask him to begin the meeting with the UNP as she was held up, and instructed him to agree to even a period of one year, meaning December 2000. As the meeting began, UNP deputy leader Karu Jayasuriya rose, said that the UNP now wished the proposals be

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<sup>34</sup> The writer, as Consultant to the Ministry of Constitutional Affairs, officiated as secretary to the talks the PA had within it and with other parties. He was also a member of the team that drafted the 1997 proposals and the 2000 Constitution Bill.

placed before the Buddhist clergy and left. The following day, Kumaratunga called Jayasuriya and through him conveyed to the UNP leadership her offer to end the transitional period in December 2000. But there was no response. The UNP's gyrations are unfathomable; perhaps it feared that the PA would get much credit for the measure at the general elections, which were three to four months away. As is well known, the PA's Constitution Bill of 2000 that was presented to Parliament on 3<sup>rd</sup> August provided for the abolition of the executive presidency at the end of the second term of Kumaratunga. Here too, a mistake was made. The Bill should have provided for the transitional period to end in December 2000, as proposed to the UNP. The UNP not only did not support the Bill; some UNP members burnt copies inside the House. A golden opportunity to abolish the executive presidency was thus missed. Both the PA and the UNP must take the blame – the PA for a badly managed process and its inability to 'rein in' the UNP, and the UNP for playing dishonest and crafty politics with the issue.

The lessons from the failed exercise are many. The country was desperate to find a way out of the Jayewardene constitution and would have accepted a Constituent Assembly if a mandate was asked for at the presidential elections in 1994. Such a mandate should immediately have been followed through with the establishment of a Constituent Assembly. There are, of course, the lessons from the 1970-72 process too, namely that the ruling party should not have dominated the process and made its proposals a *fait accompli*. Instead, a device similar to the 'sufficient consensus' formula used in South Africa in 1994 could have been agreed upon. With Tamil, Muslim, and Indian Tamil parties too supporting, the UNP could have been pressurised into a consensus. Revolutionary constitutional changes cannot be made in the last year of a Parliament. They should be initiated 'while the iron is hot' and the process not allowed to drag.

### **Restrictions through the Seventeenth Amendment**

The Kumaratunga administration agreed to the Seventeenth Amendment to the Constitution at a time when it found its



majority in Parliament threatened in 2001. The JVP offered to provide the majority but on several conditions, including the introduction of the Seventeenth Amendment. It must however be said in fairness to the Kumaratunga administration that it first proposed a Constitutional Council in 1995 and the Constitution Bill of 2000 also had provisions relating to such a Council but with less powers than under the Seventeenth Amendment. Some restrictions were imposed by the Seventeenth Amendment on the executive presidency. The sovereignty of the people was strengthened by the restriction of the powers of the all-powerful President. The Supreme Court held that the Seventeenth Amendment, while restricting the powers of the President to some extent, did not amount to an effective removal of the President's executive power.<sup>35</sup>

The Seventeenth Amendment set up a Constitutional Council which would consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons nominated jointly by the Prime Minister and the Leader of the Opposition, and one person nominated by a majority of MPs belonging to parties and independent groups other than those to which the Prime Minister and the Leader of the Opposition belong. Of the five persons jointly nominated by the Prime Minister and the Leader of the Opposition, three would be appointed in consultation with the MPs belonging to the respective minority groups to represent their interests.

The appointment of judges of the Supreme Court and Court of Appeal, members of the Judicial Service Commission, the Attorney General, the Auditor General, the Inspector General of Police, the ombudsman, and the Secretary General of Parliament would need the approval of the Constitutional Council. On the other hand, no person could be appointed as chairman or member of the Elections Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission, the Bribery or Corruption Commission, the Finance Commission, and the Delimitation Commission except on the recommendation of the Council.

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<sup>35</sup> (1991-2003) VII *Decisions of the Supreme Court on Public Bills* 247.

The Seventeenth Amendment was never fully implemented. The first Constitutional Council functioned fairly well, but an Elections Commission was not appointed as President Kumaratunga did not agree with the Council's nominee as Chairman, and the Council was not prepared to nominate another. The second Constitutional Council was not appointed ostensibly due to a dispute as to what 'parties and independent groups other than those to which the Prime Minister and the Leader of the Opposition belong' meant. The Seventeenth Amendment did have some deficiencies as it was hastily passed in Parliament and it is true that some of its provisions needed change. These issues were gone into in detail by a Parliamentary Select Committee headed by D.E.W. Gunasekera, the Communist Party Minister. The draft report of the Committee is in the public domain.<sup>36</sup> The report could not be finalised as two members of the UNP who were nominated to the committee joined the government and the UNP did not recognise them as its nominees. However, after the dissolution of Parliament in 2010, the UNP publicly stated that it accepted the recommendations contained in the draft report.

### **Strengthening the Presidency to the Utmost: The Eighteenth Amendment<sup>37</sup>**

The Eighteenth Amendment was introduced in 2010 by President Rajapaksa, ironically the leader of a party (SLFP) that had been opposed to the executive presidency throughout. It is pertinent to remind ourselves of what Mrs Srimavo Bandaranaike, the former Prime Minister, stated for the SLFP in the National State Assembly when the executive presidency was first introduced by way of an amendment to the 1972 Constitution. She stated:

“The effect of this amendment is to place the President above the National State Assembly, above the law and above the courts, thereby creating a concentration of

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<sup>36</sup> 'Interim Report of the Select Committee of Parliament on the 17th Amendment to the Constitution' (2007) *LST Review* 18(238): p.1.

<sup>37</sup> Some of the material under this sub-heading also appears in the Epilogue that the writer was privileged to contribute to the second edition of Dr N.M. Perera's booklet: J. Wickramaratne, 'Epilogue' in Perera (2013): p.109.

State power in one person, whoever he might be. This has happened in other countries before, and history is full of examples of the disastrous consequences that came upon such nations that changed their Constitutions by giving one man too much power. [...] We oppose this Bill firmly and unequivocally. It will set our country on the road to dictatorship and there will be no turning back. This Bill will mark the end of democracy in Sri Lanka, as the late Mr Dudley Senanayake realized when these same ideas were put to him in the United National Party.”<sup>38</sup>

At the 2005 presidential elections, Rajapaksa promised to abolish the executive presidency. He stated in *Mahinda Chintana*, his election manifesto:

“With the consensus of all, I expect to present a Constitution that will propose the abolition of the Executive Presidency and to provide solutions to other issues confronting the country. In the interim, I propose to present a Constitutional amendment through which the Executive President will be made answerable to Parliament by virtue of holding such office.”<sup>39</sup>

At the presidential elections held in 2010, President Rajapaksa spoke about changing the character of the executive presidency. He stated in *Mahinda Chintana Idiri Dekma*, his manifesto, as follows:

“An open discussion on the Executive Presidency will be held with all parties. The Executive Presidency will be converted into a Trusteeship which honours the mandate given to Parliament by being accountable to parliament, establishes equality before the law, is accountable to the judiciary and enacts laws that are accountable to the judiciary, and is not in conflict with the judiciary.”<sup>40</sup>

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<sup>38</sup> NSA Deb, 4<sup>th</sup> October 1977, Vol.23: Col.1293.

<sup>39</sup> ‘Victory for Sri Lanka, Presidential Election 2005: Mahinda Chinthana, Towards a New Sri Lanka’: p.97, available at: [www.priu.gov.lk/mahindachinthana/MahindaChinthanaEnglish.pdf](http://www.priu.gov.lk/mahindachinthana/MahindaChinthanaEnglish.pdf)> accessed 3<sup>rd</sup> October 2013 (24<sup>th</sup> December 2014).

<sup>40</sup> Groundviews, ‘A Timeline of Duplicity: Promises to Abolish the Executive Presidency’, 9<sup>th</sup> May 2010: [www.groundviews.org/2010/09/05/a-timeline-of-](http://www.groundviews.org/2010/09/05/a-timeline-of-)

The Left parties were concerned that there was no explicit commitment to abolish the executive presidency. Ministers Tissa Vitarana and D.E.W. Gunasekera, leaders of the LSSP and the Communist Party respectively, accordingly raised the issue with the President and reported back to their parties that the President had assured them that ‘it was not a problem as it has already been agreed to.’ However, even before the President’s second term began in November 2010, the Eighteenth Amendment Bill was presented to Parliament.

The Eighteenth Amendment removed the two-term limit imposed on a person who has held the office of President, abolished the Constitutional Council, and set up a Parliamentary Council in its place. The Parliamentary Council consists of the Prime Minister, the Speaker, the Leader of the Opposition, and a nominee each of the Prime Minister and the Leader of the Opposition who shall be Members of Parliament. The President is only required to seek the ‘observations’ of the Parliamentary Council when making appointments to the offices and commissions mentioned in the Seventeenth Amendment. The Eighteenth Amendment also took away some powers of the Election Commission.

It is significant that in no country with a parliamentary form of government is there a term limit on a person holding the office of Prime Minister. This is because he is counterbalanced by the presence of the Opposition in the chamber of Parliament. Further, the Prime Minister loses his position if at any time he does not have the support of a majority in Parliament. On the contrary, term limits are found only in countries with an executive president. A term-limit is an important instrument of democratisation in electoral-authoritarian countries. Not only do term limits constrain the powers of leaders but they promote changes in government and changes of the political parties in power as was seen in Croatia in 2000 and Kenya in 2002. Term limits provide an important check on the concentration of power; they strengthen democracy and ensure long-term stability. The longer a chief executive is in power the demarcation between the state and the ruling party becomes more and more blurred.

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[duplicity-promises-to-abolish-the-executive-presidency](#) (accessed 24<sup>th</sup> December 2014).

Experiences show that more terms erode the balance of power between government authorities and weaken the authority of legislatures, judiciaries, electoral authorities, and even other political parties, thus leading to authoritarianism. In the absence of term limits, an incumbent may govern for too long and other aspirants may grow impatient. Term limits assure such aspirants that they would also have a chance. Thus, term limits reduce the stakes of politics and may prevent alternate candidates from resorting to unconstitutional action or intra-party or 'palace coups.' They are in fact one method of strengthening democracy. They also promote a party-based, as opposed to personality-based, vision of democracy. Term limits assume that, ultimately, no one individual, no matter how capable and illustrious, has a monopoly on the skills needed to govern.<sup>41</sup>

A survey of constitutions from around the world shows that a fixed term of office is a defining characteristic of democratic presidential government. The following are among the countries that have no term limits: Azerbaijan, Syria, Turkmenistan, Vietnam, Venezuela, Yemen, Belarus, Costa Rica, Niger, Algeria, Burkina Faso, and Uganda. Of these, Turkmenistan, Syria and Vietnam are one-party states while several are not functioning democracies. Cuba recently announced that it would limit the presidency to two five-year terms. Peru, Chile, and Uruguay permit an unlimited number of terms, but they cannot be consecutive and this limitation operates in practice against the same person holding the position for many terms.

In the United States, which has one of the strongest presidencies, there is a two-term limit. This is in addition to the various checks and balances discussed earlier. President George Washington declined to run for a third-term suggesting that two terms of four years were enough for any President. Washington's voluntary two-term limit became the unwritten rule for all Presidents until 1940. In 1940, Roosevelt won a third term and was re-elected for a fourth term in 1944. Following his death in April 1945,

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<sup>41</sup> Submissions, both oral and written, were made along the above lines by the writer, as counsel for two petitioners, who challenged the Eighteenth Amendment Bill in the Supreme Court in Case No. SC (SD) 01/2010.

Amendment XXII was passed imposing the two-term limit.<sup>42</sup> Even in France, where executive power is diffused between President, Prime Minister and the Council of Ministers, a limit of two five-year terms was introduced in 2000. Earlier, the term of office was seven years and there was no term limit.<sup>43</sup>

There can, of course, be no comparison between established democracies and emerging 'monarchical presidencies' in which power is highly personalised and centralised around the President. In the absence of strong mechanisms of accountability, the President under this system may remove any obstacles that could inhibit his maintenance of the office, including term restrictions. In fledgling democracies, the main importance of term limits stems from its positive impact on power alternation, which, in turn, contributes to democratic consolidation.<sup>44</sup> It has been argued that a President would be re-elected for a third time or more only if people vote for him. In practice, people vote largely on party lines. The absence of a term limit prevents new candidates from the same party being able to contest, and supporters and sympathisers have little choice than to vote for the incumbent. Also, if the other candidates at the election are not attractive, there is little choice than to vote for the incumbent. Term limits, on the other hand, throw up new choices.

Defeating a long-sitting President is quite a difficult task as seen in many countries. A President in office has unrivalled and unfettered access to public resources and is also better poised

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<sup>42</sup> See also A. Welikala, 'The Eighteenth Amendment and the Abolition of the Presidential Term Limit: A Brief History of the Gradual Diminution of Temporal Limitations on Executive Power since 1978' in R. Edrisinha & A. Jayakody (Eds.) (2011) *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: Centre for Policy Alternatives): Ch.V at pp.116-21.

<sup>43</sup> See chapter by Kamaya Jayatissa in this book.

<sup>44</sup> F. Guliyev, 'End of Term Limits: Monarchical Presidencies on the Rise' (2009) *Harvard International Review*: [www.academia.edu/187243/End\\_of\\_Term\\_Limits\\_Monarchical\\_Presidencies\\_on\\_the\\_Rise](http://www.academia.edu/187243/End_of_Term_Limits_Monarchical_Presidencies_on_the_Rise) (accessed 24<sup>th</sup> December 2014); see also D. Vencovsky, 'Presidential Term Limits in Africa' (2007) *Conflict Trends* 2: p.15; B. Cibane, 'Africa's Elected Monarchs: Presidential Term Limits and Democracy in Africa', *Africa on the Blog*, 20<sup>th</sup> June 2013: [www.africaontheblog.com/african-elected-monarchs-presidential-term-limits-and-democracy-in-africa/](http://www.africaontheblog.com/african-elected-monarchs-presidential-term-limits-and-democracy-in-africa/) (accessed 24<sup>th</sup> December 2014).

when it comes to campaign funds. Even in the most consolidated of multiparty democracies, international observers have reported the flagrant abuse of state resources during elections. An incumbent President thus has an undoubted advantage.<sup>45</sup>

The Eighteenth Amendment Bill was challenged in the Supreme Court. It being a constitutional amendment, the only ground of possible challenge was that it was inconsistent with the constitutional provisions listed in Article 83 and thus necessitated the approval of the people at a referendum. The main entrenched provision cited was Article 3: “In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.” The salutary effects of presidential term limits set out above were placed before the Supreme Court to show that the abolition of the limit was inconsistent with the concept of people’s sovereignty protected by Article 3. It was also argued that Article 83 is not exhaustive of the constitutional provisions that necessitate a referendum. For example, the removal of the writ jurisdiction of the Court of Appeal would necessitate a referendum, as it would result in taking away an important safeguard against arbitrary executive action. When Articles 3 and 4 speak of powers of government, safeguards against arbitrary action are necessarily included.

It was also submitted that the 1978 Constitution provided for a particular form of government, namely a strong executive presidency. One of the few effective safeguards was the term-limit and its removal adversely affected the sovereignty of the people. The Seventeenth Amendment, it was submitted, was clearly a restriction of the executive presidency. The sovereignty of the people was strengthened by the restriction of the powers of the all-powerful President. The Seventeenth Amendment provided for a national consensus for appointments to important positions, including the judiciary and the independent commissions. Under the proposed set up, the President would only ‘seek the observations’ of the Parliamentary Council. The leverage that the

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<sup>45</sup> S. Griner, ‘Term Limits can Check Corruption and Promote Political Accountability’, (2009) *Americas Quarterly* (Spring): [www.americasquarterly.org/pros-and-cons-of-term-limits](http://www.americasquarterly.org/pros-and-cons-of-term-limits) (accessed 24<sup>th</sup> December 2014).

Constitutional Council had with important appointments would be completely lost.

In regard to the argument that since the Seventeenth Amendment was not approved at a referendum it can also be deleted or amended without a referendum, it was submitted that a referendum was not needed to enhance sovereignty. For example, if the right to life is to be included in the chapter on fundamental rights, that would not necessitate a referendum. But to take away the right to life later would certainly need approval at a referendum. The Seventeenth Amendment weakened the executive presidency to some extent, although the President still remained very strong. The little gains achieved through the amendment contributed to the strengthening of the sovereignty of the people. Therefore, the removal of the gains so achieved affected sovereignty and necessitated approval at a referendum.

The Supreme Court (Shirani Bandaranayake CJ, and Sripavan, Ratnayake, Imam and Suresh Chandra JJ) held that the abolition of the term limit would by no means restrict the franchise but would, in fact, enhance the same since voters would be given a wide choice of candidates including a President who had been elected twice by them.<sup>46</sup> The arguments put forward by the petitioners about the beneficial effects of presidential term limits and the experiences of other countries were not alluded to.

Regarding the Seventeenth Amendment provisions sought to be removed, the Court stated that, as was held in *Premachandra v Jayawickrama*,<sup>47</sup> there are no absolute or unfettered discretions in public law. Discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. Thus even prior to the introduction of the Constitutional Council there were necessary safeguards that restricted the discretion of appointing authorities since no one possessed an unfettered

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<sup>46</sup> *Re Eighteenth Amendment to the Constitution Bill* (2010-2012) X Decisions of the Supreme Court on Public Bills 5. See also N. Anketell, 'A Critique of the 18<sup>th</sup> Amendment Bill Special Determination' in Edrisinha & Jayakody (2010): Ch.IV, and chapter by Rohan Edrisinha in this book.

<sup>47</sup> (1994) 2 SLR 90.



discretion. The proposed provisions relating to the establishment of a Parliamentary Council was only a process of redefining the restrictions placed on the President by the Seventeenth Amendment.

It is submitted that *dicta* such as ‘there is no absolute or unfettered discretions in public law’ have little meaning when applied to actions of the powerful President under the Sri Lankan constitution. In view of the immunity the President enjoys, paralleled elsewhere only in dictatorships and monarchies, he or she is in fact above the law as the country was warned when the executive presidency was first introduced. The Seventeenth Amendment sought to remedy this, albeit to a small extent, by establishing a mechanism that had the potential to create a national consensus on important appointments. As explained earlier, the Seventeenth Amendment was never fully implemented. The non-implementation could not be challenged specifically because of the immunity the President enjoyed.<sup>48</sup> Contrary to what the Supreme Court stated, the Parliamentary Council process does not impose any effective restrictions on the President, who is only obliged to ‘seek’ the observations of the Council.

The performance of the Left in relation to the Eighteenth Amendment was disappointing, to say the least. The three Left parties, the Lanka Sama Samaja Party (LSSP), the Communist Party of Sri Lanka (CPSL), and the Democratic Left Front (DLF) held several meetings to protest against the amendment and also made strongly worded statements. The LSSP decided, not once but twice, that its two Members of Parliament should not participate in the vote. Finally, however, all five parliamentarians of the Left shamelessly voted for the amendment. The excuse given was that the amendment would have received the required two-thirds majority even without the Left members voting for it. If the members did not want to embarrass the government of which they were a part by being a party to denying it a two-thirds majority, non-participation would not have resulted in such denial, as a two-thirds majority was forthcoming in any case! The CPSL has since graciously admitted that voting for the

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<sup>48</sup> SC (FR) Nos. 297 and 578/2008, SCM, 18<sup>th</sup> March 2011.

amendment was a mistake.<sup>49</sup> The conduct of the Left members whose parties and departed leaders had been in the forefront of the opposition to the executive presidency was a classic instance of '*kiri kalayata goma tikak demma wage*' ('putting a blob of cow dung into a pot of milk'), as the Sinhala saying goes.

Dr Colvin R. de Silva described the system of government under the 1978 Constitution as a constitutional presidential dictatorship dressed in the raiment of a parliamentary democracy.<sup>50</sup> How true. With no term limit and the Seventeenth Amendment out of the way, the executive presidency in Sri Lanka has certainly become one of the strongest and vilest, if not *the* strongest and vilest, presidential systems in the 'democratic' world.

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<sup>49</sup> Resolution passed at the Special National Conference, Colombo, 27<sup>th</sup>- 28<sup>th</sup> October 2012.

<sup>50</sup> C.R. de Silva, '*Foreword*' in Perera (2013): p.v, xi.