

***Constitutionalism and Sri Lanka's
Gaullist Presidential System***

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Sri Lanka's constitutional evolution since independence from Britain in 1948 has been marked by a crisis of constitutionalism. The framers of its two autochthonous constitutions demonstrated utter disregard for basic principles of constitutionalism and it is therefore not surprising that since 1972 the country's democratic traditions and respect for liberal democratic principles have been steadily undermined. Sri Lanka's failure to create a constitutional dispensation that is inclusive and acceptable to all its ethnic and religious groups is another consequence of the failure to uphold basic principles of constitutionalism.¹

Constitutionalism requires that a constitution imposes restraints on the wielders of political power; acts as a counter-majoritarian check to prevent the tyranny of the majority and to protect individual freedom and dignity; empowers people through the protection of their rights and by ensuring that governments are accountable and responsive to them; establishes independent institutions to ensure that the reach of government is circumscribed so that with respect to decisions where partisan political considerations are inappropriate, independent and principled decisions can be made in the public interest. In more recent years, constitutions are also expected to enshrine basic values and principles by which the country is to be governed.² Sri Lanka's political leadership across the political spectrum and its legal community, with rare exceptions, have generally failed to appreciate and recognise these constitutional fundamentals as they have drafted, implemented and interpreted constitutional provisions. The debate on whether the executive presidency should continue as a feature of Sri Lanka's constitution has to be assessed in this context.

¹ See C. Amaratunga (Ed.) (1989) *Ideas for Constitutional Reform* (Colombo: Council for Liberal Democracy); and R. Edrisinha & A. Welikala (Eds.) (2008) *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives).

² See for example the South African Constitution of 1996.

The Republican Era

Both the first Republican Constitution of 1972 and the Second Republican Constitution of 1978 were fundamentally flawed when assessed from the perspective of constitutionalism.³ They both provided for a concentration of power in a single institution, introduced structures and systems that facilitated executive convenience, entrenched majoritarianism, undermined institutions that had remained reasonably independent under the Soulbury Constitution, and failed to protect basic liberal democratic values and principles. Both constitutions were partisan documents introduced by governments with two-thirds majorities in Parliament and with no serious efforts to forge consensus across the political or ethnic spectrum. The irony is that though the framers of each constitution were the fiercest critics of the other constitution, both constitutions essentially suffered from the same basic law: a concentration of power in a single institution.

The debate on which of Sri Lanka's home-grown constitutions was worse will be an evenly contested one. Colvin R. de Silva, the Trotskyite Minister of Constitutional Affairs, who was primarily responsible for the First Republican Constitution, trumpeted the need for autochthony and a home-grown constitution. However the constitution that he helped craft introduced the British doctrine of parliamentary sovereignty by making the legislature, the National State Assembly, the supreme instrument of state power, concentrating legislative, executive and judicial power in it and expressly prohibiting the universally accepted mechanism by which the supremacy of the constitution is upheld: constitutional or judicial review of legislation. The principle of the separation of powers was expressly repudiated, the independence of the judiciary was undermined, and the provisions providing for an independent public service repealed. A Bill of Rights was introduced with a limitation clause that was so comprehensive that the executive could curtail them at will.⁴ There was,

³ See R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Colombo: Centre for Policy Alternatives) for more information on the two constitutions.

⁴ J. Wickramaratne, 'Fundamental Rights and the 1972 Constitution' in A. Welikala (Ed.) (2012) *The Sri Lankan Republic at 40: Reflections on*

therefore, virtually no constitutional jurisprudence based on the bill of rights during the operation of the constitution. An example of the mind-set of executive convenience that pervaded the 1972 Constitution were the unprecedented provisions that validated existing laws even if they were inconsistent with the constitution, and provisions setting out how the legislature could enact unconstitutional laws. In a departure from the Soulbury Constitution the new constitution entrenched the language and religion of the majority and inserted the provision that the new republic was a unitary state.⁵ The countervailing forces to the power of the preeminent institution under the first republican constitution were less powerful than those under the second republican constitution. Many of the worst features of the first constitution were reproduced verbatim in the second constitution. The Left movement of Sri Lanka that was part of the United Front coalition of 1970-75 introduced the practice of what Neelan Tiruchelvam called the instrumental use of constitutions, sacrificing basic principles of constitutionalism in the interests of political expediency and ideological considerations, and for the benefit of the government rather than the governed. Sri Lanka is fortunate that the constitution lasted for just six years.

The Second Republican Constitution of 1978 continued this tradition. Power was concentrated in the office of the Executive President rather than the omniscient National State Assembly. The argument that that it was worse to repose power in a single individual than a collective assembly is persuasive. The provisions that undermined the supremacy of the constitution were reproduced. However, the new constitution's provisions on electoral systems, the independence and powers of the judiciary, the public service and the bill of rights were superior. Furthermore the principles that sovereignty was vested in the people, rather than in the legislature, and the principle of the separation of powers, were recognised more explicitly. The

Constitutional History, Theory and Practice (Colombo: Centre for Policy Alternatives): Ch.19.

⁵ N. Jayawickrama, 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective' in Welikala (2012): Ch.1; A. Welikala, 'The Sri Lankan Conception of the Unitary State: Theory, Practice and History' in A. Amarasingham & D. Bass (Eds.) (forthcoming, 2015) *Post-War Sri Lanka: Problems and Prospects* (London: Hurst & Co.)

requirement that certain constitutional amendments required the approval of the people at a referendum imposed some limitations on the powers of the legislature and affirmed the sovereignty of the people rather than Parliament.

The Second Republican Constitution and the Executive Presidency

The two radical changes introduced by the Second Republican Constitution were the introduction of a semi-presidential executive in place of the Westminster-style parliamentary executive and a system of proportional representation to replace the simple plurality electoral system. Each of these new features had a J.R. Jayewardene tweak to them that made them suit the interests of Jayewardene and his party. Though described as a hybrid, mixed or semi-presidential model, given the balance of power between the President and the Prime Minister and the Parliament, the model was most certainly a presidential-prime ministerial executive with the President wielding enormous powers within the total constitutional structure rather than a premier-presidential executive with a greater balance of power between the two offices.⁶ The President enjoyed sweeping legal immunities including those usually reserved for a nominal head of state.⁷ The President could assign to himself ministerial portfolios, dissolve the legislature virtually at any time, was solely responsible for the appointment of persons to numerous important offices, including judges of the appellate courts, and during states of emergency, which were the norm rather than the exception during the first 30 years of the operation of the constitution, exercise what amounted to legislative power through the promulgation of regulations that could override legislation.⁸

⁶ This is distinction that is drawn in the literature on different models of semi-presidentialism. See for example, R. Elgie, S. Moestrup & Y-S Wu (2011) *Semi-Presidentialism and Democracy* (London: Palgrave).

⁷ See also chapters by Niran Anketell and Sachintha Dias in this book.

⁸ See A. Welikala (2008) *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives).

The dangers of mixed systems were clearly demonstrated by the 1978 Constitution. In a 'pure' presidential (like in the United States) as opposed to a semi-presidential system, ministers are appointed from outside the legislature. This strict separation of powers promotes an adversarial relationship between the two institutions that acts as an important check and balance. Requiring the President to appoint Cabinet colleagues from among Members of Parliament enabled the President to co-opt MPs, entice opposition MPs to cross the floor, and effectively undermine the legislature's watch dog function. This was made into a fine art by President Rajapaksa, who ensured that most members of the legislature were also members of the executive.

Another example of how the so called semi-presidential model of Sri Lanka undermined basic features of representative democracy was when for the first time President D.B. Wijetunga assigned to himself the finance portfolio.⁹ Presidents Kumaratunga and Rajapaksa continued this practice that was contrary to basic norms of parliamentary democracy and possibly the constitution itself.¹⁰ The history of parliamentary democracy demonstrates the importance of parliamentary control over finance and taxation. Having a Minister of Finance who as a Member of Parliament is physically present in Parliament and who can respond to questions is an important method by which Parliament can exercise effective control over finance. This practice would of course be impossible in a 'pure' presidential system like in the United States.

Under President Jayewardene, various extra-constitutional practices added to the powers of the already 'overmighty executive.'¹¹ Despite the fact that his party commanded more than a two-thirds majority in Parliament, he requested, and received from, his shameless party MPs, undated letters of resignation, which made the President's control over the legislature absolute. This combination of the executive controlling

⁹ It is noteworthy that both Presidents Jayewardene and Premadasa did not do this.

¹⁰ I argued at the time (1993) that President D.B. Wijetunga's unprecedented move was unconstitutional as it violated Article 157. Unfortunately this unconstitutional course of action became almost the norm thereafter.

¹¹ See chapter by Chandra R. de Silva in this book.

the legislature as a result of constitutional design and also political and extra-constitutional factors meant that in effect, the powers of the President of Sri Lanka in a constitutional scheme described as semi-presidential were greater than the powers of Presidents under constitutions described as 'pure' presidential.

The Rationale for the Executive Presidency

It is important to critically evaluate the justification put forward by defenders of the presidential system in Sri Lanka. J. R. Jayewardene, to his credit, advocated its introduction since 1966 at a time when he had little chance of becoming a nationally elected President. He proposed its introduction, with the support of R. Premadasa, again in the Constituent Assembly of 1970-72, while he was an Opposition MP following his party's defeat at the parliamentary election of 1970. A. J. Wilson, an admirer and close associate of J.R. Jayewardene, argued that the two main rationales for the introduction of the executive presidency were: (a) the need for stability; and (b) the empowerment of minorities.¹² Both these rationales were flawed as was clearly demonstrated by subsequent political developments. The argument that Sri Lanka prior to 1977 was unstable is difficult to comprehend. Peaceful change of government at regular elections which were free and fair¹³ and where ruling parties accepted defeat and relinquished power to the victors is hardly a symptom of instability. Electoral manipulation, depriving political opponents of civic rights, unconstitutional postponements of elections, serious electoral malpractices and the systematic undermining of democratic institutions and the rule of law, all reached new heights after the introduction of the 1978 Constitution.

The empowerment of minorities justification appears more attractive at first sight which is probably why Tamil and Muslim organisations and political parties initially supported the

¹² See A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka 1978* (London: Macmillan)

¹³ The need to use the adjectives 'free' and 'fair' when describing elections is also a post-1978 phenomenon.

initiative.¹⁴ It is probably true that minorities are empowered at a nationwide election for the President as every vote from every part of the country counts equally. However the crucial defect in the system is that after the election the influence of the minorities effectively ends. As the experience under all the Executive Presidents demonstrates, once elected, the President functions as a virtual elected dictator and pressure from any quarter, let alone the minorities, is of limited impact. The minorities soon realised that the most effective way to ensure that the executive was responsive to their concerns and aspirations was to ensure that the head of the executive was *continuously* accountable and responsible to an elected legislature of which they were a part. This feature which is part of the classic defence of the parliamentary executive model, ensures that the main political actor is physically present in the legislature, the main locus of political power, and also prevents a shift of power to a Presidential Secretariat consisting of unelected, unaccountable presidential advisors. It also facilitates accountability on the part of the head of the executive who has to lead the government in the legislature, respond to backbench opposition concerns and criticisms, within the framework of parliamentary conventions, rules and procedures. There is also a crucial 'humbling function' very important in third world democracies, in the "real" head of the executive being subjected to parliamentary scrutiny and question time.

The Conceptual Critique

There is also a more conceptual critique of presidentialism developed primarily with the South American experience in mind, which I argue is relevant for the South Asian context. Juan Linz in his seminal article, '*The Perils of Presidentialism*' developed a convincing case to suggest that the presidential system generally promoted authoritarianism and undermined liberal democratic values and institutions.

"A careful comparison of a parliamentarism as such with presidentialism as such, leads to the conclusion that on balance the former i.e. the parliamentary system is more

¹⁴ See also the chapters by K. Guruparan and A.M. Faaiz in this book.

conducive to stable democracy than the latter. This conclusion applies especially to nations with deep political cleavages and numerous political parties.”¹⁵

Linz focused primarily on several countries in South America, though he mentions Sri Lanka in passing at the beginning of the article. The Sri Lankan experience of presidentialism from 1978 to the present, however, demonstrates that his basic thesis is relevant to this part of the world too.¹⁶

Linz argued that the presidential system encourages a personalised style of politics that favours charismatic politicians or populists and such politics is often at odds with the basic norms of constitutionalism. He also cited the danger that given the fact that s/he is elected by the whole country it fosters a mind-set where the President tends to think that because s/he is elected by the entire country s/he has the authority and legitimacy to basically do anything. It gives a person an exaggerated sense of her own importance.

Linz also discusses the defence of presidentialism in terms of stability and rigidity. Apart from the need to have a more nuanced understanding of stability as discussed above, the experience of Sri Lanka is that what is often cited as stability has resulted in a kind of unresponsiveness and strong government that goes against the interest of the people. The corruption, nepotism and the abuse of power that Sri Lanka has experienced in recent years has created enormous problems with respect to good governance and generated widespread cynicism about politics in the minds of the people. Furthermore in recent years Sri Lanka had to deal with a strong separatist movement led by the Liberation Tigers of Tamil Eelam (LTTE) that promoted, not surprisingly, an obsession with national security. The cumulative effect of all these factors created a negative kind of stability – authoritarianism and a national security state rather than a constitutional state.

¹⁵ J.J. Linz, ‘*The Perils of Presidentialism*’, (1990) *Journal of Democracy* 1(1).

¹⁶ Bangladesh flirted briefly with the presidential model in recent years. A vigorous debate has taken place in Nepal in the past six years and has continued for even longer in Sri Lanka.

The third argument that I would like to borrow from Linz is that the danger of the presidential system is that it promotes a winner takes all or zero-sum game outcome. The stakes are very high. This has at least two negative consequences. Given the South Asian reality it means that Presidents once elected are reluctant to relinquish power, as the enormous powers of patronage, the privileges and perquisites of office are all lost. Secondly, it makes power-sharing or coalition politics, which may often be desirable in plural, multi-ethnic countries where different interests need to be accommodated within the executive branch of government. In the Sri Lankan context since the powers of the President and Prime Minister are so different, it is difficult to develop an effective power-sharing arrangement. In Sri Lanka's short but significant period of cohabitation from 2001 to 2003, this tension was clearly demonstrated and the power sharing arrangement lasted as long as it did as the President chose not to exercise many of the powers vested in her. As soon as she asserted those powers the government collapsed.

A fourth argument highlighted by Linz refers to the danger that the presidential system could devalue democratic institutions. This has certainly happened in Sri Lanka since 1978. It is particularly tragic in the Sri Lankan context given its long tradition of the rule of law, parliamentary democracy and universal franchise that positioned it as one of the brightest prospects within the British Empire and also at the time of independence.¹⁷ The quality of parliamentary debates in the 1950s, 60s and 70s, was exceptionally high. Parliament functioned as an effective deliberative assembly, an important function in a constitutional democracy. The Parliament had a strong committee system. Since the introduction of the Executive Presidency and the shift in power away from Parliament many of these traditions have been severely undermined and had a corrosive effect on Parliament as an effective democratic institution.

An additional consequence of the devaluation of Parliament is that capable people no longer aspire to enter Parliament any more in Sri Lanka. The quality of Parliament as a democratic

¹⁷ See H. Kumarasingham (2013) *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I.B. Tauris).

institution has, therefore, suffered. The institution of the Cabinet of Ministers has been devalued as well. It is no longer the focal point for policy debate and formulation. Indeed Linz has argued that a presidential cabinet is less likely to include strong-minded people because those appointed to the cabinet hold office at the pleasure of the President. In a parliamentary executive model, on the other hand, there is a greater chance that even though most of the Cabinet Ministers belong to the same party as the Prime Minister, there are invariably strong members of the party, persons whom the Prime Minister is compelled to appoint, and therefore there is greater likelihood that the quality of the Cabinet will be enhanced. Ministers could resign from the Cabinet, return to the back-benches and then make matters extremely difficult for the Prime Minister. Furthermore given the more equal relationship that exists between a Prime Minister and Cabinet colleagues in comparison with that of an Executive President and colleagues, the environment within the Cabinet is more conducive to debate and deliberation. This would apply even more forcefully in situations where there are coalition governments.

The Working of the Constitution

Many of these dangers of the presidential model have been demonstrated in Sri Lanka. Presidents Premadasa and Rajapaksa, probably the country's most populist Presidents, often cited the fact that they were elected by the whole country as justification for various acts that were of dubious constitutional legitimacy. President Premadasa argued that senior government bureaucrats including Secretaries to Ministers were primarily accountable to him rather than their Ministers as executive power was vested in him. Presidential advisors on various subjects were often more powerful than Ministers who were responsible for those subjects.

President Rajapaksa deliberately and intentionally refused to implement an entire chapter in the constitution designed to promote good governance, the Seventeenth Amendment to the Constitution. While various bizarre and unconvincing justifications for such violations were presented by his ministerial cronies, the basic reason seems to me the fact that the President just did not want to implement constitutional provisions that

reduced his discretion, patronage, and power. It is almost as if he took the position 'I am the President, I am elected by the people; I should be able to appoint whomever I want to key institutions.' In Sri Lanka certainly, therefore, presidentialism has fostered a kind of crude populism that is very dangerous from a liberal democratic perspective.

In South Asia where generally the political culture is hierarchical, where there is very little internal party democracy, where there are strong linkages between the welfare state and patronage politics, and where other democratic institutions are weak or can be undermined by a powerful presidency, the dangers and the perils of presidentialism that Linz highlighted apply even more forcefully given that political context and reality.

A related point that again assumes added importance in the Asian context relates to the relative ease with which the main political actor in a country can be removed. In 1971, Colvin R. de Silva, defending the parliamentary executive model, referred to the possibility of removing the head of the executive relatively easily as a virtue rather than a weakness. Since a Prime Minister has to be 'continuously accountable to the Parliament,' a Prime Minister knows that her tenure in office is conditional on parliamentary support. In a presidency it is virtually impossible to remove the President before the end of his term.

The perils described by Linz were also foreseen in 1971 when the proposal to introduce the presidential system in Ceylon/Sri Lanka was made. J.R. Jayewardene and R. Premadasa in the Constituent Assembly. Jayewardene and Premadasa's party colleague, and the country's most distinguished liberal former Prime Minister, Dudley Senanayake, made what turned out to be a prophetic statement:

"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 an Nkrumah or a Nasser, not for a free democracy.”¹⁸

The Referendum of 1982

Within four years of the adoption of the new constitution, the powers of the Executive President were used to undermine the sovereignty of the people. President Jayewardene decided that he did not want to risk losing his two-thirds majority in Parliament at the parliamentary elections scheduled for 1983. He decided to hold a referendum instead at which he asked the people to decide whether the Parliament elected in 1977 should continue for another six years. The President who had presided over national celebrations on the occasion of the 50th anniversary of the introduction of universal adult franchise the previous year had no qualms about destroying that impressive tradition through constitutional manipulation.

The Left and left-of-centre opposition and other democratic parties were outraged by the decision.¹⁹ The government's defence led by its legal luminaries such as Lalith Athulathmudali, was that the government was asking the people to decide, that the people were sovereign, and that the referendum was an ultra-democratic device where the people through a majority vote would determine the future of the Parliament. The Left which had 10 years previously in the constitution they drafted entrenched the principle of majoritarianism both in several constitutional provisions and by assigning so much power to an assembly that operated on the basis of majoritarian decision-making, found it difficult to present a persuasive principled argument against such a move.

Such a position was articulated by the nascent Liberal movement, which had also been strongly critical of the first republican

¹⁸ Dudley Senanayake allowed his party colleagues, J.R. Jayewardene and R. Premadasa to propose the adoption of a presidential system though he opposed the idea.

¹⁹ See also the chapter by Jayampathy Wickramaratne in this book.

constitution.²⁰ It argued that both constitutionalism and liberalism emphasised the limits of majoritarian decision-making and focused on the extent of a government's power, the legitimate reach of state power *vis-a-vis* the individual, minorities and society as a whole. They argued that therefore the question posed to the people was not a question that could be decided by majoritarian decision-making as it involved an individual's inalienable right, the right to vote. One of the most effective counter arguments to the disingenuous claim that the referendum was legitimate because it was ultra-democratic was a quotation by Jayewardene's predecessor as leader of the United National Party, Dudley Senanayake, which was widely used by parties and civil society groups opposed to the referendum and who were campaigning for a calling for a negative vote. Senanayake's liberal and constitutionalist credentials, already demonstrated by his warnings against a presidential system, were evident once again:

“There are some things in every true democracy which no mandate can ever destroy. Even if a majority agrees, the freedom of speech, the freedom to organise political parties, the freedom of the press, the right to vote to elect your representatives at periodic and regular elections; these are features which cannot ever be abolished. Even if a majority agrees, a country which deprives any man of these fundamental rights and liberties, is not a true democracy, is not even a really human society. A free people should not be condemned to state slavery under cover of an alleged mandate.”²¹

The crisis of constitutionalism since 1948 in Sri Lanka including the failure of the courts to utilise the limited minority safeguards provided in the Soulbury Constitution, the retrogressive features of the First Republican Constitution, the continuation of this tradition

²⁰ The Council for Liberal Democracy led by Chanaka Amaratunga which played a key role in informing the constitutional reform debate in the period 1981 to 1994.

²¹ Statement made by Dudley Senanayake, former Prime Minister of Ceylon in 1971, during discussions on the proposed new Constitution of 1972, cited in R. Edrisinha, '*In Defence of Judicial Review and Judicial Activism*' in Amaratunga (1989): p.467.

in the Second Republican Constitution; the disappointing Constitution Bill 2000, which while certainly containing improvements was disappointing in the context of more recent developments in constitution-making,²² and the positions of the main political parties even today on the direction of constitutional reform, indicate a lack of appreciation of constitutional fundamentals and first principles.²³ Such a lack of appreciation is not confined to political leaders and parties but extends even to the legal community.

Constitutionalism and the Presidency: The Role of the Judiciary

This part of the paper will deal with two more recent controversies that arose with respect to the interpretation of the constitution and the response of the Supreme Court. The first involves the controversy with regard to the term of President Kumaratunga, when it commenced and when it ended, and the date of the presidential election in 2005. The second deals with the Eighteenth Amendment to the Constitution that repealed the Seventeenth Amendment to the Constitution and increased the powers of the President.

The Third Amendment Controversy

The first issue arose because of the Third Amendment to the Constitution, an amendment introduced by President Jayewardene for his own convenience. A key element of an executive presidential system and its promotion of stability is that the executive has a fixed term. Though he cited this feature when he defended the introduction of the system, Jayewardene soon hankered after the advantages of a Prime Minister under a Westminster executive, where a Prime Minister has the advantage of calling for elections

²² Given the developments in constitution making around the world in the 1990s, including the adoption of a new constitution in South Africa in 1996, the draft constitution produced in 2000 after a process that commenced in 1994, was also flawed both from the perspectives of process and substance.

²³ As stated earlier, these relate primarily to the issue of the supremacy of the constitution and its basic rationale.

when it suits him/her. The Third Amendment provided that a President could seek a mandate for a second term after four years of the first six-year term. Jayewardene thereafter sought re-election in October 1982 even though his six-year term ended in February 1984. It is important to note that despite being declared (re)-elected in October 1982, the then Chief Justice administered the oaths for his second term in February 1983, on the date that corresponded to the date of his election to his first term, as provided in the Third Amendment. An unprincipled and clumsily drafted provision which most people even to date struggle to comprehend, provides for different consequences depending on whether the election is won by the incumbent or challenger. If the challenger, Hector Kobbekaduwa, had been elected in 1982, his term would have begun on the date on which the election result was declared in October 1982.

When President Kumaratunga was re-elected President in December 1999 after she made use of the Third Amendment to call an early election, the then Chief Justice, Sarath Silva, erred in administering the oath of office for the commencement of President Kumaratunga's second term on 22nd December 1999. President Kumaratunga's second term should have begun on the date *corresponding to the date of her election to her first term in the following year*, i.e., 12th November 2000. The Chief Justice made a mistake; and so the whole country, including the President, the Cabinet of Ministers and the Commissioner of Elections assumed she had commenced her second term after she took her oaths before the Chief Justice on 22nd December 1999. When President Kumaratunga's second term was reaching its conclusion, the date controversy resurfaced. If her second six-year term had begun in December 1999, then a presidential election would have to be held in 2005. If it had begun in November 2000, then the next presidential election would only be required in 2006. The matter then went to the Supreme Court in 2005. It held in a controversial judgment, that President Kumaratunga's second term had commenced in 1999.

There were two serious defects in the response of the Supreme Court, one relating to process, the other to substance. With respect to process, Chief Justice Sarath Silva should not have heard the case. He was part of the problem. When President

Kumaratunga was re-elected as President in 1999, it was he who erroneously administered the oath for her second term on the date on which the results were declared. It was therefore inappropriate that Chief Justice Sarath Silva presided over a bench that decided the question of when her second term began. The judgment was questionable in terms of substantive reasoning as well. Not surprisingly, the court's decision was one that covered up the Chief Justice's blunder and was contrary to the letter and intent of the constitutional text. It was also inconsistent with past practice, what had happened after the presidential election of 1982. The decision in effect stated that even an incumbent's term commenced on the date that the results were declared. This interpretation effectively rendered an entire paragraph of the constitution nugatory and superfluous. The decision also worked to the advantage of the person waiting to succeed Kumaratunga as her party's next presidential candidate, Mahinda Rajapaksa.²⁴

The Eighteenth Amendment Controversy

While many Sri Lankans had reservations about the manner in which the Rajapaksa administration defeated the LTTE and ended the war in 2009, they all hoped that the government would thereafter introduce constitutional and political reforms to address the underlying causes of the conflict and reach out to the Tamil people who had suffered as a result of the long and bloody conflict. A constitutional amendment was introduced as an urgent bill in 2010. But it had nothing to do with Tamil rights and indeed by abolishing the Constitutional Council deprived them of some influence and power.

The Eighteenth Amendment repealed the Seventeenth Amendment which was introduced to restrict the wide powers of the President in relation to appointments, and promote the de-politicisation of important constitutional bodies. President Rajapaksa had consistently sought to undermine the Seventeenth Amendment by non-implementation since his election to his first term in 2005. In addition, the Eighteenth Amendment removed

²⁴ Given the political context at the time and the conduct of Sarath Silva C.J. throughout his tenure as Chief Justice, this was an important consideration.

the two-term limit on the President. The brazen nature in which a President elected on a mandate to abolish the presidency, removed restraints on the office and increased its powers was one of the lowest points in the constitutional evolution of the country. Civil society sought to intervene in the Supreme Court to protect many of the gains of the previous amendments that enhanced the rights and sovereignty of the people. However the Supreme Court presided over by Chief Justice Shirani Bandaranayake and including recently appointed Chief Justice K. Sripavan, far from facilitating a fair process where such principled arguments could be presented, conducted the proceedings in a shockingly partisan manner.²⁵

The President placed the Eighteenth Amendment before the Cabinet on Monday, 30th August 2010. Since the Cabinet declared it as urgent in the national interest the Amendment Bill was automatically referred to the Supreme Court, the following day on Tuesday, 31st August. Those who were fortunate enough to have had access to a copy of the Amendment Bill intervened before the Supreme Court. At the Supreme Court hearing, it became apparent during the Attorney General Mohan Peiris's submissions that the version of the bill in possession of the intervenient petitioners was different to the version relied on by the Attorney General. When the intervenient petitioners objected, the Attorney General turned to them and stated in open court, "This is what happens when you have documents you are not supposed to have." Thus, the intervening petitioners were only given accurate copies of the proposed changes after the Attorney General had commenced his submissions. The Supreme Court did not censure the Attorney General or intervene to assist the intervenient petitioners.

Within a day of the hearing the Supreme Court issued its opinion in a determination consisting of a few pages, holding that the amendment did not affect the entrenched provisions of the constitution, and thus, did not require a referendum. Many of the principled submissions of the intervenient petitioners were just ignored in the short, insubstantial determination. Though a

²⁵ See R. Edrisinha & A. Jayakody (Eds.) (2011) *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: Centre for Policy Alternatives).

parliamentary debate took place, it did so without the participation of the main Opposition party, which with its then characteristic irresponsibility boycotted the debate, and with little contribution from the smaller opposition parties. The government was able to secure a two- third majority to pass the amendment a few days after the Supreme Court hearing. The adoption of the Eighteenth Amendment, its content, the manner in which it was adopted and the meek, submissive response of the court illustrate the mood of triumphalism and arrogance that dominated the Rajapaksa administration and the impact this in turn had on other democratic institutions and political parties.

The Lanka Sama Samaja Party (LSSP) and the Communist Party of Sri Lanka, coalition partners in the Rajapaksa administration, abandoned their opposition to the presidential system and voted in support of the amendment. They seemed oblivious to the fact that the amendment, by removing restraints on the powers of the President over the judiciary and other independent institutions, as well as the two-term limit, recognised as an important check in presidential systems around the world, was consolidating the presidency and promoting even greater authoritarianism. The refusal of these two parties to support the common opposition candidate at the presidential election of January 2015 when several of their former Cabinet colleagues did so citing the commitment to abolish the presidency also raises serious doubts about these parties' commitment to do so.²⁶

²⁶ It should be noted, however, that several veteran leaders of these two parties and influential left leaders remain committed to the abolition of the executive presidency. They actively supported the common opposition candidate and have strongly criticised the leadership of these two parties. A similar lack of consistency was seen within the Liberal movement, which changed its principles and approach after the tragic and premature death of Chanaka Amaratunga in 1995. The Liberal Party supported the most illiberal regime in post-independence Sri Lanka from 2005 to 2014. Like with the Left, Liberals outside the party, continued to critique the Rajapaksa regime from a Liberal perspective and advocate radical constitutional reform on the lines of the Liberal Party, pre-1995.

Abolition or Reform?

Presidents Kumaratunga and Rajapaksa both were elected on platforms that promised to abolish the executive presidency but once they started to enjoy the overwhelming powers of the position, conveniently forgot their commitments. Already some commentators have begun to urge President Sirisena and the leadership of the new government to introduce reforms to the executive presidency rather than abolish it. As is often the case when discussions on constitutional reform take place in Sri Lanka, there is a lack of clarity with respect to what these two options entail. If the executive presidency is abolished, the constitution will still have the office of President, but the President will exercise very limited substantive power and perform largely ceremonial functions. The advocates of reform suggest that while the Prime Minister will be the main political actor in the executive, some additional powers to those exercised by a nominal head of state should be assigned to the President. Until a more detailed discussion on the scope and nature of such powers is held, there will continue to be confusion as to what is meant by ‘abolition’ and ‘reform’ of the executive presidency.

It may be more useful to adopt the position that the executive presidency will be abolished; executive power will be exercised by a Cabinet of Ministers responsible and answerable to Parliament; a President, not elected by the country, but rather by an electoral college, shall exercise the nominal powers of a head of state and certain additional powers that relate to national reconciliation and the development of independent institutions.²⁷

Conclusion

The executive presidency needs to be abolished. The experience of the past 36 years clearly establishes a link between the executive presidency and the rise of authoritarianism in the country. However, given the fact that both republican constitutions ignored constitutional first principles and the draft

²⁷ These will have to be worked out once some of the other features of the constitutional reform process are determined.

Constitution Bill of 2000 was also inadequate and deficient given international best practice, there is a need for an informed and participatory constitution reform initiative.

The process by which a new constitution is to be adopted must be carefully reviewed. The process adopted will affect the content or substance that emerges from the process. Unlike during the period 1995-2000, where it seemed as if the drafts were amendments to the text of the existing constitution, there should be a fresh start. Political parties and the legal community must be willing to learn the lessons from the past, be open to new developments and most important of all, reflect on and internalise the basic conceptual foundations of constitutionalism. One can only hope that the promises of the Sirisena-Wickremesinghe government for its first 100 days in office with respect to constitutional reform are fulfilled and that the results of the next parliamentary election are conducive to a more ambitious and radical constitutional reform process that Sri Lanka so badly needs.