ISSN: 2659-2150

LST REVIEW

Vol 29 | Issue 347 | Jan. 2019
www.lstlanka.org

LAW & SOCIETY TRUST

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First Published 2019

ISSN (print): 1391-5770
ISSN (online): 2659-2150

Printed in Colombo Sri Lanka

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Will Sri Lanka ever have a People's Constitution?

On the evening of Friday, 26 October 2018, the nation of Sri Lanka was taken by surprise. The Presidential Secretariat made three dramatic announcements: the UPFA's withdrawal from the government, the swearing-in of Mahinda Rajapaksa as Prime Minister before the President and Ranil Wickremesinghe being informed in writing of his removal from the office of Prime Minister.

As a woman in Wellawaya put it succinctly: "The government had changed without anyone knowing".

A population that had for the large part been sleepily looking forward to the weekend was now abuzz. Social media was on fire. People from all walks of life had strong views on the matter. Supporters of the move lit firecrackers. Life-size plastic banners of Rajapaksa sprouted across the country. Those rejecting the removal of the prime minister in this manner protested through online petitions and op-eds citing the Constitution and rule of law. Groups emerging to defend the Constitution formed unlikely coalitions.

As Wickremesinghe refused to step down or leave his official residence, the President dissolved the Cabinet and prorogued Parliament. The story made it to page 7 of the New York Times. Foreign diplomats in Sri Lanka were faced with a dilemma – which prime minister should they call on? A visit to one was tantamount to recognition; failure to visit akin to rejection.

All eyes were on Parliament that had to show its support to one or the other of the contesting prime ministers. The political drama spilled over to Parliament where some members crossed from one side to another and then re-crossed to their base. MPs were said to be demanding payments so large to cross over that they were unaffordable and parliamentarians attacked each other in the chamber of Parliament itself. The refusal of Wickremesinghe to concede provided the space for civil society to take the matter to the Supreme Court. The Supreme Court judgment was historic and while it ended the crisis in the short-term the implications for the future are not clear. Despite the electoral promises to abolish the executive presidency, the politicians remain tempted by the powers of that office. Commitment to democracy and rule of law is thin on the ground – especially among the elected representatives of the people.

This edition of the REVIEW takes a consummate look at the events that unfolded from 26 October 2018. It also surveys the precedents that allowed for the crisis, our long history of political meddling in the constitution and its impact on the constitutional culture, the Supreme Court's paradigm shifting decision and the thought processes of the Sri Lankan populous at large as the events unfolded.

We begin our review with Vidura Prabath Munasinghe, who takes us on an instructive journey of revelations - some predictable and others unexpected, from when he and his team traversed across the country in the immediate aftermath of the 26 October crisis. Over 140 women and men in 22 districts were interviewed in the space of a month to gauge the Sri Lankan people's stream of consciousness as they reacted to the events of 26 October and the consequent actions that immediately followed.

Interestingly, while 18% were puzzled by the events to the extent that they were unable to decide on its results, those who condoned and condemned were of equal proportions. A majority of respondents approved of Wickremesinghe losing the office of prime minister and this was in line with the results of the local government elections held earlier that year. This result was not influenced by ethnic affiliations. The Central Bank bond scam, whilst out of the mainstream media was still firmly embedded in the average Sri Lankan's mind. Also noteworthy is that despite Rajapaksa's taking of office being met with initial approval by 44% of the respondents, he began to lose this endorsement rather quickly as the consequent events played out.

Lal Wijenayake gives an insider look at the constitutional reforms process thus far and points out how the on-going process differs from previous constitution-making attempts. He was the chairman of the group of 20 academics and professionals charged by the Cabinet to put together a report of their recommendations based on public representations – both written and verbal – from all 25 districts. The representations included organisations such as trade unions, civil society and religious associations, and citizens' views as well. He is uniquely suited to provide insights into the process.

Unlike the previous constitutions, drafted by a small elite, hidden from plain sight in spaces of privilege and power, Wijenayake contends that the present process included public participation and also the participation of all political parties through their representation in the steering committee and in the six subcommittees to assure an all-party process. He attributes the delay in presenting the draft constitution to the democratic and representative process itself, asserting that consensus is of primary importance to create "a Sri Lankan nation with a Sri Lankan identity,

where all citizens will be equal and proud to call themselves Sri Lankans".

Meanwhile, Suri Ratnapala from Australia provides an academic's eye view of the challenges of sustaining constitutional government and the lessons learnt in the recent crisis. He points out that threats to constitutional government could come from above and below and that populism and weak institutions may also undermine democracy. If Sri Lanka's constitutional crisis precipitated by the President on 26 October has a positive outcome, it is the demonstration that a constitution will not be saved by its text without the social forces that sustain it. Ratnapala cites the Sri Lankan example as a demonstration of the living constitution that evolved and may set an example to other liberal democracies. He nevertheless points out that the very fact that we applaud the judges for upholding the Constitution itself points to our history of judicial improbity until recently and that the constitutional crisis made palpable the absence and weakness of a "matrix of supporting institutions" in Sri Lanka.

An overall culture of 'playing by the rules' is created by more than judicial ethics but also in the acceptance of judicial judgments by officials and citizens, where "undue political pressure is neutralised by counter pressure from civil society". To survive the inevitable political and private machinations, the constitution as written must thus derive strength from a supporting institutional fabric rooted in popular attitudes.

Radhika Coomaraswamy makes an incisive examination of the Supreme Court's verdict, including the respondents' and defendants' arguments and the judges' line of reasoning in reaching their decision, as they traversed traditional lines to draw from cases and commentary beyond Sri Lankan shores and opened up many areas of executive and legislative power to the scrutiny of rule of law.

In line with the work of Ronald Dworkin, the Supreme Court did not focus on underlying policy or politics like the American Realists and the Critical Legal Studies schools of jurisprudence nor did it seek to uncover the policy imperatives and attempt to give direction or reconcile them like some of the great realist judges of the US Supreme Court. Instead, the court reiterated giving a statute its plain and ordinary meaning with the condition that the object of all interpretation is to discover the intention of Parliament, while applying the harmony principle. The court also spelled out as principle the legal maxim that the specific provisions must be given preference over the general unless there are specific words to the contrary.

And finally, Sakuntala Kadirgamar, Executive Director of the Law and Society Trust, delves into the implications of culture for constitution building and constitutional government. Using the prism of political culture in particular, she examines its impact on shaping Sri Lanka's Constitution over the years.

She argues that our constitutional culture was chartered in the non-consultative and non-participatory process of drafting and adoption of the 1978 Constitution. It slid through the parliamentary process as a constitutional amendment of the 1972 Constitution and she traces the constitutional amendments passed to serve political expediency. The frequent amendments of the constitution for partisan reasons has undermined confidence in it and eroded the concept of constitutionalism.

The support that the President received in the early days of this crisis, and the delayed challenges to his actions that enabled him to dismiss a Cabinet and unilaterally install a prime minister and Cabinet of his choice,

demonstrates the deeply ingrained "executive mentality" that does not readily question extraordinary interventions by the executive and may even support such interventions.

The economic cost of this crisis was high. But if nothing else, it channelled extraordinary conversations around the country, not only in think tanks but also by people sipping steaming *kahata* in their *wattas*. Democracy, sovereignty, rule of law, the social contract and political morality were all deconstructed and inspected before opinions were offered and debated on how the system can and should be fixed. As Radhika Coomaraswamy wrote: "The Constitution came alive and had meaning for ordinary people."

A recurring theme however has been the necessity for active citizenry to ensure the constitution is upheld and functions as a living organism, responsive to the social, economic and cultural developments since its framing. Furthermore, for the constitution to be meaningful for the country as a whole all the people's voices must be heard and they must be empowered to fight for their rights and concerns. This however, as revealed in Munasinghe's article, is lacking, with the average citizen feeling a lack of ability or power to change the destiny of the country beyond casting a vote in the ballot box. This in turn has repercussions for the constitutional reforms process as well as the endurance of Sri Lanka's constitutional democracy.

AROUND THE NATION IN FIFTY DAYS: How the People Engaged with the Constitutional Crisis[1]

VIDURA PRABATH MUNASINGHE

The author captures citizens' reactions and opinions during the constitutional crisis that engulfed Sri Lanka in the 50 days following 26 October 2018 via in-depth interviews carried across a cross-section of the country with the objective of examining how the citizenry responds and reacts to a complex political scenario of this nature.

Introduction

It was around 1pm on 26 October 2018 when we three researchers left Monaragala for Colombo having completed a field study. The batteries of our mobile phones were exhausted and there was no radio in our vehicle. We slept for the most part of our journey. It was around 7.15pm that we stopped in Nugegoda for one of our team members to alight. A person who was outside my colleague's home informed us that Mahinda Rajapaksa had been sworn-in as the new prime minister. It took us a long time to process this news. Observing our surroundings more keenly, we began to notice that everyone was watching this piece of news play out on televisions in their homes and in shops. In some places, people were gathered in clusters and firecrackers were being lit.

There had been no sign of regime change when we left Monaragala. But everything had changed within a few hours. In retrospect[2], the few hours we had spent out of the loop of regular communication felt like travelling to the future through a vacuum tube. If proper processes had been followed, a change in government would have been possible in one-and-a-half years at the earliest.[3]

In the 50 days passed beginning 26 October 2018, many changes have taken place in the country's political, economic, legal and social spheres, resulting in more proactive dialogue on politics among the public. In these discussions many aspects of democracy, sovereignty of

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the people, rule of law, social contract and political morality were animatedly discussed at many different levels. What was remarkable was that people, regardless of their level of education and place in the social hierarchy, had a keen appreciation of what appeared to be abstract concepts - democracy, sovereignty of the people, rule of law, the social contract and political morality - and proactively engaged with the political events that unfolded during this short period of fifty days.

Objective and methodology

The objective of this research was to examine how people critically engaged with their political realities and made sense of the concepts of 'democracy' and 'sovereignty of the people' at a/this time of political turmoil.

Given the rapid turn of events, data had to be gathered quickly and the analysis completed swiftly, to accurately capture the pulse of the people and their reactions. Hence, data collection for this study was begun on 29 October, three days after the commencement of this controversial series of events, and was concluded within a month. In-depth interviews were carried out, with 143 men and women from various socioeconomic levels and hailing from 22 districts in the country. The interviewees were drawn from Borella, Thalawathugoda, Bambalapitiya, Kiribathgoda, Panadura, Rathupaswala, Puttalam, Anuradhapura, Polonnaruwa, Jaffna, Mullaitivu, Trincomalee, Batticaloa, Kattankudy, Ampara, Pottuvil, Siyambalanduwa, Panama, Wellawaya, Monaragala, Buttala, Bandarawela, Galle, Matara, Walasmulla, Ratanapura, Kandy, Matale, Kurunegala, Badulla and Thalawakele.

The sequence of sociopolitical events that unfolded within this one-month long period are summarised below as the views expressed by the interviewees were influenced by the rapid turn of these events.

The Sequence of Events

26 October – *The United People's Freedom Alliance decides to withdraw from the coalition government. The President issues three Gazette notifications: removing Ranil Wickremesinghe from the office of prime minister[4], dissolving the Cabinet[5], and appointing Mahinda Rajapaksa as the new prime minister[6]*

27 October – *The United National Front led by Ranil Wickremesinghe refuses to accept the decision of the President and demands for an emergency session of Parliament[7] to prove its majority*

27 October – *President prorogues Parliament until 16 November*

28 October - *Members of Parliament begin to cross over to support Mahinda Rajapaksa*

29 October – *Swearing–in of the new Cabinet begins (and is finalised on 9 November)*

30 October – *A letter signed by 128 members of Parliament requesting that Parliament be convened is handed over to the Speaker of Parliament*

30 October – *Groups that both oppose and support the decision of the President begin to hold protests and rallies*

2 November – *The Mahinda Rajapaksa government is subjected to allegations of "buying off" MPs*

2 November – *No-confidence motion against Mahinda Rajapaksa is handed over to the Speaker of Parliament*

4 November – *President issues Gazette to convene Parliament on 14 November[8]*

9 November – *President issues a Gazette Extraordinary dissolving Parliament[9] and setting the date of election as 5 January 2019*

10 November – *13 petitions are filed with the Supreme Court requesting the Gazette issued by the President to dissolve Parliament be nullified on grounds that the decision of the President is a violation of the Constitution*

13 November – *Supreme Court grants leave to proceed to the petitioners and issues a stay order on the Gazette to dissolve Parliament issued by the President*

14 November – *Parliament convenes. Amidst many disturbances, the no-confidence motion against Mahinda Rajapaksa is passed with a majority*

15 November – *Speaker sends a letter to the President informing him that a no-confidence motion has been passed by 122 MPs against Mahinda Rajapaksa and asking him to take further action according to the Constitution*

15 November – *President informs the Speaker of Parliament that the manner in which the no-confidence motion was passed in Parliament cannot be accepted and a fresh no-confidence motion needs to be moved and passed in Parliament formally*

16 November – *MPs who support Mahinda Rajapaksa disrupt the Speaker's duties in the chamber of Parliament and Speaker announces that the no-confidence motion moved against Mahinda Rajapaksa is passed for the second time. The President does not agree with the manner in which the no-confidence vote was passed in Parliament and does not accept it*

24 November – *122 MPs submit a petition to the Court of Appeal requesting a writ of Quo Warranto challenging the functioning of Mahinda Rajapaksa and his Cabinet on grounds that their appointment is not lawful*

29 November – *Parliament passes a motion prohibiting the use of public funds by the new Cabinet and ministry secretaries.*

03 December – *President states that he will not make Ranil Wickremesinghe the prime minister even if he is the choice of all 225 MPs*

07 December – *Court of Appeal issues a writ of Quo Warranto suspending Mahinda Rajapaksa and his Cabinet functioning as the prime minister and ministers, respectfully. (Mahinda Rajapaksa appeals to the Supreme Court against this writ)*

08 December – *President says that Mahinda Rajapaksa could not show a majority in Parliament because the price of MPs had gone up to the point where he could not afford it*

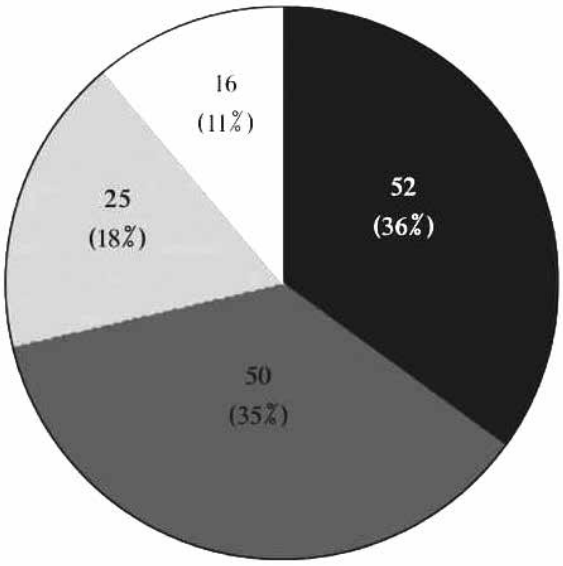
12 December – *A motion is passed in Parliament requesting Ranil Wickremesinghe be re-appointed as prime minister*

13 December – *Supreme Court determines that the Gazette published by the President dissolving Parliament is against the Constitution*

15 December- *Mahinda Rajapaksa resigns from the office of prime minister.*

Re: Incident on 26 October

All our discussions with the respondents began by referring to the incident on 26 October, the first event that set off the series of consequent events. Of the 143 individuals we interviewed, 50 (35%) stated that they endorsed the aforesaid event while 52 (36%) expressed their disapproval. Another 25 (18%) claimed that it puzzled them and that therefore they are unable to determine its effect. Sixteen respondents wished to express no remarks in this regard.



People's views on the event that took place on 26 October

(Chart 01)

Although the number of persons who endorsed or disapproved of the event appear to be equal, it is interesting to note that with the exception of seven persons (from Galle, Panama and Polonnaruwa), all who expressed disapproval were Tamils or Muslims, from Batticaloa, Jaffna, Puttalam, Kattankudy, Wellawaya and Thalawakele. Quoting one Sinhalese woman we met in Panama, who expressed her disapproval:

> *"Even the SLFP supporters were surprised by the incident of the 26th. My uncle is one of them; he stated that doing this overnight was unfair. However, as party supporters they do not want to admit this out in the open. It is true they lit firecrackers on the 26th because they were happy about forming a government from their party. After the court decision was given,[10] the UNP supporters lit firecrackers. However, the SLFP supporters did not make that a problem. That is because they knew that the victory they had celebrated earlier should not have been celebrated".[11]*

This captured the gist of the views of many.

A woman from Wellawaya stated that she was terrified when she heard the sound of firecrackers on 26 October. She assumed they were lit because elephants had come into the village.[12] She referred to the incident saying: "The government had changed without anyone knowing".[13] A majority of the people who spoke with us found it incomprehensible that the change took place without any consultation with Parliament or the people. In short, they stated that "the manner in which it was done was not appropriate".[14] Many of them saw this as a political conspiracy. The words they used to interpret the government change were: "An issue between two or three leaders has been converted into an issue affecting the whole country".[15] Some referred to the incident as "a fascist decision"[16], "an unconstitutional decision"[17], "a decision against rule of law"[18], "an act that denies people the right to vote"[19], "a decision taken with greed for power"[20], and "big shots changing things without consulting the people".[21] As a result, those who did not approve of the incident of the 26th viewed it as leading to instability[22] and making the country appear ridiculous in the eyes of the world.[23]

The majority that endorsed the incident of 26 October were Sinhalese and the ideas they expressed were generally based on their belief that the country was heading in the wrong direction and that this action was taken to change it. That is why they felt great happiness when they heard the news.

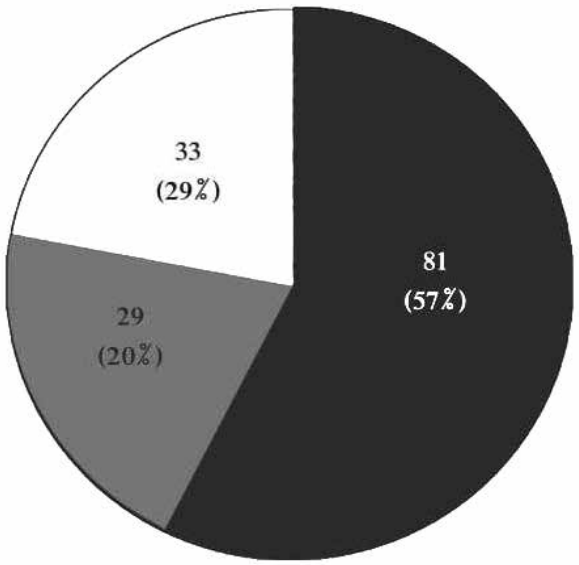
> *"We were elated with happiness and went looking for firecrackers. We even gave a dansala."[24]*

Ranil Wickremesinghe vs Mahinda Rajapaksa

Going beyond their personal feelings of elation or frustration about the events of 26 October, people had their own perceptions about the rationale behind this move. According to one public servant from Panadura, the local government elections held in February 2018 was a clear indication of the people's dissatisfaction in the direction that the Ranil Wickremesinghe government was heading.[25] The response of the people towards the government was not portrayed at the national level. What took place on the 26th was rectification of this mistake.[26] Further, some people stated their belief that this move was made to stop the signing of a number of agreements which would have been detrimental to the country.[27]

It was not only the majority of those who approved of the event of the 26th but also a considerable number of people who disapproved of this event who found it reasonable that Ranil Wickremesinghe lost the premiership. Eighty-one (57%) expressed their approval of his removal and only 29 (20%) disapproved of it. Meanwhile 33 (23%) refrained from expressing a clear view in this regard.

The overwhelming majority of those who expressed their disapproval of the incident of the 26th were Tamils and Muslims, but no such distinction could be observed with respect to people's opinion about Ranil Wickremesinghe losing the premiership. The majority of persons from all ethnic groups interpreted it as a positive change. The general perception that non-Sinhalese groups favour the United National Party did not appear to be valid with respect to the respondents of this survey. However, members of the Sinhalese community who expressed their views appear to be of the opinion that the Tamil and Muslim communities prefer the UNP.



Removing Ranil Wickremesinghe from the post of Prime Minister

(Chart 02)

"Ranil is a man who depends on Muslim and Tamil votes." [28]

"Ranil was on a journey that went against our religion and culture." [29]

Much of the displeasure expressed at the Ranil Wickremesinghe government was centred on his economic management. No ethnic or geographical distinction could be seen in respect to people's disapproval over this matter.

"Ranil did not provide any jobs. He only favours the rich. He does not voice the common man's needs." [30]

"There were weaknesses in the manner he intervened and took action with respect to the political and economic problems of the country." [31]

" *He sold the resources of the country. He gave vouchers instead of school uniforms. Some people in our villages don't even know what a voucher is."* [32]

"Ranil never thought of the lower class commoners like us."[33]

"Development should benefit people, but this development does not."[34]

The majority of the people we met all over the island believed that Prime Minister Ranil Wickremesinghe should be held responsible for the Central Bank bond scam.[35] This was the example cited by many when speaking about deficiencies in his management of the country's economy. When asked about matters that should be given priority by any future government, 69.2% of the respondents stated that the economy should be given priority. A large majority of the people who approved of Ranil Wickremesinghe losing his premiership were also of the opinion that he was not successful in managing the country's economy.

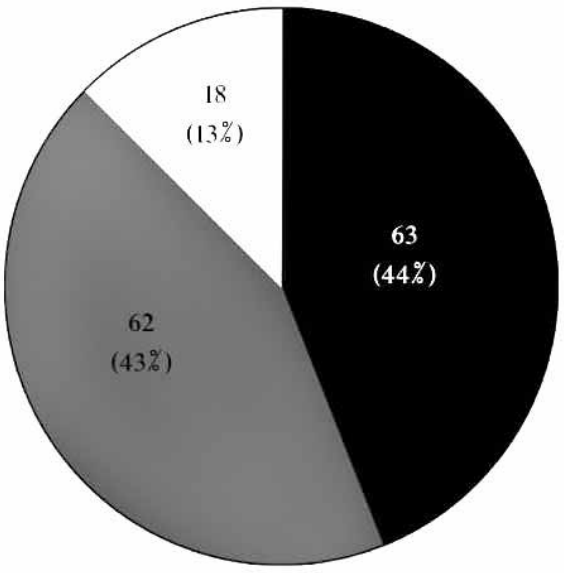
Although the dissatisfaction expressed by the people over economic policies and management of the economy by Ranil Wickremesinghe was uniform regardless of ethnic and geographical differences, a large majority of those who expressed their approval of Mahinda Rajapaksa's political policies belonged to the Sinhalese community. Of the 143 people interviewed, 48 belonged to Lankan Tamil, Indian Tamil and Muslim communities. Of those, 37 (77%) expressed their objection at Mahinda Rajapaksa becoming the prime minister on the basis of the political policies adopted by him when he was president.

"A person who was defeated at the last presidential election by the Tamils as well as people of this entire country, and a person who was involved in crime should not have been appointed as the prime minister." [36]

"Mahinda should never be allowed to come back to power. We can never forget the destruction he caused on the Tamil people." [37]

"Mahinda returning to power is a danger to the Muslims and the country in general."[38]

Although the argument that economic development will render all these other political issues secondary or insignificant has been emphasised in many political platforms and dialogues, this brings us to the conclusion that it is not so when applied to the Tamil and Muslim communities. In general, 63 (44%) of the 143 persons interviewed viewed Mahinda Rajapaksa becoming the prime minister as a positive change, while 62 (43%) expressed their disapproval. Eighteen (13%) refrained from commenting.



Appointing Mahinda Rajapaksa as the Prime Minister

(Chart 03)

Political Morality

In interviews carried out in majority-Sinhalese areas, a majority viewed the change as for the better. In particular, it was evident that they were ecstatic over the changes taking place during the first 10 days.

"Everyone likes Mahinda. What else needs to be said? Ranil has no choice but to accept defeat and step down." [39]

"No matter what happens in Parliament, Mahinda should win. Not only will he win but he will continue to stay in power." [40]

However, as the days passed and incidents such as the court cases being filed and the disturbances occurring in Parliament unfolded, people began to look more critically at Mahinda Rajapaksa becoming the prime minister. This was evident in the views they expressed.

"It would have been better if Mahinda became the prime minister by means of an election rather than this." [41]

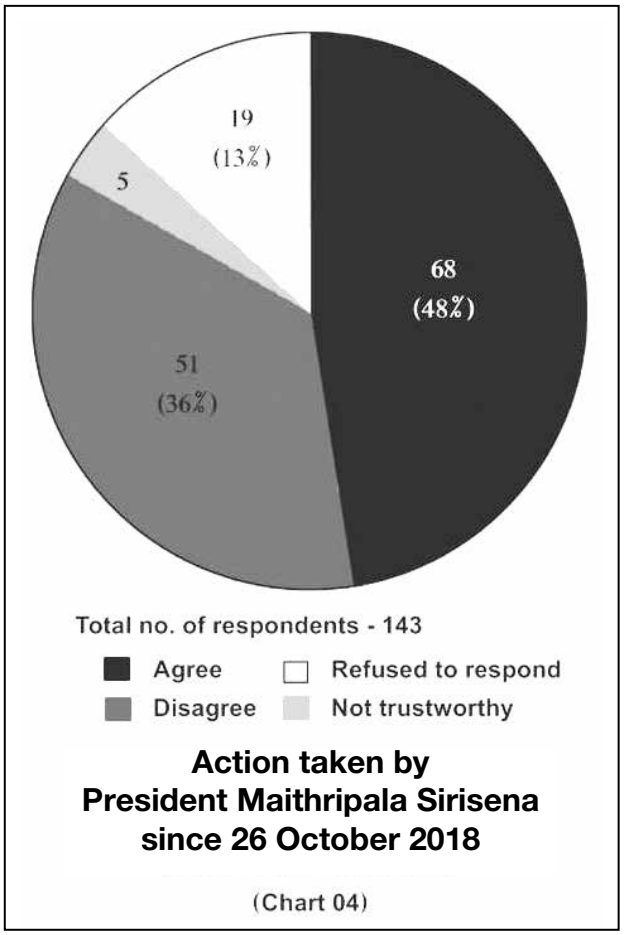
"I like the fact that Mahinda has come to power but this is leading the country towards autocracy. I say this because Mahinda did not respect the majority vote of Parliament." [42]

After about two more weeks, even the Mahinda Rajapaksa supporters had started to worry.

"Mahinda is going to forge ahead no matter what. After being defeated, he kept on pursuing power not to return to it but to hold on to it. Anyways he is a rowdy." [43]

Thus, the change in views expressed made it evident that although a majority of the Sinhalese people were in favour of the change that took place on 26 October with Mahinda Rajapaksa becoming the prime minister, the issues of political morality and how the changes were enacted were also important to them.

The people's understanding of political morality was observed through the views they expressed regarding the conduct of the President. Of the 143 interviewed by us, 68 (48%) stated that they did not agree with the President's action to appoint Mahinda Rajapaksa as prime minister and his consequent actions while 51 (36%) stated they approved of his action. Five people said that while they agreed with the action taken by the President, they had concerns of whether his intentions were genuine. Nineteen (13%) refrained from commenting.



Action taken by President Maithripala Sirisena since 26 October 2018

(Chart 04)

In almost all areas, the people who expressed disapproval over the President's action on 26 October said that the basis for their disapproval was the gap they observed between the ideas he expressed before the people in 2015 and his present conduct. Many were of the opinion that his action was in violation of the agreement he entered into with the people, and that he should have presented his reasoning to the public before making a decision of this nature. They saw it as a breach of ethics. A woman from Panama stated that the President levelled allegations and accusations against Ranil Wickremesinghe – allegations of assassination conspiracies, Wickremesinghe's dependency on the west and betrayal of the country - after

the President breached his agreement with the people and that this was not acceptable. According to her, the President should have spoken to the people about these allegations not after but before 26 October because the agreement was between the President and the people and not between the President and the Prime Minister.[44] Many others alleged that the President "came to power promising that the powers of the executive presidency will be curtailed"[45] but is now "acting like an autocrat abusing his power in breach of people's trust in him"[46] because of his "hunger for power which is making him leverage loopholes in the law".[47] Thus people doubted the credibility of the President. They used phrases such as "this is similar to his decision which was taken in 2015 after a meal of hoppers"[48] and "this is like abandoning one woman for another"[49] to describe his actions.

Even the people who justified the President's action, quoting reasons such as the assassination conspiracy, bad economic decisions taken by Ranil Wickremesinghe, the Central Bank bond scam and proposing a constitution that would divide the country, stated that the action adopted was not ethical. They did not express similar ideas concerning morality when it came to Ranil Wickremesinghe as the majority of them had already rejected his actions. According to them, their agreement was with Maithripala Sirisena and not with Ranil Wickremesinghe. It was this pact that the President had breached.

Another noteworthy point is the manner in which Tamil people of the North viewed this sequence of events with suspicion. According to some, "there is an outside influence behind these events".[50] A small business owner interviewed in Jaffna saw these events as "a response to the new political realities created as a result of the divisions within the Tamil National Alliance in recent times".[51]

While some saw the action of the President on 26 October as a means for facilitating people's aspirations, some stated that the people's aspirations were the last thing taken into consideration when this decision was made. A person from Batticaloa stated that the incident of 26 October reminded him[52] of the movie *Mudhalvan*.[53]

> *"Maithri is thinking only of himself. He is not thinking of the common man."* [54]

> *"People were under pressure. But the decision of the President was taken based on the assassination conspiracy. So we cannot say he took decisions thinking of the people."* [55]

Representative Democracy, Supremacy of Parliament and Sovereignty of the People

In the interviews, the respondents presented considerably rational and profound ideas in relation to representative democracy, parliamentary supremacy and sovereignty of the people. Their attention was primarily focused on the exchange of political power during the first week. The views they expressed in the first week were based on their approval or disapproval of the changes that were taking place at the time. They also spoke of their positive or negative outlook about future socio -political and -economic conditions in relation to the changes that took place after 26 October. During the first 10 days after 26 October, they were expecting the new government to govern the country and forge ahead. Those who saw this change as a change for the better did not appear to take any serious interest in the need to establish a majority in Parliament or question the legitimacy of the process adopted.

> *"It doesn't matter whether they convene Parliament or not. Mahinda has the majority.*

Even if Parliament states something to the contrary, the President will take care of that too." [56]

"There is literally nothing that Parliament can do. Everything has already been decided. No matter what decision is taken, this government shall be the government." [57]

"Whether it is through Parliament or through some other means, what happened is good. That is all." [58]

"It does not matter who acknowledges the decision of Parliament and who doesn't. We support the new government." [59]

An interviewee from Kurunegala stated on 1 November: "How many other governments have functioned without a majority? A majority is needed only to pass finance related bills and other such bills. Otherwise there is no use for a majority".[60]

However, the subsequent events that unfolded in Parliament - the clashes in Parliament, no-confidence motions, legal actions, MPs crossing over and general conduct of politicians - resulted in the people scrutinising the situation with a more critical eye. By the time a month's duration had lapsed since the initial event, they had begun to seriously ponder the instability created in the country.

A woman selling betel in Polonnaruwa commented, "If Parliament represents us, they cannot come to a decision that is against our wishes".[61] This statement, simply worded, indicated her view that if Parliament is to maintain its legitimacy, it cannot represent a standpoint that is different to the standpoint of the public. "If a Mahinda Rajapaksa government is what the people seek, there is no way that Parliament can decide otherwise,"[62] she continued.

The situation was further complicated by MPs crossing over from one political party to the other. Nearly all respondents were against this behaviour. They were of the opinion that "a representative who crosses over to other political parties no longer represents the people he/she was elected to represent. When this continues, Parliament can no longer be considered a place that represents the people".[63] Under such circumstances, "the majority that either Mahinda Rajapaksa or Ranil Wickremesinghe is able to show in Parliament is rendered unacceptable".[64] Another respondent commented, "Parliament cannot be considered a proper representation of the people as some candidates who lost the 2015 election have been appointed to Parliament through the National List".[65] All these statements raised the same concern: if Parliament is meant to represent the people and does not do so due to some reason, what legitimate right does Parliament have, to represent the sovereignty of the people?

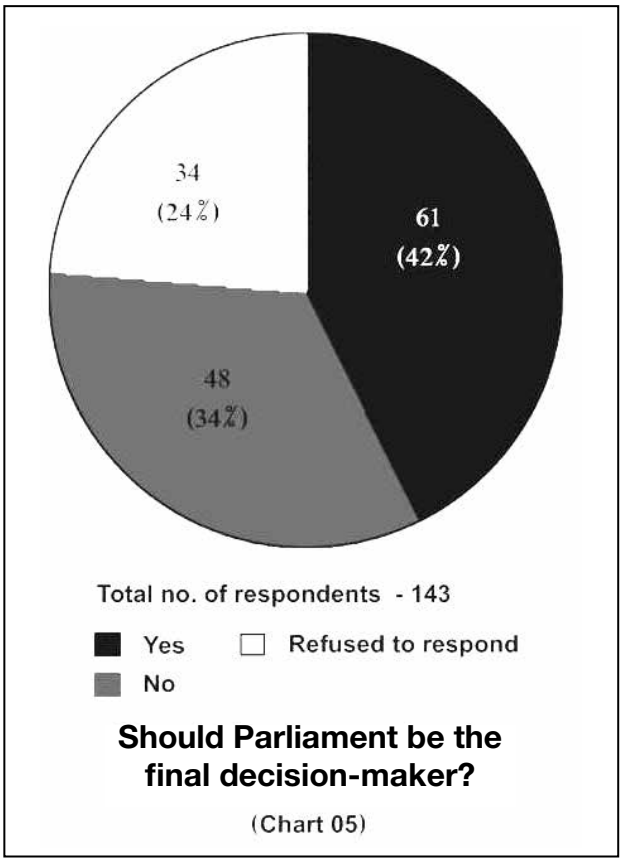
"These MPs in Parliament cross over to other political parties. If we, the people, are the source of their power, why should we accept this distorted Parliament?" [66]

"We have now seen it is the law of the jungle that operates in Parliament. Therefore it no longer holds dignity or power." [67]

"They are the ones who say that Parliament is supreme. However, they are the same people who destroy the dignity of Parliament. Political parties will have to accept the decision of Parliament even if it is against public aspirations. However, the people do not need to accept it. A Parliament that does not represent the people needs not be accepted by the people." [68]

Of the 143 we interviewed, 61 (42%) believed Parliament to be the institution that could resolve this dilemma while 48 (34%) were of the opinion that Parliament is not in a position

to resolve this dilemma; 34(24%) refrained from responding.



(Chart 05)

Those who stated that a solution to this issue should be found through Parliament were also of the belief that despite everything, an institution that implements democracy should not be ignored or bypassed. According to them, rejecting Parliament leads to creating military rule[69] and that only Parliament can affirm the lawfulness of an appointment.

> *"No matter who is appointed it should be done in a lawful manner."* [70]

> *"Taking decisions outside of Parliament is a way to direct the country towards militarism."* [71]

> *"The whole world is looking at Parliament, so approval of Parliament is paramount."* [72]

Another respondent stated that questioning the legitimacy of Parliament's response to an act that challenged the law is not justifiable. According to him, this dilemma, created due to a legal error, should only be resolved by following the law.

> *"Instead of the will of Parliament, a decision taken by two people has been implemented. Now, a person who attended Parliament only 10 times (sessions) during the whole year*[73] *has become the prime minister."* [74]

A woman from Wellawaya stated: "No matter what the problem is, it should be resolved within the framework of the Constitution. When Mahinda was president, he never went against the Constitution no matter what he did. He acted within the framework of the Constitution".[75] While the majority were of such an opinion, another segment opined that the situation had escalated to a level where accepted methodologies could not resolve it. A respondent from Anuradhapura stated, "What is the use of the Constitution when the country has been doomed?"[76] A similar thought was expressed by a woman in Ratnapura. She commented that while the final decision should be lawful, it should also represent the will of the people. According to her, the law exists to serve the people. She was of the opinion that seeking refuge in the law when there are shortcomings in it will only serve to reveal the failure and limitations of the law. In such instances the intention behind the law must be taken into consideration and the law must be amended suitably to reflect that intention.[77]

A university student from Colombo stated that "the incident of 26 October was a legal and procedural error and hence is wrong even if Parliament approved it".[78] A woman from Panama said that the issue had escalated to a level where it cannot be resolved through the Constitution. According to her, "referring to the Constitution again and again in an attempt to resolve this problem will only dishonour the Constitution".[79]

These views indicate the depth of understanding of the people of current political realities. Their analysis of the situation was remarkably advanced and amazed the research team.

Some stated that given the current situation, this dilemma could only be resolved by referring the matter to the source of sovereignty, i.e. the people. They were of the opinion that the only way out of this deadly trap is to elect a new Parliament, reflecting the will of the people.[80]

Some respondents proposed holding an election and referring the matter to the people who hold sovereignty in order to strengthen representative democracy in Parliament. Other respondents proposed having an election so that a mandate can be obtained to overcome the conflicting ideas in Parliament and to concentrate power on one central figure. According to them, the majority of the people expect such a leadership and found it in none other than the charismatic leadership of Mahinda Rajapaksa. It is interesting to note that all the remarks endorsing the charismatic leadership of Mahinda Rajapaksa were expressed only by Sinhalese respondents.

> *"A tough guy comparable to Mahinda has never been elected to the leadership of this country. No one has a problem with the things he does, even if he sells the country. Because this is the country that he saved."*[81]

> *"No matter how the numbers games play out in Parliament, the people of the country prefer Mahinda. It is the power held by the Tamils and Muslims that will be decisive in Parliament."*[82]

> *"If we are to make a decision in the name of the country without giving into the Tamil and Muslim influence, we must go into an election."*[83]

Despite differences in reasoning, the general emphasis was on the fact that the people who hold sovereign power should be the ones making a decision. Therefore, it is important to scrutinise how people have interpreted their responsibility as citizens in a time of political dilemma. When consulted, 63 (44%) of the 143 respondents indicated that they see no other means of citizen activism other than voting at an election. The majority of them did not express any initiative beyond crowning their preferred political party or personality.

> *"If they ask us to do something, we oblige. We will do anything at all. If they ask us to protest, we will. If they ask for our vote, we will give it."*[84]

> *"What else can we do other than giving our vote? We are here struggling to sell some betel, what else can we do?"*[85]

A considerable number of people emphasised the need to remain peaceful during such times of political uncertainty. They also stated that when the political party they support is in power, they must continue to support the government despite any short-term economic and other hardships they might have to suffer. Some were of the opinion that the smart thing to do at a time like this is to stay away from politics.[86] Others expressed sadness over the lethargic reaction of the people with respect to the situation but were unable to convey anything substantial on how citizens can become active.

> *"All this time our people were waiting, they did nothing. It will be the same in the future."*[87]

> *"Sri Lanka is not a good country to live in. Better to just leave."*[88]

> *"If our people cannot govern our country, at least someone should come from another country and take it over."*[89]

A number of respondents expressed disappointment over the conduct of the major political parties of the country. On the same basis, some commented that it is now time to consider other political alternatives. However, our general observation was that even those who expressed powerful and advanced critical thoughts on parliamentary democracy and sovereignty of the people failed to make any clear comments about citizen activism. This was especially evident in the responses made by those from the North and the East who particularly spoke about the need to ensure parliamentary democracy and rule of law. According to them, citizen activism is not something they can afford anymore. They believe that their ability to do that ended when the war was ended. They were of the opinion that the responsibility of the citizenry has now fallen on the Sinhalese who should now fulfil that responsibility. With the exception of one person, all respondents from Jaffna viewed this dilemma as one of the Sinhalese government in the South. One person stated: "The 19th Amendment which was made by the Sinhalese for the Sinhalese has been made such a mockery of by the Sinhalese themselves. Imagine what would have happened if they had given us a political solution: How they would have crushed it."[90]

That the people of the North felt that a crisis in the state was not their problem, but a problem of another state,[91] 10 years since the end of war, is a matter that requires deep scrutiny.

Many who expressed exultation at Mahinda Rajapaksa coming to power, approving the event of 26 October along with its emerging political complexities, opined that the will of the people must be gauged through a general election and not based on a distorted Parliament. They did not articulate a need for active dialogue among the citizens, as they believed Mahinda Rajapaksa would fulfil all responsibilities. Their responses to questions in this regard were short and precise. A statement made by a three-wheeler driver in Kurunegala can be considered as a summation of their views.

> *"There is nothing we can do. Mahinda mahaththaya will take care of everything."*[92]

Conclusion

The event of 26 October 2018 propelled the people of Sri Lanka to enter into debates on politics and law of unprecedented complexity and within an extremely short period. In the 50 days (from 26 October to 15 December), the majority of the people critically viewed the sequence of events unfolding before them. They treated them and debated on them with marked seriousness. Some of the ideas they expressed are highly advanced and profound. It is inconceivable that they would have engaged on these issues under normal circumstances. However, under extraordinary and intense political events of this nature, they had to stretch their minds and understanding. It is important to note that it was ordinary men and women in society who expressed these thoughts. However, they did not indicate possession of the imagination or will to convert their advanced political understanding into a role of active citizenry.

Despite the numerous limitations of this study, carried out with a sample of 143 individuals from across the country, it is important to note that the objective of this study was to examine how people responded and reacted to a complex political scenario of this nature. This study attempted to document the responses and interpretations of the common people on democracy and people's sovereignty in a politically intense moment. However, amidst all the positive ideas expressed by the people,

it was crystal clear that there is a need for a serious dialogue on citizens' activism as this is a perquisite for a politically advanced society.

Notes

[1] The initial idea for this research - to capture citizen's reactions and voices - came from Dr. Sakuntala Kadirgamar, Executive Director of Law & Society Trust (LST). The staff of LST including P.M. Senarathne, Anuradhi Jayasinghe, Tharmika Selvaraj, Zamruth Jehan, Vijekanth Madasamy, Imesha Perera, Kaushalya Ariyarathne and Natasha Vanhoff rendered invaluable support to complete the fieldwork required for the study within a short period of one month. LST research assistants Prabath Hemantha Kumara, Malinga Jayarathne, Ishan Chamara Batawalage and Lakshan Abeygunawardena deserve heartfelt appreciation for travelling extensively to many districts all over the island in order to conduct interviews. LST Director of Operations and Programmes Sandun Thudugala is acknowledged with appreciation for his insights and valuable comments made during the research process.

[2] This paper was written between 8 and 15 December 2018

[3] As per the 1978 Constitution, a term of Parliament is five years. The last general election was held on 17 August 2015. Thus the term of the current Parliament is set to end on 16 August 2020. As per the 19th Amendment to the Constitution, the president may dissolve Parliament only after the lapse of four-and-a-half years.

[4] Gazette Notification No. 2094/43

[5] Gazette Notification No. 2094/43A

[6] Gazette Notification No. 2094/44

[7] The next date fixed for Parliamentary sessions was 5 November

[8] Gazette Notification No. 2095/50

[9] Gazette Extraordinary No. 2096/70

[10] Stay order issued on 13 November 2018 suspending the Gazette Extraordinary issued by the President dissolving Parliament

[11] Interview of a woman in Panama on 23 November 2018

[12] Interview of a woman in Wellawaya on 26 November 2018

[13] Ibid

[14] Interview of a labourer from Jaffna on 15 November 2018

[15] Interviews of a businessman in Jaffna on 15 November 2018 and an individual in Batticaloa on 25 November 2018

[16] Interview of a small business holder in Jaffna on 15 November 2018

[17] Interview of a farmer in Jaffna on 15 November 2018

[18] Interview on 8 November 2018 of a Muslim woman in Batticaloa

[19] Interview of a person in Batticaloa on 26 November 2018

[20] Interview on 11 November 2018 of an individual in Matara

[21] Interview of a three-wheeler driver in Polonnaruwa on 6 November 2018

[22] Interview on 11 November 2018 of a businessman in Puttalam

[23] Interview of an individual in Batticaloa on 24 November 2018

[24] Interview on 1 November 2018 of a three-wheeler driver in Kurunegala

[25] Local government elections were held on 10 February 2018 to elect members for 337 local government bodies. At this election the UNP won only 34 local government bodies while the Sri Lanka Podujana Peramuna led by Mahinda Rajapaksa won 231 local government bodies.

[26] Interview on 02 November 2018 of a public servant in Panadura

[27] Interview of an individual in Wellawaya on 26 November 2018

[28] Interview on 25 November 2018 of a woman in Monaragala

[29] Interview of a woman in Wellawaya on 26 November 2018

[30] Interview on 23 November 2018 of a woman in Panama

[31] Interview on 24 November 2018 of a person in Batticaloa

[32] Interview of a person in Walasmulla on 19 November 2018

[33] Interview on 01 November 2018 of a lottery-ticket seller in Kurunegala

[34] Interview of a public servant in Hambantota on 2 November 2018

[35] People who did not appear to know what a bond was still expressed this view

[36] Interview on 20 November 2018 of an individual in Batticaloa

[37] Interview on 15 November 2018 of a person in Jaffna

[38] Interview on 23 November 2018 of a person in Kattankudy

[39] Interview of a three-wheeler driver in Kurunegala on 01 November 2018

[40] Interview on 2 November 2018 of a fruit vendor in Ratnapura

[41] Interview of a person in Galle on 12 November 2018

[42] Interview on 11 November 2018 of a woman in Matara

[43] Interview on 23 November of a private security officer in Buttala

[44] Interview on 23 November of a woman in Panama

[45] Interview of a businessman in Jaffna on 15 November 2018

[46] Interview on 27 November 2018 of a person in Badulla

[47] Interview of an individual in Batticaloa on 23 November 2018

[48] Interview on 6 November 2018 of a three-wheeler driver in Polonnaruwa

[49] Interview of a woman in Matara on 11 November 2018

[50] Interviews on 15 and 17 November 2018 of two persons in Jaffna, and on 7 November 2018 of an individual in Mullaitivu

[51] Interview on 17 November 2018 of a small business holder in Jaffna

[52] Interview of a person in Batticaloa on 8 November 2018

[53] *Mudhalvan* is a Tamil movie directed by S. Shankar. The plot revolves around a journalist who gets the opportunity to become the chief minister of Tamil Nadu, India for just one day.

[54] Interview on 21 November 2018 of a person in Bandarawela

[55] Interview on 1 November 2018 of an employee of a shop in Kandy

[56] Interview of a restaurant owner in Anuradhapura on 5 November 2018

[57] Interview on 4 November 2018 of a bus conductor in Polonnaruwa

[58] Interview of a young man in Thalawathugoda on 3 November 2018

[59] Interview on 2 November 2018 of a person in Ratnapura

[60] Interview of an individual in Kurunegala on 1 November 2018

[61] Interview on 10 November 2018 of a female vendor in Polonnaruwa

[62] Interview on 11 November 2018 of a woman in Matara

[63] Interview of a woman in Ampara on 12 November 2018

[64] Interview of a person in Bandarawela on 21 November 2018

[65] Interview on 25 November 2018 of a person in Buttala

[66] Interview of an individual in Galle on 12 November 2018

[67] Interview on 26 November 2018 of a person in Batticaloa

[68] Interview of an individual in Kandy on 21 November 2018

[69] Interview on 11 November 2018 of a person in Galle

[70] Interview of a small business holder in Rathupaswala on 26 November 2018

[71] Interview on 15 November 2018 of an individual in Jaffna

[72] Interview on 14 November 2018 of a woman in Matara

[73] Records indicate that Mahinda Rajapaksa attended 22 of the total 96 parliamentary sessions held in 2018 and not 10 as noted by the interviewee (https://www.parliament.lk/en/members-of-parliament/attendance).

[74] Interview of a labourer in Jaffna on 15 November 2018

[75] Interview on 26-11-2018, woman in Wellawaya

[76] Interview on 26 November 2018 of a person in Anuradhapura

[77] Interview on 24 November 2018 of a woman in Ratnapura

[78] Interview on 16 November 2018 of a university student in Colombo

[79] Interview on 23 November 2018 of a woman in Panama

[80] Interviews on 6 November 2018 of a woman in Monaragala, on 21 November 2018 of a three-wheeler driver in Bandarawela, on 26 November 2018 of a person in Puttalam, and on 13 November 2018 of a person in Mullaitivu

[81] Interview on 3 November 2018 of a private security officer in Buttala

[82] Interview on 23 November 2018 of a person in Siyabalanduwa

[83] Interview on 10 November 2018 of a small business holder in Galle

[84] Interview on 3 November 2018 of a security officer in Buttala

[85] Interview on 6 November 2018 of a small business holder (female) in Polonnaruwa

[86] Interviews on 4 November 2018 of an employee in a private company in Colombo, on 3 November 2018 of a student in Thalawathugoda, and on 2 November 2018 of a restaurant worker in Ratnapura

[87] Interview on 5 November 2018 of a farmer in Anuradhapura

[88] Interview on 11 November 2018 of a person in Matara

[89] Interview on 13 November 2018 of a person in Kurunegala

[90] Interview on 14 November 2018 of an individual in Jaffna

[91] The Tamil word they used to describe this was *'thesam',* which means 'nation'

[92] Interview on 01-11-2018, three-wheeler driver in Kurunegala

ON THE PROCESS OF CREATING A PEOPLE'S CONSTITUTION

LAL WIJENAYAKE

An insider look of the ongoing constitutional reforms process, emphasising on its representation from the populace as well as all elected political parties and contrasts it against previous non-inclusive constitution-making initiatives.

The ongoing constitutional reform process is an attempt to enact the fourth constitution of Sri Lanka after Independence.

The Constitution in force from 1948 to 1972 was not drafted and enacted by the people of our country, but introduced by the Ceylon (Constitution) Order in Council, 1946 and Ceylon (Independence) Order in Council, 1947, known collectively as the Ceylon (Constitution and Independence) Orders in Council of 1947.

These reforms were based on the Soulbury Commission report. The Soulbury Constitution was drafted based on discussion between the British government and the political elite of Sri Lanka. The people had no say in the constitution-making process. The Soulbury Constitution introduced a democratic parliamentary form of government based on the British model.

The first Republican Constitution of Sri Lanka in 1972 was enacted by a constituent assembly consisting of all members of Parliament elected at the general election of 1970. Once again there was no direct consultation with the people in the making of the Constitution enacted in 1972.

The Constitution of 1978 repealed the 1972 Constitution under Article 51 of the first Republican Constitution of 1972 and adopted the Constitution of 1978 under Article 51(5)

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of the first Republican Constitution of 1972, by passing the bill by a two-thirds majority in the National State Assembly. There was no consultation with the people although a select committee of the National State Assembly is said to have submitted a report making recommendations on the new constitution. It is not wrong to say that this constitution was drafted in secrecy.

The ongoing constitutional reforms process is thus different from previous constitution-making processes in two important aspects.

First, the ongoing process commenced with the Cabinet of ministers, appointing in January 2016, a Public Representations Committee on Constitutional Reform comprising 20 academics and professionals to ascertain the views of the public on constitutional reforms and to submit a report of their recommendations. The committee called for public representations in writing and/or orally. Public sittings were conducted in all 25 districts with over 10 sittings held in Colombo.

As many as 2,516 persons/organisations appeared before the committee and made oral submissions. Of these over 1,000 were representatives of large organisations such as trade unions, organisations of professionals, religious organisations, and civil society organisations representing diverse interest groups. The committee also met the heads of nearly all religious organisations. Seven provincial chief ministers appeared before the committee. In addition, it received over 3,000 written representations from individuals and civil society organisations. The committee submitted a comprehensive (over 300 pages) Report on Public Representations on Constitutional Reforms containing the recommendations of the committee, on 10 May 2016.

On 9 March 2016, Parliament passed a resolution for the appointment of the Constitutional Assembly. The resolution, passed unanimously in Parliament, read as follows:

> *Whereas there is broad agreement among the people of Sri Lanka that it is necessary to enact a constitution for Sri Lanka, this Parliament resolves that there shall be a committee which shall have the powers of the committee of whole Parliament consisting of all members of Parliament for the purpose of deliberating and seeking the views and advice of the people, on a constitution for Sri Lanka, and preparing a draft of a constitutional bill for the consideration of Parliament in the exercise of its powers under Article 75 of the Constitution.*

Thus, the members of Parliament, representing the people, unanimously resolved that it was necessary to enact a new constitution, and that the mandate given to the Constitutional Assembly should not be challenged.

The task of the Constitutional Assembly, comprising all members of Parliament, is to implement this mandate handed by Parliament. To make the task easier, the Constitutional Assembly unanimously resolved to appoint a steering committee comprising 21 members of Parliament representing all political parties, with the Prime Minister as chairman.

The members of the steering committee are: Ranil Wickremesinghe (UNP), Nimal Siripala de Silva (SLFP), Rauff Hakeem (SLMC), Lakshman Kiriella (UNP), Susil Premajayantha (SLFP/JO), Rishard Bathiudeen (ACMC), Patali Champika Ranawaka (JHU), D.M. Swaminathan (UNP), Mano Ganesan (TPA), Malik Samarawickrama (UNP), Dilan Perera (SLFP/JO), R. Sampanthan (TNA), Dinesh Gunawardena (MEP), Douglas Devananda (EPDP), Anura Kumara Dissanayaka (JVP),

Wijeyadasa Rajapakshe (UNP), Bimal Rathnayake (JVP), M.A. Sumanthiran (TNA), Prasanna Ranatunga (SLFP/JO), Jayampathy Wickramaratne (UPLF) and Thusitha Wijemanne (UNP).

Further, six subcommittees were appointed – fundamental rights, the judiciary, law and order, public finance, public service and centre periphery relations - also ensuring representation from all political parties. They were chaired by Mahinda Samarasinghe (SLFP), Rauff Hakeem (SLMC), Sagala Ratnayaka (UNP), Bandula Gunawardena (JO), Susil Premajayantha (JO) and D. Siddharthan (TNA), respectively.

From the composition of the Constitutional Assembly and its steering committee and subcommittees, it is manifestly clear that this constitutional reform process is an all-party process. This is the second important deviation from constitutional reform processes in the past.

To this date it remains an all-party process as no party has withdrawn from the process. It is significant to note that all parties represented in Parliament have provided leadership to the process by having their representatives lead subcommittees. Thus it is understood that no party has the right to question the necessity for a new constitution or the validity of the process.

All six subcommittees have, after lengthy deliberations and having consulted experts both local and foreign, submitted their reports to the steering committee.

The steering committee, which has held over 78 sessions to this date, in turn, having studied these reports, made a report to the Constitutional Assembly of the views that had emerged in respect of the main issues as regards the constitution-making process. Any disagreements and alternative formulations that had been presented were also included to allow for the Constitutional Assembly to gain the complete picture. It is significant to note that broad agreement was seen between SLFP chief ministers and the steering committee on devolution. The report, dated 21 September 2017, also contained the stands taken by the different political parties as an annexure to the main report. Thus there was no attempt to override any views that emerged or impose majority views.

The Constitutional Assembly deliberated on this report for five days. A member of Parliament confided to me that fireworks would be witnessed during deliberations, however I witnessed not even a spark from the Speaker's Gallery as over 115 members of the Assembly expressed their views on the report.

This was a big positive step towards the making of a new constitution. The contributions made by the members at the debate were useful and not negative. The debate encouraged those involved in the process to continue with confidence. The most important contribution to the debate was made by TNA MPs R. Sampanthan and M.A. Sumanthiran on the first day of the debate. It is important to read these two speeches to clearly understand the stand of the northern people on the national question. I believe it is these two speeches that set the tone for positive contributions from all members. Only two members challenged the necessity for a new constitution and only one member challenged the process.

After the debate the steering committee worked on a zero draft of the new constitution to be submitted to the Constitutional Assembly, taking into consideration the report of the Public Representations Committee on Constitutional Reforms, the six subcommittee reports, the steering committee report to the Constitutional Assembly and the views

expressed by the members of the Constitutional Assembly at the debate.

A delay in translating the zero draft into Tamil and Sinhala however delayed its submission and it is almost certain that it will be presented before the Constitutional Assembly in November. A zero draft is only a discussion paper and one must not jump to the conclusion that it is the new constitution. It will simultaneously be released to the public so they may express their views as well. Many of the people I meet have commented that there are many an important and contentious issue included in the discussion paper.

The constitution, if it is to be long lasting, should be acceptable to all groups of people in the country. Thus, there should be room for compromise and flexibility. The delay in presenting the draft constitution, I believe, is due to the process itself as it is the aim is to present a draft constitution that is acceptable to all sections of people, unlike the 1972 and 1978 constitutions which were based on the views of the ruling party at the time.

A matter that is raised in the media frequently, mainly through electronic media, is whether we need a new constitution. However if one considers the social, economic and cultural standards of our country since independence, we see serious crises in all these spheres. There is a serious rejection of conventions, democratic values and good governance itself and we face challenges to the rule of law, independence of the judiciary, respect for human rights and in fact democratic rule itself. Although we have emerged from the worst scenario that existed prior to 8 January 2015, these reforms are not based on a solid political foundation and can fall apart at any time.

The reason for these crises lies in Sri Lanka's failure to emerge as a nation state with a 'Sri Lankan' identity. India was able, mainly through its constitution adopted soon after independence in 1950, to integrate its diverse social, economic, linguistic and cultural groups across a wide expanse as a nation with an Indian identity. The Indian leaders at the time of gaining independence had the foresight to address the main issue of integration of human and material resources in the country in the constitution. This, they understood as the fundamental requirement for the social and economic development necessary to overcome the poverty that engulfed India at the time.

A consensus is necessary to create a Sri Lankan nation with a Sri Lankan identity, where all citizens will be equal and proud to call themselves Sri Lankans. The challenge lies in ensuring this. From the representations made to the Public Representations Committee on Constitutional Reform it can be seen that provisions in the constitution must guarantee

1. All communities a stake at governing the country
2. Equality
3. Anti-discrimination
4. Power sharing at the centre and the periphery (full implementation of the 13th Amendment), and sharing of power at the centre (creation of a second chamber consisting mainly of equal representatives from provincial councils)
5. Protection of group rights (inclusion of an article containing the substance of Article 29 of the Soulbury Constitution)
6. Supremacy of the Constitution

The representations made to the Public Representation Committee and the views expressed by the members of the Constitutional

Assembly at the debate on the first report of the steering committee cleared one hurdle with the broad acceptance of devolution of power, at least to the extent as set out in the 13th Amendment.

It was also clearly evident that a vast majority of the people desire and fully realise the urgent need of a settlement. In fact, many organisations from both the North and South that appeared before the Public Representation Committee specifically comment that this may be the last chance to find a solution. Thus the stage is set to rethink the approach on constitutional reforms in Sri Lanka with only the political will to generate a lasting solution lacking.

Postscript

The constitutional crisis that Sri Lanka faces at present has brought to the centre stage, more than ever before, the necessity of drastic constitutional reforms leading to a new constitution, protecting democracy and the parliamentary system. The people have enjoyed democratic rule for over 70 years after independence under trying circumstances such as the military coup in 1961, JVP uprisings in 1971 and 1989, communal riots in 1983, LTTE uprising and 30 year long war, and tyrannical rule under Mahinda Rajapaksa. The victory of the people in January 2015 shows their ability to counter challenges to democracy.

The crisis brings into focus the instability and challenges to democratic rule by the creation of two power centres, viz the president and prime minister, under the 19th Amendment. The 19th Amendment, the mandate upon which President Maithripala Sirisena was elected, was intended to strip the powers of the president and strengthen the powers of Parliament, repealing the president's power to remove the prime minister provided under Article 47 of the Constitution as well as the power to dissolve Parliament at any time after the lapse of one year after a general election. It was voted in near unanimously, with only one member voting against it.

Today's crisis was created by the failure to completely do away with the presidential system leaving in its place solely a parliamentary form of government with executive power vested in the cabinet of ministers headed by the prime minister. Whilst the crisis has been temporarily overcome, the damage caused and the instability and loss of faith in the system that it has brought about will not be overcome easily. We desperately need a new constitution that will abolish the presidential system and establish parliamentary democracy as it existed before 1977. Only a national consensus of a new constitution will ensure the protection of democracy and the fundamental rights of the people.

SUSTAINING CONSTITUTIONAL GOVERNMENT - the Threats and Tests of Sri Lanka's Living Constitution

SURI RATNAPALA

Suri Ratnapala sets out the principles of constitutional governance including an overall culture of independence and impartiality and traditions of liberal democracy, the threats and challenges to such, and the importance of social forces and institutions rooted in popular attitudes in the upholding of constitutional governance.

Every country claims to have a constitution but not many have constitutional government. It takes more than a well-intentioned and skilfully crafted statement to achieve and maintain constitutional government. The constitution needs to be grounded in a culture of reverence for rule of law and the forms and traditions of liberal democracy. Where such a culture exists, constitutional government is possible even without a supreme statute as the United Kingdom and New Zealand have shown the world.[1] If Sri Lanka's constitutional crisis precipitated by the President on 26 October 2018 has a positive outcome, it is the demonstration that a constitution will not be saved by its text without the social forces that sustain it. This is the principal theme of this article.

A culture of legality and moral propriety critically determines all the conditions needed for a system of liberal democracy, such as judicial independence, public service integrity, media objectivity, regard for facts and evidence, informed debate, toleration of dissent, respect for basic rights and freedoms of citizens (majorities and minorities alike) and civility in politics. This must be obvious to all thinking persons, whether of the left, the right or the centre who desire this form of government. Unfortunately, in the heat and passion of partisan politics, people forget that the aim of constitutional government is to make civilised, prosperous and harmonious living possible among persons who do not agree on everything.

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Events

Sri Lanka's president, elected on the promise of abolishing the office of executive president, now wishes to preserve it, critics say, to remain in that office. He attempted to replace the Prime Minister Ranil Wickremesinghe whose government enjoys the confidence of Parliament, with Mahinda Rajapaksa, who does not. When faced with parliamentary resistance, he sought to dissolve Parliament against its will and in violation of the 19th Amendment of which he is co-author. The Supreme Court on 13 December 2018 annulled the proclamation and affirmed the continuance of the current Parliament. The Court of Appeal restrained the usurping ministry from functioning until quo warranto proceedings against them were concluded. On appeal, the Supreme Court refused to vacate that injunction. The state was effectively without a government, the lawful one evicted from its offices and the usurpers unable to function lawfully. On 15 December 2018, Rajapaksa 'resigned' as prime minister, an office that he did not hold legally. The President 'reappointed' Wickremesinghe as prime minister even though, constitutionally, he never vacated the office. This, despite the President's earlier declaration, in defiance of the Constitution, that he will never reappoint Wickremesinghe as prime minister even if that was Parliament's wish.

Now, this political tragicomedy has ended and constitutional order restored, i.e. the constitutional reform of the 19th Amendment enacted in 2015 has passed its first acid test. The saga will stand as a vindication of the people's faith in constitutional government and a demonstration of the living constitution. It could serve as a worthy example to other liberal democracies of the world, both new and old.

The judges of the Supreme Court and the Court of Appeal are justly applauded for their courage and integrity in upholding the Constitution against the President's actions. It is a little sad when we must commend a court for courage and integrity. In a stable liberal democracy, these judicial attributes are taken for granted. They gain attention only when courts are under duress or inducement which, unfortunately, has been the case in Sri Lanka's recent history.

It was not long ago that the previous Parliament of Sri Lanka impeached the serving Chief Justice Shirani Bandaranayake by a seriously flawed process in disregard of judgments of the Supreme Court and the Court of Appeal. The International Bar Association's Human Rights Institute reported:

> Sri Lanka is facing a constitutional crisis. Its 43rd Chief Justice, a woman who had been on the Supreme Court for 14 years, has been removed by the country's Parliament and President, in contravention of an unequivocal ruling by Sri Lanka's Court of Appeal. President Mahinda Rajapaksa has chosen as Chief Justice Bandaranayake's replacement a lawyer who has spent several years serving the government of Sri Lanka, most recently as attorney general and legal advisor to the Cabinet. Meanwhile, people opposed to her removal have suffered harassment, intimidation and threats of death from persons unknown. This follows years of executive encroachment into the judicial sphere and a series of assaults, abductions and murders committed against critics of the government that have been rarely investigated and never prosecuted (International Bar Association, 2013).

Constitution and Constitutional Government

There are different understandings of the idea of a constitution, just as there are of the notions of constitutional government, the rule of law and democracy. Some regard a constitution as any supreme law that determines the repository of absolute and unchallengeable political power. It is in this sense that the People's Republic of China or the Democratic People's Republic of Korea (North Korea) or the Republic of Cuba or the Kingdom of Saudi Arabia can be said to have a constitution.

There is another, philosophical, meaning of constitution that the Greeks called *politeia* known also as nomocracy. A constitution in this sense is one that limits the powers of rulers by subordinating them to enduring laws which they cannot unilaterally abrogate. Such a constitution is inextricably associated with the ideal of the rule of law which seeks to ensure that people are not at the mercy of the momentary will of a ruler but enjoy a degree of stable freedom with respect to life, liberty and property. Aristotle wrote in the *Politics* that "The law ought to be Supreme over all, and the magistracies and the government should judge only of particulars so that if democracy be a real form of government the sort of constitution in which all things are regulated by decree is clearly not a democracy in the true sense of the word, for decrees relate only to particulars"(Aristotle, 1916). Aristotle's ideal of a government of laws is hard to attain in a complex technologically advanced welfare state. Nevertheless, it is the standard to which liberal democratic states aspire through the institutions of representative democracy, checks and balances, and the guarantees of basic rights and freedoms. The core principles of constitutional government include the following.

1. A constitutional arrangement that cannot be changed at will by transient holders of legislative power without public consent
2. Supremacy of just laws over rulers and citizens alike
3. Law's object is to advance the public interest *(res publica)* and suppress the private designs of rulers
4. Representative democracy is the best available (though imperfect) means of aligning the law with public interest
5. Representative democracy must accommodate the principle of subsidiarity according to which public choice decisions should, as far as practicable, be devolved on those who are most affected by them
6. Courts have authority to ensure the legality of legislative and executive actions
7. Basic rights and freedoms should be protected by means including independent, impartial and competent courts

The first requirement of constitutional government, then, is a constitution that is designed to implement these principles. Sri Lanka's Constitution, especially after the 19th Amendment subscribes to these principles, though imperfectly. However, there is a second condition which is much harder to attain. This is the existence of a matrix of supporting institutions grounded in a nation's culture. The absence or weakness of such a culture explains the failure of constitutionalism in many emerging democracies. The current constitutional crisis in Sri Lanka throws this dimension into sharp relief.

The Living Constitution

A constitution is only as good as its implementation. Take a look at the Constitution of the Republic of Zimbabwe, or of Venezuela. Zimbabwe's basic law guarantees judicial independence, free multi-party elections, equality before the law and

the whole panoply of universal human rights and remedies. Venezuela's constitutional bill of rights is longer than the entire Constitution of Australia. However, in the experience of the people of these countries the constitutions are empty promises. Zimbabwe was ruled as a dictatorship by Robert Mugabe who accumulated immense wealth at the people's expense. The rulers of Venezuela, a country of vast natural resources have impoverished its people and driven millions out of the country as political and economic refugees. Similar tales of increasing constitutional dysfunction and public distress are heard from other emerging economies. Sri Lanka, despite periods of dangerous authoritarianism, has so far avoided an irreversible descent to despotism. The country has survived many threats to its fundamentally liberal constitutional order including, it seems, the latest crisis.

A constitution faces its gravest threats from those upon whom it confers power. History is a constant reminder of Lord Acton's aphorism about the corrupting nature of power. Checks and balances depend on the behaviour of constitutional functionaries. A corrupted or intimidated court will not stand in the way of a powerful executive. The military, the police and the public services can be made to serve political aims of the government unless they have a strong culture of independence and integrity. Elections can be defrauded. The media, even those in private hands, can be censored or silenced. We must remember that not every judge is a modern superhero or a Dworkinian Hercules.[2] What gives the non-heroic human judge the sense of security and confidence to resist the threats and overtures of their political masters? Surely, not the pious words of a constitution? Besides the institutional separation of powers, it must be the strength they draw from the culture and attitudes of the people. Courts are weakened when the community is indifferent to the fate of the constitution and the rule of law or, are cowed to the point of silence.

Sociological jurists were perhaps the first to recognise that the structure of society is determined by more constraints than the lawyer's law. Georges Gurvitch explained that social reality consists of different layers. There is an outer layer that we can grasp by our senses such as the demography, geography and technology of the society. Beneath this lie the organisational layer (governments, laws, courts, etc.), the layer of unorganised social patterns (traditions, fashions etc.) and several more. Gurvitch identified eight such layers, with the lowermost representing the spiritual values of people (George Gurvitch 1947).Institutional economics takes a similar approach to understanding the structure of society. The concept of an 'institution' has been likened to the constraints that make up the rules of the game, as opposed to the players who engage in the game who are individuals and organisations (Douglass North, 1990). The term institution is elastic enough to include constraints of all kinds that influence human behaviour, including legal and moral rules, etiquette, cultural constraints, superstition, other more-personal and less understood values that guide action such as parental and filial affection and compassion toward fellow beings (Douglass North 1990, p. 4-5).

It is important to remember that laws like all other norms are incorporeal things. They manifest in the form of human behaviour. A norm also can exist only as a part of an extended matrix of norms. The social order of a free people is maintained not by an omnipotent and ubiquitous police force but by the fact that most people, most of the time, voluntarily observe the law and moral norms of society. The ancient legal norm *pacta sunt servanda* (contracts should be observed) is supported by many other norms, such as those concerning respect for person and property, truthfulness,

the impartiality of third-party arbiters (in case of breach), and the integrity of law enforcement officials. The cardinal constitutional norm of independence and impartiality of the judiciary, so essential to the rule of law, depends critically not only on judicial ethics but also on the acceptance of judicial decisions by officials and citizens adversely affected by them. Such acceptance is the outcome of numerous other norms that create the overall culture of 'playing by the rules'.

Threats to Constitutional Government from Above and Below

Constitutions can be destroyed from above and below. We observe the rising phenomenon of populist revolts against liberal values and constitutional government. 'Populism' is an undefined term that has been appropriated by parties of the left and the right who oppose what they call 'the establishment', another imprecise label which usually means the status quo with respect to the norms and practices of governance. Populism can be good or bad for liberal democracy. Likewise, so can the 'establishment'. An 'establishment' which is unresponsive and uncaring and serves special interests at the expense of the general interest of society is bad. Populism that seeks to reform such an establishment is good.

The dangerous sort of populism is founded on nativism that identifies a race or religion with the nation, the nation with the state and the state with a charismatic saviour. Populist leaders usually arise in times of discontent with promises of restoring the nation to greatness. No society can wholly eliminate discontent and those that tried it, like the communist states, fared the worst. Dissatisfaction is part of being human and is a driver of change and growth. But, as Steven Pinker warns: "When we fail to acknowledge our hard-won progress, we may come to believe that every problem is an outrage that calls for blaming evildoers, wrecking institutions, and empowering a leader who will restore the country to its rightful greatness" (Steven Pinker, 2018). Among these villains are invariably foreigners and minorities, international traders, mainstream politicians, bureaucrats and experts who Donald Trump refers to as the swamp that needs to be drained. Trump perhaps did not know that *Drenare la palude* or 'drain the swamp' was an early slogan of fascist dictator Benito Mussolini in his surge to power. Surely his advisor Steve Bannon knew.

Sri Lanka has tragic experience of this kind of populism in the form of Sinhala supremacism that first brought to power Solomon Dias Bandaranaike and remains a major factor in every general election including the next. The Tamil community has suffered even more from the violent separatist movement led by the charismatic and dictatorial Velupillai Prabhakaran that almost eliminated a generation of liberal minded Tamil leaders. I like to think, wishfully, that the electorate has matured beyond nativism of this kind. The country needs strong leaders but not of the kind who draw strength by dismantling the Constitution and displacing rule of law.

Historically, however, the greater threat to constitutional government has been from the top – by military commanders or elected leaders who gain power by feeding on discontent and by extravagant promises of national glory. Hitler and Mussolini rose to power by elections. Putin of Russia, Mugabe of Zimbabwe, Chavez of Venezuela, Ortega of Nicaragua, Erdogan of Turkey, and the theocracy of Iran used or are using democratic pathways to consolidate one party rule. The democratically elected Prime Minister of Hungary Viktor Orbán thinks that

democracy need not be liberal. He believes, wrongly, that a democracy organised on liberal principles is unsustainable (Viktor-Orban's-speech). Many fear that Orbán is treading a familiar path to authoritarian rule.

The classic fascist regime as epitomised by the Mussolini and Hitler dictatorships consists of authoritarian government dominated by one party led by a charismatic leader. In the fascist state the party and government are difficult to separate. The nation is identified with race and the state in the form of the 'great leader' becomes the ultimate good. Individualism is suppressed for the communal good, knowledge is censored, and civil liberties are extinguished. The fascist state favours mercantilism against free trade, rejects both liberalism and socialism, adopts capitalist means of production under state control and displaces rule of law with the will of the regime. Few states today display all these features but unfortunately, many are trending towards the archetype. The Sri Lankan electorate has thus far resisted this trend by turning out governments that ventured too far down the road to despotism. Unfortunately, the superior courts have not always helped the cause of constitutionalism. The International Crisis Group, in its report *Sri Lanka's Judiciary: Politicised Courts, Compromised Rights,* came to the following conclusion after its lengthy investigation of the judicial performance in the era of Chief Justice Sarath Silva.

Sri Lanka's judiciary is failing to protect constitutional and human rights. Rather than assuaging conflict, the courts have corroded rule of law and worsened ethnic tensions. Rather than constraining militarisation and protecting minority rights, a politicised bench under the just-retired chief justice has entrenched favoured allies, punished foes and blocked compromises with the Tamil minority. Its intermittent interventions on important political questions have limited settlement options for the ethnic conflict. Extensive reform of the judicial system – beginning with a change in approach from the newly appointed chief justice – and an overhaul of counterproductive emergency laws are essential if the military defeat of the LTTE is to lead to a lasting peace that has the support of all ethnic communities (International Crisis Group 2009).

The more recent Chief Justices Kanagasabapathy Sripavan and Priyasath Dep have shown dignity, humility and competence in their efforts to restore the stature of the Supreme Court.

Unrestrained Majoritarian Democracy is an Impossibility

Unconstrained majoritarian government desired by populist leaders inevitably becomes minority rule. There is a critical difference between majority rule and liberal democracy. Liberal democracy is a form of majority rule in which the powers of the elected government are limited by constitutional checks and balances and the fundamental rights and liberties of citizens. This enables democratic correction of misrule and prevention of accumulation of power. This is the reason that Orbán wants democracy without liberalism.

Elected leaders often wish to perpetuate their power. They do so by weakening opposition to their rule through time tested strategies of dismantling the key institutions of democracy and rule of law. The judiciary, the media and the electoral system are early targets for intimidation and corruption by popularly elected governments with authoritarian ambitions – as the world has seen in Russia, Turkey, Venezuela and Nicaragua, and is now distressingly witnessing in Poland and Hungary. Sri Lankans are familiar with this kind of conduct by their elected governments.

Seeds of the Current Crisis

In 1978, the United National Party government led by J.R. Jayawardene won the general election with a majority sufficient to amend or replace the Constitution. Out of the main democratic models, the US system of tripartite separation, the Westminster parliamentary government and the French Gaullist presidential-parliamentary system, the government chose to adopt a corrupted version of the latter. The French president has limited executive powers but has competence to dissolve the National Assembly in the event of fundamental disagreement. There are important safeguards concerning the appointment of judges, ministers and high officials, and crucially, European Union law and the European Convention of Human Rights add a further layer of constitutional oversight. The 1978 Constitution of Sri Lanka granted greater executive powers to the president including untrammelled power to change ministries, appoint superior court judges and high officials and dissolve Parliament at will after the first year of term.[3] The enormous patronage at the president's command allows them to corrupt public offices and secure defections in Parliament.

Shorn of its important safeguards and taken out of its cultural context, the Gaullist system can be a dangerous launch pad to the seizure of oppressive power by ambitious strong men as Putin of Russia, Chavez and Maduro of Venezuela and Mugabe of Zimbabwe have shown. Turkey's President Erdogan has changed the Constitution to convert the titular presidency to a powerful executive office. Sri Lanka's own leaders have not been immune to the temptations of the supreme office. President Jayawardene, the principal architect of the 1978 Constitution, used his party's extraordinary parliamentary majority to extend the life of that Parliament and to give himself the freedom to choose the timing of his re-election. President Rajapaksa using his super-majority in Parliament and backed by a sympathetic Supreme Court, enacted the 18th Amendment to remove the two-term limit on the presidency and expand his powers of appointment to the superior courts and other critical constitutional offices.

After the defeat of Rajapaksa in 2015, Parliament enacted the 19th Amendment with, among other aims, to re-impose the two-term limit, remove the power of the president to dissolve Parliament until the last six months of his term and to create a Constitutional Council and auxiliary commissions as independent bodies to guard against the politicisation of the judiciary, the public service, the police, the military and key constitutional offices. Maithripala Sirisena, who defected from Rajapaksa's party at the eleventh hour to become the victorious common opposition candidate, led the campaign to curtail presidential powers. On the one hundredth day of his term, in a statement to the nation, Sirisena said:

> *In order to build a democratic and civilised society, it is necessary to prevent the emergence of dictatorship and taking control of state power, state assets, the judiciary, Parliament and all of this to one's own control that comes from the executive presidential system.*
>
> *This should be immediately changed. I have worked towards this in the past three months. I am not aware of any leader in the world who had obtained an office with all these powers but has been as flexible in trying to get rid of those powers that had been bestowed on such a leader (President Maithripala's statement, 2018).*

Unfortunately, it appears that Sirisena also succumbed to the seductive embrace of power. He recanted his pledge not to seek a second term and adopted a strategy for re-election in alliance with the opponent he defeated to gain office precipitating the crisis.

Test of the Living Constitution

When the President's strategy was impeded by the constitutional fetters on his power (that he helped to enact), he and his advisors chose to disregard them, perhaps in the belief that the judges would defer to the executive's interpretation of its own powers as they had in the recent past. However, the social context had changed, and the 19th Amendment proved to be firmly grounded in the new expectations of people who prioritised constitutional propriety over expedience. I do not wish to belittle the role of the judges in resolving this crisis. Their learned and lucid judgments saved the 19th Amendment from the scrapheap and delineated the province of presidential power with clarity and the authority of unanimity.

The point I wish to make is about the relevance of the social forces to the cause of constitutional government. In every era there are brave, upright and erudite judges who are unmoved by political pressure. However, a climate hospitable to judicial independence will exist only if undue political pressure is neutralised by counter-pressure from civil society. To survive the inevitable political and private machinations, the constitution as written must derive strength from a supporting institutional fabric rooted in popular attitudes.

There have been times in the recent past when the lawful opposition, the trade unions, the media and civil society had been brutally silenced (Jason D Stone 2014, IBA 2013 and Radhika Coomaraswamy and Charmaine de los Reyes 2004). It was not surprising that during these periods, the conduct of judges at the highest levels of the hierarchy came under international criticism. As a distant expatriate, I am not the best judge of the pulse of Sri Lankan society. Yet, I observe that since the 2015 elections, there has been a palpable lifting of the pall of intimidation in the country. Superior court judges have been appointed on seniority and the rulers have kept a respectful distance from the courts' business. Opposition parties, trade unions and media are emboldened. The most strident criticisms of the government, fair and unfair, are aired with impunity on print and online platforms. Independent public policy research centres have sprouted, including notably, the publisher of this journal. Spontaneous civil society protests are reported to have occurred peacefully in defence of the rule of law.

It is notable that many intellectuals and groups who led the civil resistance to the President's moves did so not out of love for the United National Party leader or his government, but to defend the Constitution, the rule of law and democracy. They gave leadership and definition to the social force without which the pious words of a constitution are valueless. The judgements of the superior courts should not be regarded as a political win for one side but as a vindication of the Constitution for the benefit of all sides, but above all the people of this nation. Friends of liberal democracy around the world should salute them.

An important battle is won but it must not be thought for a moment that the work is done. The defence of constitutional democracy is an endless project, the eternal burden of those who cherish freedom under just law.

Notes

[1] Exceptions to the universality of countries with a single written constitution also include Israel. However, in 1995, the Israeli Supreme Court under President Aharon Barak ruled in an historic judgment that the Basic Laws have superior constitutional force with the consequence that other laws which offend them may be judicially invalidated. United Mizrahi Bank v. Migdal Cooperative Village (CA 6821/93, 1908/94, 3363/94), p 352.

[2] Hercules, the ideal judge, is first introduced by legal philosopher Ronald Dworkin in his essay 'Hard Cases', (1975) 88 Harvard Law Review, 1057.

[3] For a comparative analysis of the Gaullist and the 1978 Sri Lankan Constitutions, see Suri Ratnapala 2012, 'Failure of Quasi-Gaullist Presidentialism in Sri Lanka', Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects, Centre for Policy Alternatives, Colombo, vol 2, 666-671.

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THE SUPREME COURT'S TRYST WITH DESTINY

RADHIKA COOMARASWAMY

The author provides an in-depth jurisprudential analysis of the recent Supreme Court judgment on the powers of the executive as provided by the 19th amended constitution emerging from the constitutional crisis of October 2018.

No landmark Supreme Court case takes place in a vacuum. Though the judges may dedicate themselves to the plain meaning of the words contained in the law before them, the intent of the legislature and the citizens who may have voted in the elections must inevitably frame the analysis. It is the subtext that guides our understanding. Courts are averse to ever mentioning the social and political context. Judgment writing requires courts to stay closely to the plain meaning of language and at most look at documents conveying legislative intent such as those contained in parliamentary proceedings. However, a realistic understanding of constitutional developments, best developed by the American Realist school[1] and Critical Legal Studies scholars[2], requires us to go beyond the positive frame of the law to situating the constitutional narrative within its political and social context.

The 19th Amendment to the Constitution has a particular history. Its genesis is the 2015 elections and finds first reference in a platform drawn by civil society activists led by Venerable Maduluwawe Sobitha Thera that was deeply concerned by the wide ranging powers of the executive presidency and therefore lobbied for its abolishment. The years immediately preceding the 2015 elections saw executive powers exercised in the prerogative style of a monarch. The abuses and injustices that occurred created a whole social movement. Despite a climate of surveillance and fear, this social movement gathered strength and focused its energy on the need to abolish the executive presidency and to make the institutions of

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democracy strong and independent. The proposals of the National Movement for Social Justice called for the abolition of the executive presidency, a national consensus on appointments to high posts and the strengthening of independent commissions and institutions.[3]

The 19th Amendment is a product of this agitation with its roots in popular and civil society activism. The amendment disappointed many since it did not abolish the executive presidency but it did severely curtail its powers. In particular, it strengthened checks and balances by limiting the president's power of dissolution allowing for a more consensual process for the appointment of judges and independent commissions and put in place procedures to ensure the independence of important institutions. This particular history of the 19th Amendment must guide us in situations where the text is complex and the drafting awkward. The purpose and direction of the 19th Amendment was - without any doubt - to clip the unfettered discretion of the executive.

Judicial Review of Executive and Administrative Action

One of the most important aspects of the recent dissolution case was the question of judicial review, its scope and its application. When the president dissolves Parliament, does the Supreme Court have jurisdiction and if so, how much discretion or leeway should it give to the actions of the president? The initial response by the respondents focused on close reading of the dissolution provisions of the Constitution and not on judicial review. On the other hand, their written submission as well as the Attorney General's submissions rested much of the case on the argument that the Supreme Court has no jurisdiction, has no right to hear the case and that there can be no judicial review of a proclamation to dissolve Parliament.

For the most part of our post-colonial history, our great legal minds and more influential judges were the students of John Austin[4]: People equals sovereignty, sovereignty equals Parliament; all other institutions were secondary. The 1978 Constitution introduced an executive president, but the supremacy of Parliament was not questioned at that time. Defending Parliament has been a central theme among many of the older parliamentarians. John Austin, who was the greatest influence on British and American law till the growth of human rights litigation, also argued against any link between law and morality.

As the father of legal positivism Austin saw a sovereign as a single unit and rested most of his analysis on sanction, command and duty within a hierarchical order. The Central Parliament was that unit and Austin was not an advocate of strong bills of rights or the devolution of power. The Attorney General's submissions have Austinian tones, tones that are singularly out of date where even positivists who followed Austin, such as H.L.A. Hart, noted that law making power is much more dispersed among many different entities (Hart, 1961). The Attorney General argued that the Supreme Court has no jurisdiction because it is Parliament, through impeachment proceedings, that has the sole power to remove the president. One of the other respondents also argued this forcefully saying that in our Constitution, the language states clearly that judicial power is exercised through Parliament first and then through Parliament to the courts (Article 4(c) 1978 Constitution). They further argued that since there is an impeachment process that involves Parliament, the Supreme Court is precluded from taking the case. Yet, as Asanga Welikala argued forcefully in his short piece for Groundviews (Welikala, 2018), the Constitution envisages both political

accountability and legislative accountability of the president. Political accountability includes impeachment by Parliament. Legislative accountability is about the rule of law and the exercise of judicial power in protecting the Constitution.

Since the 1970s, most courts in the world have moved away from Austin, narrow legal positivism and the notion of a monolithic sovereign to embrace the doctrine of separation of powers and the presence of checks and balances among different arms of government. With its roots in the US Supreme Court case *Marbury v. Madison,* the concept of separation of powers has grown with international and national human rights movements as individuals have sought a judicial remedy against arbitrary state action.[5] In Sri Lanka, the embrace of the doctrine began in the 1990s but perhaps found fruition in 2015. Priyantha Jayawardena PC, quoted by the present Chief Justice, wrote in *Jathika Sevaka Sangamaya v. Sri Lanka Hadabima Authority:*

> "There are three distinct functions involved in a government of a state, namely legislative, the executive and judicial functions. Those three branches of government are composed of different powers and function as separate organs of government. Those three are constitutionally of equal status and also independent from one another."

The present Supreme Court also strikes down any return to the moral vacuum of legal positivism by quoting *Baker v. Carr* (1962), "The court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction."

In the Supreme Court's judgment there is a stated understanding that Sri Lankan legal and political order rests on the supremacy of the constitution. But such a consensus is late in developing. One respondent argued, like George Bush did regards the US Constitution, that the supremacy of the president and not Parliament or the constitution was the cornerstone of the Sri Lankan Constitution (*R. Sampanthan and Others v. AG,* p.52). The Supreme Court easily dismissed this argument using Sri Lankan and international case law *(Nixon v. Fitzgerald)*. However a socio-legal analysis of Sri Lanka's very powerful executive presidents, who have used a great deal of prerogative power not expressed in the constitution, could lead many to argue that whatever is present in theory, the executive presidency is structurally the most important institution. In terms of functions, impact and powers, the presidency has remained the most forceful institution since the 1978 Constitution was enacted until the 19th Amendment and the recent judgment by the Supreme Court.

While some put forward the notion of the supremacy of the presidency, many others argue for the supremacy of Parliament.[6] The Constitution is unclear and silent on the matter of supremacy. It does not state anywhere that the doctrine of 'rule of law' requires that the Constitution itself should be supreme thus establishing a system where men are governed by laws and not by men. This present judgment using judicial construction, however, appears to put the matter to rest. The present court unequivocally accepts the supremacy of the Constitution over all institutions and locates the judiciary as the arbiter. This line of reasoning began in 1994 with *Premachandra v. Major Montague Jayawickrema*[7] and developed in a few later cases. But the vagaries of the Supreme Court in recent years have not always brought clarity to the question. During the period after 2005, there were serious doubts as to where the court stood with regard to other arms of government. We must not lose sight of the developments that took place with regard to Chief Justice Shirani Bandaranayake *(Shirani Bandaranayake Impeachment Case)*.

Such assaults on the judiciary also took place during other regimes.[8] This Supreme Court is in line with other progressive judiciaries throughout the world in stating that, despite what has often been a tug of war for many years, the Constitution is supreme, rule of law runs through the fabric of the Constitution, and the judiciary is its final arbiter. The subtle shift of power, raising the judiciary not only as a co-equal arm but the final interpreter of every clause of the Constitution, except for those given away, is the mark of a confident and forward looking judiciary.

The Secretary to the President also argued that the Supreme Court had no jurisdiction because the dissolution of Parliament is a political question (*R. Sampanthan and Others v. AG,* p. 23). The landmark decision is drawn from the United States where the matter of the political question was often litigated in the early years of the US Supreme Court. The landmark case on this issue is *Baker v. Carr* and it was about judicial power in the United States to review the drawing up of voter districts, and so called gerrymandering to diminish the power of the minority vote. It was expected that since this was about voting areas it would be solely the subject matter of the legislature. Yet, the court argued that the drawing of district lines directly affected the right to vote. The link to citizen's rights in what seems to be a political question is now a pathway for courts to exercise jurisdiction. This was during the strong days of Bill of Rights jurisprudence in the US and the right to vote was a central tenet of the US civil rights movement. Since then anything that impacts on the Bill of Rights despite its political nature is seen as a justiciable issue. Today there is Republican backlash in the US Supreme Court. This year the US Supreme Court accepted the judicial review of gerrymandering but upheld very Republican drawn legislative districts. With the court moving to the far right in the United States, the re-emergence of the political question argument is already being seen as a possibility to prevent justiciability of civil rights, especially those relating to democratic institutions and social and economic policy (*Miller v. Johnson; Shaw v Reno; Bush v. Vera*).[9]

The respondents to the present case also argued that the state of the country's political and economic situation was such that it was an emergency and the President had to dissolve Parliament because of political exigencies. The respondents argued that since the local government elections in February, challenges in Parliament and recent events were "compelling, unprecedented and critical circumstances" (*R. Sampanthan and Others v. Attorney General, p.19*) that required the President to dissolve Parliament with Article 62 (2) providing that emergency backdoor.[10] The factual basis of this argument would be in question and would require a lengthy trial. The case that the country was in a total state of crisis was not compelling. The court emphatically did not accept that political exigencies would justify bypassing constitutional processes and procedures.

The Attorney General and the respondents also argued that dissolving Parliament was not an "executive or administrative act" which is a requirement for judicial review in fundamental rights cases. They claimed dissolution was an executive act of the president outside Article 126 and the scope of fundamental rights. For this they deconstructed executive power into basically two types: plenary powers exercised by the president as head of state and executive powers exercised by the president as head of government. They argued that only acts by the executive as head of government are reviewable and that acts as head of state are not. The power of dissolution, according to the Attorney General, is a plenary power exercised by the president as head of state. It resembles a royal prerogative power. This power inherited from the colonial monarch, according to the

Attorney General, is full and complete in certain areas such as the discretion to dissolve Parliament. This argument, that the head of state possesses prerogative powers of a monarch would give the executive widespread unfettered discretion on a whole host of matters and the right to act as a king. It is extremely surprising that an attorney general of a democratic country would allow for such an argument.

Quoting a string of Sri Lankan cases, the Supreme Court made it very clear that the president of Sri Lanka had not inherited the mantle of a monarch. The court highlighted Sarath Silva's words, that the president is not the repository of plenary executive power that pertain to the Crown as in the UK. The court made clear that the president of Sri Lanka is accountable for his actions in his official capacity both as head of state and head of government in "appropriate circumstances" (*R. Sampanthan and Others v. Attorney General,* p.43).

The court argued that what is "executive or administrative action" depends on the facts of the case (*R. Sampanthan and Others v. Attorney General,* p. 39). The judges began by looking at the heading of the chapter in which the power of dissolution is contained which states clearly "the Executive" which would be evidence that the powers exercised were executive or administrative. They then used an important rule of interpretation to provide their analysis. The rule expression *unius est exclusion alterius* states that the mention of one or more things of a particular class may be silently excluding all other members of the class.[11] Executive power to declare war and peace (Article 33 (2) (g) of 1978 Constitution) is specifically excluded from judicial review by a fundamental rights application under Article 126. None of the other clauses have that limitation preventing judicial review based on fundamental rights. The court was persuaded, by reading the text, that as a result of the exclusion of that clause – except in the right to declare war and peace - the power of dissolution is subject to judicial review.

However some of the cases taken to support this plain meaning reading by the court were controversial. Judicial review is painted with a very broad brush and the cases quoted supporting the argument are not without their detractors. Athula Chandraguptha Thenuwara *(Thenuwara v. Speaker of Parliament)* in 2012 brought an action against the then Speaker of Parliament. The Speaker had decided to appoint a select committee and this act was seen by the Supreme Court as an executive and administrative act that the court could review. Many may argue that the appointment of a select committee is clearly a Parliamentary Privileges issue and Parliament and the speaker must have sole discretion. Since Parliament was not so activist in protecting its rights during that time this issue was passed over. Judicial overreach at some point may produce a backlash and most importantly prevent the proper operation of checks and balances as envisioned by a separation of powers system.

The other case cited - with kudos - by the court, was that of Singarasa, also an extremely controversial case (*Singarasa,* p. 245). The President at the time, using his treaty making powers, had signed the Optional Protocol to the International Covenant on Civil and Political Rights. As a result, a procedure developed that if domestic remedies were exhausted, an individual could bring his case to the United Nations Human Rights Committee. The treaty making powers of the president is usually clearly seen as within executive powers.[12] In most jurisdictions they are not executive and administrative acts subject to review by the judiciary - though in dualist systems they must also be adopted by two-thirds of the legislature to be binding. In the Singarasa case it was a question of whether the executive could sign the Optional Protocol. In countries with

a presidential system, the traditional position has been that the president has sole power to interpret all treaties.[13] The Singarasa case made clear inroads into that power. The present court endorsed that position.

It is clear from the words of the judges of this Supreme Court and the judgments they cite that the present court will broadly interpret judicial review while looking at the facts of the case. In doing so, they have crossed traditional lines and changed the dynamic, opening up many areas of executive and legislative power to the scrutiny of rule of law and through that principle, the judiciary. For the most part this is a welcome trend. But there is the danger that like the then recent Pakistani Supreme Court, the court will become an alternate dispensation of power, interfering robustly in the day to day affairs of the state, a role that does not sit well with the separation of powers. Finding the right balance will be the test of this new and energetic court.

The other side of judicial review of executive or administrative action is the immunity of the president under the Constitution. Prior to the 19th Amendment, the president was clothed with blanket immunity for acts committed and/or omitted in his public or private capacity, *(Mallikarachchi v. Shiva Pasupati, Attorney-General)* though courts had interpreted it to mean that such immunity shielded the doer but not the act *(Karunathilaka and another v. Dayananda Dissanayake)*. The 19th Amendment in 2015 made a special exception for fundamental rights cases filed under Article 126. In those cases applications can be made against the attorney general for acts committed or omitted by the president (Article 35(1) 1978 Constitution). There was clear intent on the part of lawmakers to ensure a remedy for fundamental rights violations that result because of the actions of a president.

Though it is welcome to see that fundamental rights against presidential action is made justiciable by forcing the attorney general to stand in for the president, one wonders whether his independence is thereby brought into question. Successive attorney generals have not shown an independent streak but the new proviso to Article 35 (1) may have made it even more difficult to secure that independence. Nevertheless, making a president's actions justiciable and subjecting them to fundamental rights is extremely laudable. One can only hope that the practices of the attorney general in this regard will also evolve to maintain a measure of independence.

For a country that has been ruled by emergency for much of its post independent life there is one article that is etched in the minds of the public and public interest lawyers that is the cornerstone of their dealings with the Constitution. Article 126 recognises the Supreme Court as having "sole and exclusive jurisdiction" to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right" (Article 33 of 1978 Constitution). The 1978 Constitution was the first one to set out a list of those fundamental rights, much of it drawn from the International Covenant on Civil and Political Rights. The 1978 Constitution also made fundamental rights justiciable.

The litigation around this clause is so vital to the body politic of Sri Lanka that the judges in this present case used Kelsen's word 'grundnorm' to describe the link between fundamental rights and sovereignty. This was also the intention of the 19th Amendment. Hans Kelsen in his book *Pure Theory of Law* (Kelsen 1962; Raz 1974) used the word 'grundnorm' to describe the basic norm or rule that is the grounding principle of the legal system that gives the system its legitimacy.

In using grundnorm to describe the chapter on fundamental rights and linking it to sovereignty, the court made the argument that the fundamental rights chapter is one of the root bases of the Constitution and thus gives legitimacy to it. Without the grundnorm, the structure of the legal system would be made meaningless in the eyes of the society as a whole.

Though the link between sovereignty and fundamental rights is present in the text of the Constitution (Art. 3 1978 Constitution), the clear link to sovereignty and fundamental rights as a grundnorm is a product of the 19th Amendment and is not present in earlier constitutions and early cases before the Supreme Court. Early courts were timid since fundamental rights litigation in the country has a short history, beginning only in the 1980s. But over the years the courts have begun to understand their special role with regard to fundamental rights. In this case, the court quoted *Mutuweeran v. The State* and *Edirisuriya v. Navaratnam* as supporting court's "sacred" duty with regard to fundamental rights (*Edirisuriya v. Navaratnamand others; Mutuweeran v. The State*). They argued that the Constitution requires that the Supreme Court "vigorously protect the totality of its jurisprudence for the protection of fundamental rights"(*R. Sampanthan and Others v. AG* p.34).

With regard to the particular fundamental right affected in this particular case, the clause the court and petitioners focused on was 12(1), which the court described as the most dynamic clause in our constitutional law history (Article 12 (1) 1978 Constitution); it's about equality. In a technical sense, this provision, as one of the respondents pointed out, could be limited to the classical work of Aristotle on equality - the sameness principle or like vs. like, called the formal equality principle.[14] This requires petitioners to prove that the classification in a piece of legislation or an executive action is unequal on its face and in some instances in its application, i.e. you have to prove discrimination. The US courts in recent times for example have limited equal protection to a variation of this classification theory.[15] However, that is because in the US Constitution there is a separate due process or rule of law clause - the 5th Amendment to the Constitution. Since there is no separate due process clause in Sri Lanka, from the early 80s,[16] following the lead of the UK and Indian judiciaries[17], rule of law issues and curbing the arbitrary and unfettered discretion of the executive are now challenged under Article 12, the equal protection clause of the Constitution.

The late 20th century and the beginning of the 21st century saw a rebirth of rule of law as an important doctrine especially in newly emerging democracies. Rule of law, when it was initially conceived, was seen as a doctrine of anti-tyranny. Its rousing history and rhetoric may be traced to Thomas Paine (Paine, 1776) and its longer history to Greece and Rome. However, its use in an Anglo American legal context was initially developed by A.V. Dicey, one of Britain's first constitutional theorists to focus on a society ruled by laws and processes and procedures (Dicey, 1915). The doctrine also developed substantive aspects to include constitutionalism and the fundamental rights chapters of a constitution. Today it has found new support in global funding for good governance programmes and includes in its scope the activities of all public institutions.

In recent times, critical legal studies scholars have criticised the unquestioning approach to the rule of law doctrine by the legal community. They believe the doctrine gives credence to the belief that the law is the panacea for all problems and that it is generally fair and reasonable. Critical legal scholars always argue that no legal decision is without political bias so rule of law is only an instrument in seeking political gain. They also critique rule of law

as cementing over fundamental fault lines in a society, often taking very illiberal positions. Dicey, for example, was a firm democrat but was extremely conservative on social issues such as home rule for Ireland or women's suffrage.[18] He was reactionary on important issues and yet he will be remembered for his liberal doctrine of the rule of law. In the end, whether rule of law is used in the romantic sense as being the bulwark against tyranny or in its reactionary sense as a bulwark against social change depends on the facts of the case before you. In the present judgment the court obviously saw rule of law as a bulwark against tyranny.

Sri Lankan courts have gone very far on rule of law. As early as 1984, Justice Wanasundera equated Article 12 of the Constitution to Article 14 of the Indian Constitution. The present Supreme Court, like Justice Wanasundera and the Indian courts, rejected limiting Article 12(11) to unequal classification and limiting it to specific cases of clear discrimination. It argued forcefully, "Rule of law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not need positive discrimination or unequal treatment. An act that is prohibited by law receives no legitimacy merely because it does not discriminate against people."[19] Endorsement for the rule of law principle, despite its placement by case law in the equal protection section of the Constitution, cannot be clearer. The present court has little tolerance for unfettered discretion on the part of the executive especially when it goes wrong. Quoting Justice Mark Fernando, the court reiterated that under Article 12 (1) "Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."[20] The present court, throughout its judgment, stated that rule of law runs through every chapter of the Constitution.

The other interesting fundamental rights issue relating to the rights of the citizen that emerges from this case is the right to franchise and its link to sovereignty under Article 3, an entrenched provision of the Constitution. Basically the argument is that the President acted to save the country. Calling a general election is the ultimate act of sovereignty. Nothing derogates from the right of the president to call for general elections. The respondents made an interesting end-justifies-the-means argument in a constitutional context. Emergency requires the president to act decisively and the powers are inherent in his position with Article 62 (2) an "emergency door". Luckily the court was not persuaded by the position that the president has the power to take extraordinary action with regard to the political exigency of a current situation. To repeat the words of the court, "nothing valid flows from illegality. Elections must be lawfully called and elections must be lawfully held". [21]

Much of the court's 80 page judgment dealt with issues related to judicial review and rule of law. The actual provisions of the Constitution that are the subject of the court's decision relating to dissolution appear to be quite straightforward using the plain meaning or "ordinary language" interpretation urged by the court. Here all the judges and especially Justice D'Abrew were very decisive. The three relevant clauses of the Constitution were Article 33 (2), Article 62 (2) and Article 70. The petitioners who filed the case were clear and straightforward in their argument. They stated that Article 33(2) only recognises and vests the general power of dissolution with the president while Article 70 sets out the specific manner in which that dissolution can take place. The President can only dissolve Parliament after four years and six months or after a two-thirds majority of Parliament vote to dissolve it. The court agreed with the petitioners, arguing that Article 33(2) is about general powers and Article 70 qualifies the general powers with

specific clauses with regard to the manner of dissolution. On the surface it looked an open and shut case.

The respondents tried all sorts of constitutional arguments to challenge what seems to be the plain meaning of the law. They were aided by some loose drafting of the 19th Amendment that prevented a watertight case. The first is that Article 33 (2) is a stand alone provision and the general power of the president to dissolve Parliament can be exercised without Article 70, especially in situations of emergency or a deadlocked Parliament.[22] The counter to that argument is that the drafters may have envisioned such situations but left it to Parliament to make the decisions about dissolution and not the president. The second is that Section 62 (2), the automatic dissolution provision, is also an empowering provision for the president to dissolve Parliament regardless of its fixed term, focusing on the words "unless Parliament is sooner dissolved".[23] The respondents also argued the words "at any time" in Article 70 (3) gives unfettered discretion to the president[24] though for the court and the petitioners it had an explicit qualifier "subject to the provisions of this article". They further argued that the dissolution in Article 33 is executive driven, i.e. the president, and the dissolution in Article 70 is legislature driven, i.e. a two-thirds majority of Parliament. In the first, (Article 33) the president's power they claimed is stand alone and absolute. They also argued the provision for non-dissolution of Parliament for four-and-a-half years does not apply if Parliament is prorogued. They challenged the petitioners by stating that the Sinhala text differed from the English text with legal consequences. All seven judges rejected these arguments. It is unnecessary to go into the specifics because the twists and distortions of language that the respondents engaged in were quite complex and unnecessary, and much of it was roundly chided by the court.

If one goes beyond the actual provisions of the Constitution and the facts of the case to the jurisprudence of the judgment, it is clear that it belongs to a particular school. The style of the court in holding with the petitioners is much in line with the work of Ronald Dworkin.[25] The court did not focus on underlying policy or politics like the American Realists[26] and the Critical Legal Studies schools of jurisprudence.[27] It did not seek to uncover the policy imperatives and attempt to give direction or reconcile them like some of the great realist judges of the US Supreme Court. In addition, eight of the judges of this Sri Lankan Supreme Court go for a broad expansive canvas and do not focus on only formal legal analysis and logic like the many schools of legal positivism.[28] Justice D'Abrew, on the other hand, appears to be a legal positivist. He shies away from the larger analysis of a court influenced by Dworkin and South Asian jurisprudence. He focuses on the facts of the case before him, does the plain meaning analysis and relies on Sri Lankan case law.

The Chief Justice, on the other hand, tries to elucidate rules and principles that must guide constitutional decision-making not only in this case but also future cases. In that sense this judgment was not only about this case but a harbinger of the approach that is yet to come. A principle based adjudication, which is the art of judicial making that Ronald Dworkin encouraged, is welcome in a country that at times seems to lose its moral compass.

The first principles the court reiterated were the long standing rules of interpretation. The first rule is that a statute must be given its plain and ordinary meaning. The court should not "twist or stretch or obfuscate the plain and clear meaning and effect of words".[29] Throughout the judgment the words plain meaning and ordinary language appear. However, they also argued in the same paragraph that the object of all interpretation is to discover the intention

of Parliament. The court's judgment merged and supplemented the plain meaning rule with the intent of the legislature seamlessly. Justice Amerasinghe seemed to be the voice of authority for the judges. "Where the words are precise and unambiguous and there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves best declare the intention of the makers of the Constitution" *(Somawathie v. Weerasinghe and others)*. If the language employed is plain and unambiguous, the same must be given effect to irrespective of the consequences that may arise.

In the court's judgment there was no recognition that the really hard cases are when the plain and ordinary words of a constitution seem to be at variance with the intent of the legislature. One would not be honest if one were not to admit that the drafters of the 19th Amendment did leave some room for that variance, a variance that was seized upon by the respondents. The court, however, did not recognise this as a question of variance - a situation where the text is actually ambiguous and the plain meaning of what is written appears to go against the intention of the legislature. If that were the context we would be left wondering whether the plain meaning rule or the gauging of the intention of Parliament would be supreme. In this particular case, according to the Supreme Court, the ordinary language of the Constitution, the intent of the legislators and the agitation of the citizenry appeared to point in the same direction.

The second principle the court applied was the harmony principle. If there is more than one provision in a statute or a constitution that deals with the same subject, there must be a smooth and harmonious interpretation. Buttressed by international cases, the court quoted the passionate Krishna Iyer, that a court must engage in the healing art of harmonious construction, not the "tempting game of hair-splitting".[30] As a result, the court felt their reading and analysis of Articles 33, 62 and 70 allowed for that smooth harmony, not positing one provision of the Constitution against another.

The court also spelled out as principle the legal maxim that the specific provisions must be given preference over the general unless there are specific words to the contrary. It quoted Indian cases, "where there is in the same statute a specific provision and also a general provision, that, in its most comprehensive sense, would include matters embraced in the former, the particular provision must be operative and the general provisions must be taken to affect only such cases within its general language as are not within the provisions of the particular provision".[31] Article 70 with its specific mention of four-and-a-half years before a president can dissolve Parliament supersedes Article 33 (2) (c), which are the general powers.

Dworkin would be particularly glad that the guiding substantive principle of this case, as mentioned earlier, is rule of law. The Supreme Court moved on to make rule of law not only a formal process, such as entrenching the supremacy of the Constitution and ensuring proper rules and procedures, but also a substantive concern with an emphasis on fundamental rights. It quoted a whole host of judgments from a wide variety of Sri Lankan judges to show how entrenched the rule of law principle is, especially as it applies to curtailing unfettered discretion.[32] It made clear that rule of law is the highest principle and a fundamental norm of our society. Whether this is an aspiration or will become a reality will have to be ascertained from events in the next few years.

The court was also expansive in this judgment arguing that in constitutional cases one has to go beyond narrow technicalities. Unlike a statute there has to be notice of a constitution as a living organism capable of growth and

development,[33] and there may be need to take into account social, economic and cultural developments, which have taken place since its framing. There are many paragraphs in the judgments where the court waxed eloquent about these issues and the court's role as an enabler of social promise and growth. However, it recognised a limit and quoted Amerasinghe: "I consider it to be legally and constitutionally unsound, even though the invitation has been extended to us by learned counsel to eviscerate the Constitution by our own conceptions of social, political or economic justice."[34] The Supreme Court judgment contained this internal contradiction in many parts of the text. It began with aspirational language that made the reader believe that the court would allow unique possibilities, but at the end of the exploration came back to Justice Mark Fernando and Justice Amerasinghe, reminding them of the cautious role of the judiciary in a democratic and plural society. What is the final balance between aspiration and restraint? Will the court develop this line of thinking? The next few challenging years may give us some answers.

The court is unusual in the sense that it deals primarily with Sri Lankan case law but does not hesitate to draw on cases and commentary from India, the US and the UK. In that sense it was self aware that this was going to be a landmark case, read not only by Sri Lankans but also by commentators the world over. It was comprehensive both in matters dealing with process and substance and all arguments were dealt with using the full plethora of commentary and case law. Justice D'Abrew was more modest. His judgment utilised a very clear plain meaning analysis and drew only on Sri Lankan case law.

Despite our island location, no country is isolated from the intellectual and professional currents that traverse the world. Due to political gridlock, corruption and abuse of power in the South Asian region, South Asian judiciaries have become very activist. There was a legendary time for the Pakistan judiciary and the bar with people like Asma Jehangir leading the charge.[35] Today however, there is some caution and concern with regard to the unbridled activism of the Pakistani Supreme Court. Many agree with A.G. Noorani when he writes, "judicial activism is a virtue only when it is accompanied by restraint" (Noorani, 2019). The Indian Supreme Court has also made some groundbreaking judgments.[36] In Africa, the South African and Kenyan courts are also pushing forward. Since the 1970s, no longer do we have to only look to the west for inspiration. The judiciaries of South Asia have come into their own, understand their role and will probably fight to keep their independence. Regardless of the jurisprudence in this particular case, this development of a self-aware judiciary demarcating its borders may be the greatest triumph.

This case then points to a new and progressive era for the Supreme Court. Rule of law and the supremacy of the Constitution have been further entrenched. Rule of law is seen to run through the entire fabric of the Constitution and there will be no unfettered discretion except perhaps with regard to the President's power to declare war and peace. Separation of powers and checks and balances has been strengthened at the expense of the supremacy of the president or the supremacy of Parliament. What was once ambiguous or debated especially in the era 2009-2014 has now been made crystal clear.

Constitutions are not only for lawyers and judges, they are also about the people's passions. A young scholar Rohit De has just published a book titled *A People's Constitution* which discusses the everyday effect of constitutional law in the Indian Republic. Recent discussion on successful fundamental rights cases in India

show that when citizens are aware and agitate, the Supreme Court responds more effectively.[37]

In Sri Lanka, in the 52 day period since the crisis of 2018 erupted, copies of the Sri Lankan Constitution were said to be sold out. Everyone was an expert on Article 33 and Article 70. The Constitution came alive and had meaning for ordinary people. Their energy on social media and sometimes on the streets charged the atmosphere so that the judges were aware that the whole world was watching them. In legal analysis and writing the role of the greater society, the enthusiasm and activism of the ordinary citizen, especially in fundamental rights cases, is ignored. Most of the great legal moments in the last two centuries are because those moments were an important part of the growth of a social movement fighting for rights and seeking vindication in the courts. The citizens and lawyers of the movement often frame the analysis and discourse before it even gets to the judiciary. As Rohit De writes, "as citizens, historians and lawyers, we should listen for Nanu's drumming as we look at the Constitution, reminding ourselves that constitutional narratives are forged inside and outside the courtroom (Rohit De, 2018).

Notes

[1] The American Realist school is concerned with the law as applied policy, focuses on cases and sees the judiciary as the main drivers of the law.

[2] The Critical Legal Studies Movement is a critical school of law that aims at transparency in the creation and application of the law especially with regard to the analysis of power imbalances in society and within the discourses of the court

[3] 'Full Text : Proposals For Constitutional Reform', Colombo Telegraph, 6th April 2013, available at: https://www.colombotelegraph.com/index.php/full-text-proposals-for-constitutional-reform/

[4] John Austin is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism." See Morison, W.L., John Austin. Stanford: Stanford University Press, (1982)

[5] *Marbury v. Madison* U.S. Case Law, 5 U.S. 137 (1803), declared, for the first time, an act of Congress unconstitutional, thus establishing the doctrine of judicial review. The Supreme Court held that a section of the Judiciary Act of 1789 (specifically, Section 13, which authorized the Court to issue a writ of mandamus) was unconstitutional and thus invalid. Chief Justice John Marshall declared that in any conflict between the Constitution and a law passed by Congress, the Constitution must always take precedence.

[6] Parliament supremacy is a concept in the constitutional law of some parliamentary democracies. It holds that the legislative body has absolute sovereignty and is supreme over all other government institutions, including executive or judicial bodies. It also holds that the legislative body may change or repeal any previous legislation and so it is not bound by written law (in some cases, even a constitution) or by precedent.

[7] *Premachandra v. Major Montague Jayawickrema* [1994] 2 Sri LR

[8] Asia Report. 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights' International Crisis Group. June 2009.pg.11

[9] *Miller v. Johnson,* 515 U.S. 900 (1995) / Shaw v. Reno, 509 U.S. 630 (1993)/ Bush v. Vera, 517 U.S. 952 (1996).

[10] Article 62(2) of the constitution of the democratic socialist republic of Sri Lanka ; Unless Parliament is sooner dissolved, every Parliament shall continue for six years from the date appointed for its first meeting and no longer, and the expiry of the said period of six years shall operate as a dissolution of Parliament.

[11] Unius exclusion, a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded

[12] Article 154G(11) Constitution.

[13] Treaty Clause is Section 2 Clause 2 of the U.S. Constitution

[14] Aristotle, Nichomachean Ethics, Volume 3 in Barnes, J. ed. Princeton: Princeton University Press (1995)

[15] Legal Information Unit, Cornell University, "The New Equal Protection" w.w.w.law.cornell.edu

[16] *Nagananda Kodituwakku v. Commissioner of Elections and others* SC (WRITS) 05/2015 26 November 2015

[17] See Burt Neuborne, The Supreme Court of India, 1 Int'l J. Const. L. 476 (2003)

[18] Tulloch, Hugh. "A. V. Dicey and the Irish question: 1870-1922". Irish Jurist, 1980.

[19] *R. Sampanthan and Others v. Attorney General* SC FR Application No. 351/ 2018, SCM 13th Dec 2018, p. 87

[20] Ibid p.67.

[21] Ibid p.85

[22] Article 33(2) of the Constitution.

[23] Article 62(2) of the Constitution.

[24] Article 70(3) of the Constitution.

[25] *Dworkin, R., Taking Rights Seriously.* Cambridge: Harvard University Press, 1978.

[26] see ibid., 1

[27] see ibid.,1

[28] "legal positivism" sees the legal system as a closed, logical system in which correct decisions can be deduced from predetermined legal rules without reference to social considerations moral judgments, unlike statements of fact, which can be established or defended by rational argument, evidence, or proof

[29] Dhavan J in *Moinuddin v. state of Uttar Pradesh* [Air 1960 all 484, p 491]

[30] *R. Sampanthan and Others v. Attorney General* SC FR Application No. 351/ 2018, SCM 13th Dec 2018, p. 64

[31] Ibid, p. 72

[32] Quoting Sripavan in *Wijeyaratne v. Warnapala* SC(FR) 305/2008 03 May 2010, Sarath Silva in *C. Vasudeva Nanayakkara v. Choksy and others* SC(FR) 29/2007 May 2008, Mark Fernando in *De Silva v. Athukorale* SC(FR) 76/92 March 1993, *Eva Wanasundera in Premalal Perera v. Tissa Karaliyadda* SC(FR)18/1985 May 1985, *Shiranee Tilakawardane in Sugathapala Mendis v, Chandrika Kumaratunga* SC(FR)352/07 July 2008, *Priyantha Jayawardena in Jathika Sevaka Sangamaya v. Sri Lanka Hadabima Authority* SC(FR) 15/2013 16 December 2015. *Shirani Bandaranayake in Gamage v. Perea* SC (FR) 16/2002 18 August 2005.

[33] *R. Sampanthan and Others v. Attorney General* SC FR Application No. 351/ 2018, SCM 13th Dec 2018, p. 64

[34] Ibid p.66

[35] Judicial Activism and Implications for Democracy in Pakistan (A Case Study of Lawyers) wc2018.ipsa.org>congress>paper

[36] Arun K. Thiruvengadam, "Revisiting The Role of the Judiciary in Plural Societies", in S. Khinani et al ed. Comparative Constitutionalism in South Asia, New Delhi, Oxford University Press, 2013 at 341

[37] See Open Global Rights, Jayna Kothari, India's Supreme Court is making Landmark Judgements in Social Change; openglobalrights.org

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SRI LANKAN 'CULTURE' ON CONSTITUTIONALISM:

How Political Culture has shaped our Constitution

SAKUNTALA KADIRGAMAR

In this article the writer analyses the nexus between culture and constitutionalism in Sri Lanka, examining how Sri Lanka's constitutional culture is influenced and shaped, particularly by its political culture.

'Implications of Culture for Constitution Building' was the topic of discussion at the Melbourne Forum[1] roundtable organised recently in Sri Lanka. There was a vibrant discussion around this theme with participants from South[2] and South East Asia[3], and the Asia Pacific regions.[4] Given that Sri Lanka is in a protracted constitution-building mode, this discussion was particularly relevant and useful.

I believe that this line of inquiry should be extended to consider the relationships between culture and constitutionalism and the impact of culture in supporting and sustaining the values embedded in the constitution. Using the prism of culture, specifically political culture, I pose the following questions to gain an understanding of political developments and legal jurisprudence in Sri Lanka: Does Sri Lanka have a constitutional culture shaped through its specific legal and political precedents or do the broader values of constitutionalism influence the constitutional culture? What is the impact of Sri Lanka's political culture in shaping the Constitution?

In Sri Lanka, 'culture' is used variously and extensively. It is used descriptively to extol a glorious past of wise and benevolent kings and a prosperous agrarian economy. This historical narrative glosses over the destructive war and numerous instances of patricide and regicide resorted to to transfer power and ignore the reality that people were subjects and not citizens. This cultural representation

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of glory is viewed from the apex of society, yet it is regarded as authentic and universally appreciated. Some of Sri Lanka's contemporary leaders view it with nostalgia – presumably with a wish to recapture some aspects of this past glory.[5]

Sri Lanka's unique 'culture' is also frequently referenced to demarcate 'us' from the 'rest of the world' in general, but more particularly to demarcate 'us' from the 'west'.[6] Too often, the assertion of the universality of human rights was regarded by some of Sri Lanka's political and spiritual leaders as an alien imposition of strident 'western values' that disrupts the harmony of societal relations in Sri Lanka.[7]

Although women were enfranchised in 1931 with the first woman to head a government elected in Sri Lanka,[8] and women are robustly engaged as voters and active in employment and in institutions of higher education, Sri Lanka remains a patriarchal society. This patriarchal culture enables the mutation of constitutional provisions guaranteeing equality and for the protections against gender discrimination. On the one hand, the major political parties robustly defend 'minority rights' by recognising personal laws, notwithstanding the fact that they discriminate against women in significant ways.[9] On the other hand, power sharing with minorities is contested as it runs counter to a deeply entrenched majoritarian mindset and a political and cultural construction that privileges the Sinhala language, Buddhism and a centralised, unitary state.

Minority communities too, frequently resort to the 'culture argument', asserting the importance of protecting sub-national identity by recognising personal laws as vital to protecting their cultural uniqueness, notwithstanding the fact that it subordinates women in matters of inheritance, marriage, divorces, custody of children[10] and their economic agency.[11] Minorities too, canvas their rights in particularistic terms and not from a universal principle of minority rights.

In saner moments, Sri Lankans have also reflected and agreed on the need to turn away from 'the culture of impunity and corruption' that pervades all forms of political and economic life in the country. The rallying cry at the presidential elections of 2015 and in the following parliamentary elections was *'Yahapalanaya'* or good governance, as a reaction to the culture of impunity and corruption that prevailed. During the war against the Liberation Tigers of Tamil Eelam, human rights violations were justified on grounds of national security, but these violations, including disappearances and extrajudicial killings of political and other alleged opponents, especially journalists, continued in the aftermath of the war as well. Trade unions, students and people protesting against environmental degradation, threats to their health and evictions from their homes and lands were treated to the same rough treatment and abuses. The 'culture of impunity' was well established and the 2015 elections were regarded as a rejection of that very culture.

The most promising moment of Sri Lanka's recent political history was the coming together of members of the two major political parties, along with representatives from the minority parties to defeat a president seeking an unprecedented third term and their expressed commitment to draft a new constitution in consultation with the people. This was to be a constitution that removed the executive presidency, restored the independence of constitutional bodies and addressed the national question, promising fairness to the minorities and the establishment of rule of law. The national government was to undertake reconciliation between the communities, establish accountability measures and was determined to end impunity and violence, corruption and the misuse of state resources.

The 19th Amendment to the Constitution of Sri Lanka reflected the first steps towards this process. Given that the Constitution of Sri Lanka (1978) entrenched the executive presidency by requiring a two-thirds parliamentary majority and a referendum to remove it, the 19th Amendment could only make some incremental changes until a fully-fledged reform was undertaken. Nevertheless, the passing of the 19th Amendment was regarded as the step in the right direction to re-establish rule of law by creating checks and balances between executive, legislative and judicial power, strengthening democratic accountability and the fundamental rights of the citizen. Furthermore it constitutionalised the right to information and by including civil society representation on the Constitutional Council ensured high calibre and non-partisan representation in key constitutional bodies.

Understanding Sri Lanka's constitutional culture through its amendments

The 19th Amendment is remarkable in the history of constitutional amendments in Sri Lanka. Of the 19 amendments made to the Constitution, the initial trawl of 16 amendments was made within the first decade of its enactment. Many amendments were enacted largely to smooth political outcomes for the party in power. Consequently, the constitution and the amendment process were viewed as partisan and instrumental to the ruling party's agenda. Three amendments (the 6th, 13th and 16th Amendments) had a direct impact on the ethnic conflict that overshadowed the politics of Sri Lanka.

Although the government elected in 1977 received an overwhelming national and parliamentary mandate,[12] in the early years, little was done to make the Constitution serve as the glue to nation building. It was not used to address minority concerns regarding identity, security, representation and participation in the polity. Neither was it used as a mechanism to build political consensus between the ideologically divided majority communities, save in the instances where they coalesced to outbid each other in damping down on minority rights.

The 13th Amendment and the ensuing provincial councils legislation[13] were enacted under the pressure of the Indo-Lanka Accord.[14] They were passed in a context of political strife, with little public consultation or awareness and they were not promoted or initially perceived by the majority as a positive measure to enhance the democratic project. Several attempts were made over time to undermine its effectiveness through centralised administrative practice, by law, and by reference to the subordination of provincial council powers to national policy (Judgment on North East demerger and Determination on the Divineguma Bill). Due to the years of conflict, provincial councils were operational after elections in the East only after 2007, and in the North only in 2013. However, today, despite the initial hostility towards establishing provincial councils, they are regarded as an important part of the constitutional architecture and provincial council elections are enthusiastically contested in all parts of the island. Provincial councils are also regarded as the training ground for aspiring national level politicians and a barometer of support for political parties at the national level.

The exceptional constitutional amendments that attracted broad based parliamentary support were the 17th and 19th Amendments, which strove to reclaim democracy. However, the 17th Amendment became defunct and the 19th Amendment is now at the heart of controversy, contested by the very Parliament that voted overwhelmingly for its passage. Is

this a sad indicator that these two amendments that were most instrumental for democratic reform and rejuvenation were not sufficiently deep-rooted in the value-system of the parliamentarians, that they were ready to abandon them both when it was politically expedient to do so?

In retrospect, one could argue that the constitutional culture was chartered in the process of drafting and adopting the 1978 Constitution. The process was non-consultative and non-participatory and was the unilateral endeavour of the ruling party. It slid through the parliamentary process as a constitutional amendment of the 1972 Constitution although it did not even keep the skeleton, or even a few shards of the constitution that it sought to amend. Within the first decade, the amendments that were passed violated the very principles that the Constitution sought to establish.

One of the arguments made in 1978 to support the new constitution, was the need for stable and predictable government – a government that was not undermined by mid-term elections and crossovers. To prevent parliamentary crossovers, the constitutional drafters provided that a member of Parliament crossing over to another party would lose his or her seat. The rationale for this measure was that the voters selected a party as well as a representative, and this must be duly respected and represented in Parliament. Nevertheless, a constitutional amendment to enable parliamentarians to cross over to the government from the opposition was made shortly after enactment, to accommodate an opposition member seeking to cross over to the government ranks (Article 99(13) (a) of Fourteenth Amendment).The amendment in effect permitted opposition party members to cross over to the government and not the other way around. Crossovers often take place at the time of government formation with parliamentarians explaining their decisions in altruistic terms – to better represent their constituency by being part of the government. Although it is rarely expressed, it is closer to the truth that parliamentarians cross over to the government to personally enjoy the perks of being on the side of the government in power and sometimes, their constituents too derive some of the benefits of development.

However, with the constitutional coup of 26 October 2018, the horse-trading to engineer a functional parliamentary majority to support President Sirisena's appointee for the post of Prime Minister - Mahinda Rajapaksa - led to mind-boggling cash inducements alleged to have been offered and paid. Some of these deals were taped and aired on television but they have not led to arrests for bribery or attracted any political or legal consequences for the bribe givers or takers.

The most partisan of constitutional amendments, and perhaps most demonstrative of a political culture of creeping authoritarianism, was the failed, third attempt to amend the Constitution. An amendment was passed with the requisite two-third majority in 1982 to alter representation in Parliament to permit two members to represent the single Kalawana electorate - one as a "nominated" member (to accommodate the government's member of Parliament who lost his seat in the by-election) and one for the elected member (from the opposition party who legitimately won the by-election). The courts held that such an amendment required a referendum and while political wisdom finally led to the proposed amendment being shelved, it was brought home to the public that constitutional amendments were to be made on the grounds of political expediency and that the supra-parliamentary majority required was not a real safeguard in a Parliament where the governing party held such a majority and was ready to use and abuse it at will.

The (eventual) 3rd Amendment (1982) enabled the president to seek re-election after four years - giving the incumbent the power to choose a politically opportune time to hold presidential elections. When the constitution was adopted, one of the arguments presented by the drafters in its favour was that it provided for fixed and limited terms of office for the president. This amendment undermined the objective of stability and certainty through fixed terms of office.

The 4th Amendment (1982) was passed to extend the term of the first Parliament and maintain its composition. This was supported by a referendum – the only referendum held thus far, under the Constitution. Political strategists recognised that while the United National Party would still achieve victory at the polls in 1982 under the new proportional representation system while suffering the effects of mid-term anti-incumbency sentiments, they would not secure a two-thirds majority in Parliament. It would bring an end to unilateralism and any future constitutional amendments would require multi-party support. Such efforts would have required compromise, consensus building and ensuring that hasty, partisan amendments would not be introduced. It would have also strengthened parliamentary democracy. Nevertheless, the government opted to extend Parliament through a referendum and not hold a general election.

The 6th Amendment (1983) was to prohibit against violation of the territorial integrity of Sri Lanka. This amendment prohibited persons from supporting, espousing, promoting, financing, encouraging or advocate the establishment of a separate state within the territory of Sri Lanka. It furthermore prevented any political party or other association or organisation from having as one of its aims or objects the establishment of a separate state within the territory of Sri Lanka.

As a result of this, the Tamil parliamentarians had to withdraw from Parliament, as they could not take an oath of allegiance to Parliament given that they had received a mandate from their electorates to lobby for a separate state.

Meanwhile, the 10th Amendment repealed the constitutional protections requiring two-thirds majority in Parliament for the Proclamation of Emergency under Public Security Ordinance.

In 1987, the 13th Amendment to the Constitution was introduced under pressure from India, to provide for a degree of provincial autonomy and thereby counter the Tamil minority's more extreme demand for secession. The passage of this Amendment tore at the unity of the governing party, leading to a defection by a senior member and resort to an unprecedented corralling of members to ensure that they arrived in Parliament to vote on the bill. Some sections of the population, mostly within the Tamil minority, dismissed this legislation as 'too little, too late' and others, mostly from the Sinhalese population, regarded it as the harbinger for secession. For many years, provincial councils could not be established in the areas most populated by the Tamil community (the Northern Province), due to the conflict and in any event, provincial autonomy could only function to the extent that the centralised and increasingly autocratic executive presidency permitted it scope to function. However, today, there is robust participation in provincial council elections, and provincial councils are seen less as a harbinger of secession and more as a training ground for national level politicians. The provincial councils themselves exercise limited powers and budgets and must exercise their powers in ways that do not contradict national policies.

The 14th Amendment (1988) extended the immunity of the President; increased the number of members of Parliament to 225

of which 196 are elected while 29 seats are distributed among the political parties in proportion to the votes they received, to fill as National List members; clarified the validity of referendum; appointed a delimitation commission for the division of electoral districts into zones; and clarified proportional representation and the cut-off point to be 1/8 of the total votes polled. Although the Amendment recommends that the political parties appoint members from communities, ethnic or otherwise, who are not sufficiently represented in Parliament (Fifteenth Amendment, section 2 and Article 99 A (6) of Constitution) they are not mandated to do so and more often than not, political parties appoint party members who have been defeated in the election, making a mockery of people's franchise.

The 16th Amendment (1988) made provisions for Sinhala and Tamil to be languages of administration and legislation. Significantly this was enacted thirty years after the Sinhala Only Act was enacted and to create the prospect of a realistic framework for the implementation of the 13th Amendment to the Constitution.

The 17th Amendment (2001) was to make provisions for the Constitutional Council and independent commissions to improve democratic governance. This amendment secured bi-partisan support for its enactment and was enthusiastically viewed as a way of re-setting Sri Lanka's slide away from democratic governance. However, it was never implemented.

The 18th Amendment (18th Amendment to the Constitution, 2010) removed the crucial sentence that mentioned the limit of re-electing a President and proposed the appointment of a parliamentary council to decide the appointment of independent posts such as the commissioners of election and human rights, and Supreme Court judges. By packaging two counter proposals – removing the term limits and checks against a President riding high on the advantage of incumbency, to contest elections without limits, with the creation of independent constitutional posts to create checks and balances – presented parliamentarians with a Hobson's choice. Nevertheless the government of the day had the required parliamentary majority of pliant and uncritical members to secure its passage. In retrospect, this was determined to be a significant factor that contributed to Rajapaksa's defeat in the presidential election of 2015, as many feared the outcome of his un-ending presidency.

This is indeed a tired recounting of the uninspiring history of constitutional amendments not always amounting to reform in Sri Lanka. The histories of the constitutional amendments in Sri Lanka are themselves a window to the constitutional culture of the times. The party that drafted and passed the Constitution of 1978 and was well satisfied with it while it held the reins of power found it less satisfactory when in the opposition and experienced the many abuses perpetrated under it. Clearly the drafters did not adopt the veil of ignorance when drafting the Constitution and thus did not anticipate that they may one day be in the Opposition and under the domination of the executive presidency. The Constitution of 1978 did not pass the litmus test presented by Rawls – the test of securing to each person the right to have the most extensive basic liberty compatible with the liberty of others and the principles of distributive justice that ensures social and economic positions are to everyone's advantage and open to all without the bias of privilege (Rawls, 1971).

Under the 1978 Constitution, liberal values, human rights and checks and balances through strong institutions were routinely undermined. The major political parties, when in opposition,

vowed to replace the executive presidency, but once in office, found it expedient to maintain it and use the extraordinary powers vested in the presidency to push their political agendas. Eventually they reached a consensus that the institution of the executive presidency in Sri Lanka had corroded parliamentary democracy.

The 19th Amendment was passed in April 2015, to annul key elements of the 18th Amendment that removed term limits for the President, while reinstalling the key elements of the defunct 17th Amendment that established independent commissions. In addition, the 19th Amendment introduced the right to information, established a Constitutional Council that included civil society representation to provide oversight for appointments to independent commissions, removed the executive president's powers to unilaterally dissolve Parliament at will and defined the context when Parliament could be dissolved. It limited the term of office of the President to five years and curtailed the size of Cabinet. Sri Lanka was renowned for its mega cabinets – a source for distributing patronage and securing political loyalty.[15] Under the amendment Cabinet was restricted to 30 Cabinet ministers and 40 deputy ministers and non-cabinet ministers (19th Amendment, section 9 and Article 46 (1) of Constitution). However, an exception was made to accommodate the political coalition, stipulating that in the event a national government is formed, the size of Cabinet will be determined by Parliament (19th Amendment, section 9 and Article 46 (4) of Constitution). There are no guidelines to indicate what the optimal size of a Cabinet should be in the context of a national government or the basis for providing representation for the respective coalition partners, thus leaving the door open for the continuation of bloated Cabinets. While this may be considered a pragmatic and strategic provision, it detracts from the commitment to shrink the size of Cabinets and dispense with patronage politics.

The 19th Amendment also defined the circumstances in which the Prime Minister would cease to hold office. Previously, the president could dismiss the prime minister one year after he or she took office, irrespective of the parliamentary support the prime minister may enjoy.[16] While the president continued to function as the head of State, head of the Cabinet and head of the security forces, the clear objective of the 19th Amendment was to reduce the powers of the president, the opportunities for arbitrary exercise of discretionary powers and to create a platform from which more broad based and fundamental constitutional reforms could be supported.

'Yahapalanaya', the government of good governance, soon became the subject of derision when it became mired in corruption scandals and demonstrated a reluctance to prosecute the perpetrators of war crimes, financial scams and abuses of power.

In the aftermath of the dismissal of one prime minister and the induction of another on 26 October 2018, the notion of 'culture' regained central place in political discourse in Sri Lanka. The President asserted that a "clash of cultures" made it impossible for him to work with the Prime Minister. 'Cultural incompatibility' was used to explain, justify and even to direct legal interpretations and political actions in bypassing constitutional provisions and legal reasoning for the sacking of a prime minister who enjoyed the support of a parliamentary majority and replacing him with another who did not have that support. The President argued that the culture of the government and the Cabinet were alien to him and by extension to the majority of Sri Lankans, justifying his putsch to replace Prime Minister Ranil Wickremesinghe. The President also asserted

that the development culture and priorities promoted is alien to the culture of Sri Lanka. Sri Lanka in his view is primarily an agrarian economy with small farmers as the backbone of the economy. Investments in the creation of a megapolis and free trade agreements run counter to this culture causing further alienation of the people from government.

While the constitutional coup was stymied, unlike in other failed coup d'états there were no dramatic changes and calls for institutional or personal accountability. The country returned to the status quo ante with the Prime Minister being reinstalled, a scaled-down Cabinet reinstated, but few lessons were learned on matters of political accountability and the need to provide clarity of direction. It is uncertain if the large investments in terms of time, resources and political capital invested in the constitutional reform process will be carried forward to yield results. Will Sri Lanka move towards a parliamentary democracy that supported decentralisation at the provincial level, or would it maintain strong presidential powers that permit the president to intervene on matters of policy and implementation? The support that the President received in the early days of this coup, and the delayed challenges to his actions that enabled him to dismiss a Cabinet and install another demonstrate that there remains a deeply ingrained "executive mentality" that does not readily question extraordinary interventions by the executive and may even support such interventions.

Many believe that the constitutional coup was set back through the extraordinary leadership of the Speaker in calling for Parliament to determine whether it had confidence (or not) in the competing prime ministers at hand, and through the courageous decisions of the Supreme Court, first suspending the decision to dissolve Parliament and then in ruling against the President's decision to dissolve Parliament on grounds that the president does not have unfettered discretion but must exercise his powers (to dissolve Parliament) within the terms of his powers as provided by the Constitution. The court affirmed the co-equal status of the three pillars of government – i.e. the executive, legislature and the judiciary - and the constitutionally defined checks and balances and further affirmed that the Constitution embeds the rule of law. Indeed this marked a high point of judicial independence in a country where the judiciary is but recently emerging from several challenges and compromised leadership. However, it is not certain if this is a foundation from which the judiciary can continue to assert its independence. In recent days the mandates of the Human Rights Commission and the Constitutional Council and the independence with which they have acted have been criticised by opposition members of Parliament. It is uncertain whether the gains made are irreversible.

The 19th Amendment was transformed into the eye of a political and constitutional storm, pitting the powers of the presidency against those of the prime minister and the speaker, and demonstrating the fundamental and strong attachment that many political actors still retain for an untamed executive presidency.

The challenge is for Sri Lanka to regain the core values of a restrained parliamentary democracy and embed them within Sri Lanka's constitutional culture. Sri Lanka faces the challenge of going beyond the 19th Amendment to embed the principles of constitutionalism and the rule of law that are, in the final analysis, the best preservers of the social peace. However, constitutional principles do not have autonomous agency. The citizens must uphold them and fight for them – whether they are in Parliament, in the judiciary, in public service or in civil society.

Notes

[1] The Meetings was organized by International IDEA and the Constitution Transformation Network and was hosted by the Centre for Policy Alternatives (CPA), 15-16 October 2018.

[2] South Asian participation was from India, Sri Lanka, Nepal, Maldives, Bhutan and Afghanistan.

[3] South East Asian participation was from Thailand, Myanmar, Vietnam, Malaysia, Timor-Leste, The Philippines and Indonesia.

[4] From the Asia Pacific region, participation was from Papua New Guinea, Tuvalu and Japan.

[5] http://www.colombopage.com/archive_19A/Jan05_1546663133CH.php, http://www.pmdnews.lk/the-foundation-which-strengthen-national-economy-is-the-agriculture-president/

[6] "Apart from policy differences, I noted that there were also differences of culture between Mr Wickremesinghe and me. I believe that all those differences in policy, culture, personality and conduct aggravated this political and economic crisis." See President Maithripala Sirisena's Address To The Nation, Colombo Telegraph, 28 October 2018, https://www.colombotelegraph.com/index.php/president-maithripala-sirisenas-address-to-the-nation-full-text/

[7] Cardinal Ranjit, 'Western world's latest religion is human rights', Times of News, September 23, 2018, https://srilanka.timesofnews.com/western-world-s-latest-religion-is-human-rights-cardinal-malcolm-ranjith.html; "MR asks whether Mangala's statement reflects Govt's opinion" Daily Mirror, http://www.dailymirror.lk/156051/MR-asks-whether-Mangala-s-statement-reflects-Govt-s-opinion

[8] Mrs Bandaranaike was elected as Prime Minister in 1960.

[9] Muslim Marriage and Divorce Act of 1951 (MMDA); The adoption of "Roman Dutch law concepts such as husband's marital power over his wife and his right to control and manage his wife's property, into Tesawalamai paved way to raise the position of the husband to that of an irremovable attorney of his wife in respect of common property called thediathettam as well as her separate property" See Technical Assistance Consultant's Report, ADB "Discriminatory Laws, Regulations and Administrative Practices Affecting/Impacting on Land and Property Rights of Women", Law & Society Trust, Feb 2010, https://www.adb.org/sites/default/files/project-document/63874/37402-012-reg-tacr-04.pdf

[10] Muslim Law

[11] Under the Thesavalamai, a married woman my not sell her own property without the consent of her husband. See section 6 of the Matrimonial Rights and Inheritance Ordinance (Jaffna) No: 1 of 1911 where the wife should obtain the written consent of her husband to dispose of her separate property. This has been extended in practice to require a woman to obtain her husband's consent to apply for a bank loan.

[12] The United National Party received 50.92% of the popular vote and 140 seats in a Parliament of 168 seats (4/5th of the seats in Parliament). See: Table 38, (Gov., Parlia.) Parliament Election (1977), The Tenth Parliament of Sri Lanka, The Associated Newspapers of Ceylon Ltd., Lake House, Colombo. http://www.jpp.co.jp/lanka/gov/govd/govde/gov38e.htm

[13] On 14 November 1987 the Sri Lankan Parliament passed the 13th Amendment to the 1978 Constitution of Sri Lanka and the Provincial Councils Act No 42 of 1987 to establish provincial councils

[14] Signed on 29 July 1987 in Colombo, Sri Lanka.

[15] In 2005-2015 The Cabinet of Sri Lanka comprised 82 Ministers and 83 Deputy Ministers, non-cabinet ministers and project ministers. It was described as the largest cabinet in the world. The Cabinet of 2015 secured an exception on grounds that it was a national unity government and had to accommodate coalition partners.

See The 91st Amendment to the Constitution of India, passed in 2003 that added two important restrictions to the process of appointment to the Council:

i) The total size of the Council of Ministers could no longer exceed 15% of the total number of members in the lower house, which, at the current number of 543 Lok Sabha seats establishes a ceiling of 81 ministers;(Article 75 (1A) of the Indian Constitution (Ninety First Amendment) and

ii) that no member of parliament who was disqualified under the terms of the Anti-Defection Amendment of the Constitution (Amendment No.52) was eligible to be appointed as a minister - Article 75 (IB) of the Indian Constitution (Ninety-First Amendment) Act, 2003

(See Nikolenyi, Csaba and Shaul Shenhav. 2009, 'In Search of Party Cohesion: The Emergence of Anti-Defection Laws in India and Israel'. Paper delivered at the American Political Science, Association Meetings in Toronto, September 3-6, 2009. https://www.researchgate.net/publication/228152587_In_Search_of_Party_Cohesion_The_Emergence_of_Anti-Defection_Legislation_in_Israel_and_India

[16] President Kumaranatunga in fact exercised this power in 2003 to dismiss Prime Minister Ranil Wickremesinghe, although a functional parliamentary majority backed him.

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17th Amendment to the 1978 Constitution of Sri Lanka

19th Amendment to the 1978 Constitution of Sri Lanka was passed on April 28, 2015

Article 99(13) (a) of 14th Amendment to the 1978 Constitution.

15th Amendment, (Section 5)to the 1978 Constitution of Sri Lanka,

Article 99 A (6) of 1978 Constitution of Sri Lanka

19th Amendment (section 9) to the 1978 Constitution of Sri Lanka

Article 46 (1) of 1978 Constitution, Sri Lanka

Article 46 (4) of 1978 Constitution, Sri Lanka

15th Amendment (section 5) to the 1978 Constitution

Article 99 A (6) of 1978 Constitution of Sri Lanka

18th Amendment to the 1978 Constitution [Certified on 09th September, 2010]

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