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The Eastminster Viceroy and the Republican Monarch: The Sri Lankan Head of State and the 2018 Constitutional Crisis in Historical Context

Asanga Welikala

Introduction

A few minutes before 8 pm on Friday 26th October 2018, a short video clip began to go viral on the internet. It showed former President and now Member of Parliament, Mahinda Rajapaksa, taking oaths as the Prime Minister of Sri Lanka before President Maithripala Sirisena, flanked by presidential *aides-de-camp* and senior functionaries. In a country where political secrets are notoriously porous, there had been no prior indication whatsoever of an imminent transfer of power, and the video was at first greeted as a hoax. Uneasy amusement turned to widespread consternation, however, as the realisation dawned that the event – effectively, a constitutional coup – had actually happened.¹

The constitutional drama that was to grip Sri Lanka for the next 52 days was triggered by three presidential acts in quick succession that evening. The first was an announcement of the withdrawal of the President's party, the United People's Freedom Alliance (UPFA), from the national government which had been in power alongside Prime Minister Ranil Wickremesinghe's United National Front (UNF). The second was the swearing-in of Rajapaksa as Prime Minister, and the third, that the President had dismissed Wickremesinghe from the office of Prime Minister. While the first, political, act was conceivably within Sirisena's discretion as party leader, the second and third, legal, acts as President were *prima facie* unconstitutional in that Wickremesinghe had not lost the confidence of Parliament, and hence could not be removed and replaced. After trying and failing to assemble a parliamentary majority for Rajapaksa, the President also purported to dissolve Parliament on 9th November, an act that was again *prima facie* unconstitutional given that it occurred during a period within which Parliament could not be dissolved except with a resolution passed by a two-thirds majority. The crisis eventually ended in December when Parliament consistently and repeatedly refused confidence for Rajapaksa, both the Court of Appeal and the Supreme Court held the presidential acts to be unconstitutional, and Wickremesinghe was restored to office.²

The Path Dependency of Executive Aggrandisement

The crisis was unprecedented to the extent that never before had a Head of State attempted such a blatantly unconstitutional power-grab. There were little or no interpretational doubts about the constitutional provisions governing the situation, and it is clear the President's plan was based on a belief in the efficacy of crude political power prevailing over legal formalities. Yet the exceptional nature of the crisis is somewhat moderated when it is considered against the precedents of 'executive aggrandisement' in Sri Lanka's post-independence history, within both parliamentary-monarchical and presidential-republican constitutional frameworks.³ Many legitimate criticisms can and must be made about the contemporary culture of politics, the quality of political leadership, and the relative merits of systems of government in containing backsliding tendencies.⁴ But an historically contextualised analysis of the crisis reveals a more profound insight that is critical, but is lacking, in post-crisis discussions about the office of Head of State. President Sirisena's unconstitutional behaviour is not a calamity that befell Sri Lanka from nowhere, or solely due to his personal predilections. It stems from an autocratic style of leadership that is a dominant characteristic of Sri Lankan post-independence statecraft, which was established in several 'high politics' episodes in the 'critical juncture' of the Sri Lankan state's formative years. These episodes have determined a certain 'path dependency' for the nature of the office of Head of State throughout the continuum of its institutional transformation from Governor General of the Dominion of Ceylon to Executive President of the Second Sri Lankan Republic.⁵ Historicising the reform debate, or in other words, an 'historical institutionalist' approach to constitutional theorising, therefore seems prudent in order to both understand and respond to the challenge of democratic backsliding.⁶

Although these issues cannot be explored at length in this chapter, it is nevertheless worth noting that it is also only an historically grounded analysis that permits an understanding of the social context of constitutional democracy and constitutional reform. Without an account of the social context, discussions about constitutional forms are not only dull and unproductive, but also incapable of righting the wrongs they are concerned with.⁷ The social context of constitutional democracy at any given time and space is defined by the complex

and interrelated panoply of formal and informal political institutions, the culture of governance, the personalities constituting the elite leadership, and the transactions through which competing power blocs negotiate the acquisition and demission of state power. In Sri Lanka, moreover, the social context is characterised by deeply hierarchical traditions of leadership, and a fitful constitutional modernity that frequently permits political power to trump legal authority to the detriment of rules-based order.⁸ The operation of procedural democracy is substantively animated by ‘ethnocratic’ values and the practices of ‘delegative democracy’ and weak accountability.⁹ In this context, the Head of State is in particular an office in which a tremendous amount of informal power inheres regardless of both the system of government and the formal limiting precepts of the written constitution.¹⁰ Understanding the history of this source of democracy-threatening authoritarianism is therefore crucial to designing the preventive constitutional measures that can secure the future of Sri Lankan constitutional democracy.

The Structure of the Discussion

The main purpose of this chapter therefore is to elucidate the 2018 crisis, and its implications for the future of constitutional democracy, when it is understood against the historical trajectory of Sri Lanka’s post-colonial political development. Consistently with the themes of this book, the office of Head of State is examined in the context of its relationship to the Prime Minister and Cabinet, and its relationship to Parliament. Little, therefore, is said of judicial checks and legal accountability, and the focus is on the forms and norms of horizontal political accountability. In both its dominion and republican incarnations, the horizontal political accountability of the Sri Lankan Head of State has depended on the Cabinet and Parliament. The way Governor General and President understood these two accountability relationships, and so stretched, and, on occasion, broke them, is thus central to explaining the office of the Sri Lankan Head of State.

The discussion begins with a brief recollection of the episodes from Sri Lanka’s immediate post-independence era that established, as I argue, the path dependency precedents for the attempted presidential coup of 2018. These events are documented elsewhere expertly and at length.¹¹ But particularly important is the experience of the country’s first protracted state

of emergency in 1958-59, when Governor General Sir Oliver Goonetilleke effectively took over the government from Prime Minister S.W.R.D Bandaranaike, and laid bare the full viceregal potential of his office. This was the elision of the 'efficient' and 'dignified' aspects of the 'implanted' Westminster model in South Asian conditions that formed the basis for a new model of constitutionalism in the Commonwealth that Harshan Kumarasingham has persuasively theorised as 'Eastminster.'¹²

Sir Oliver's breath-taking exercise of raw power met with the approval of J.R. Jayewardene, then an Opposition MP, who was subsequently the architect of the Second Republican Constitution of 1978 and the first executive President under it. Jayewardene's other influence was the imperious General de Gaulle and his 1958 Constitution of the French Fifth Republic – a model of government intended to fix the real and perceived instabilities of parliamentary democracy that an early exegetist, Maurice Duverger, vividly described as '*la monarchie républicaine*.'¹³ The Gaullist and Eastminster admixture that is Jayewardene's constitution was acknowledged by A.J. Wilson, whose seminal comparative political analysis of the 1978 Constitution was written in close consultation with President Jayewardene, when he noted that, "The *Second Republic* is vice-regal in character."¹⁴ Notwithstanding the semi-presidential turn in 1978, the Westminster legacy was not wholly uprooted in Sri Lanka. Although this was not borne out in practice in the ensuing years of presidential authoritarianism, Jayewardene maintained that Westminster traditions of parliamentary democracy would not only continue to operate, but also that they would be a source of restraint on presidential power under the new dispensation.¹⁵

Jayewardene's claims about his constitution, however, gained more plausible currency posthumously. On the back of the historic electoral defeat of the promiscuously corrupt and authoritarian Rajapaksa regime in January 2015, the national government led by President Sirisena and Prime Minister Wickremesinghe successfully enacted the Nineteenth Amendment to the 1978 Constitution.¹⁶ This was the most significant formal recalibration of the constitutional relationships within the executive and between the executive and the legislature since the constitution was established. The 2018 crisis was the occasion at which the new arrangement was stress-tested, and this highlighted three features of the system. The first was that, despite the changes, the Eastminster phase's "anachronistic eighteenth-

century” patterns of behaviour had survived, demonstrating the subliminal link between the Eastminster Viceroy and the Republican Monarch.¹⁷ Nevertheless, secondly, the strengthening of the constitutional position of the Prime Minister and Parliament *vis-à-vis* the President did have an effect in controlling backsliding, and in this respect there was a revival of Westminster traditions of parliamentary democracy, in particular the twin principles of confidence and responsibility. Finally, the fundamental tension between these authoritarian and democratic tendencies of the systemic culture was reflected in the breakdown of the semi-presidential executive in the aftermath of the 2018 crisis, and was revealed with tragic consequences in the governmental failures that led to the Easter Sunday 2019 terror attacks.

***La Monarchie Républicaine* and its Eastminster Antecedents: Emergency ‘58**

There is a substantial literature examining the numerous instances of constitutionally questionable behaviour, democratic backsliding, executive aggrandisement, and even an attempted military-bureaucratic *coup d'état* in 1962, that litters Sri Lanka’s post-independence constitutional history.¹⁸ Constitutional lawyers, historians, political scientists, sociologists, and even anthropologists have made insightful contributions to this literature.¹⁹ Sri Lanka’s experience with meddling with the values of constitutional democracy in favour of the dictates of a highly personalist political culture came early, when, in the first change of Prime Ministers in 1952 upon the death in office of D.S. Senanayake, Lord Soulbury appointed Senanayake’s son Dudley over the ruling party’s apparent preference for Sir John Kotelawala, in a manner conspicuously inconsistent with Westminster conventions.²⁰ But in exploring the links and continuities in the nature of the office of Head of State between the dominion and republican constitutional orders, the historical episode that is most fruitfully compared with the last major constitutional crisis in 2018 is the first major constitutional crisis in 1958, exactly six decades apart.

In 1956, Sri Lanka was the first country in the decolonised world to democratically change governments, when S.W.R.D. Bandaranaike became Prime Minister at the head of a coalition of nationalists and socialists which defeated the United National Party (UNP) that had been in power since independence. The democratic moment, however, was contaminated by

Bandaranaike's ethnocentric policies which favoured the interests of the Sinhala-Buddhist majority, spurred a strong resistance within the Tamil community, and set the stage for an era of ethnic confrontation that would culminate in a 30-year civil war.²¹ Ethnic tension boiled over into violent communal riots in 1958, in response to which a state of emergency was imposed between May 1958 and March 1959.²² Historical commentary on this episode is near-unanimous in observing the virtual abdication of power by the Cabinet in favour of the Governor General, Sir Oliver Goonetilleke, and the unconventional and creative use of both express emergency powers and implied prerogatives by him. The confluence of the personalities – a weak and inefficient Prime Minister unable to control his own Cabinet let alone govern the country, and a competent, experienced, and excessively confident Governor General – was doubtless a salient factor. But from a historical institutionalist standpoint, the significance of the affair was that it marked the post-colonial political elite's coming of age in realising the extents of, and the possibilities for the use of, the awesome power of the state.

From the perspective of how the emergency experience impacted on the executive as an institution, and more broadly on statecraft, the following propositions can be distilled:

1. The formal and functional separation between the Head of State (Governor General) and the Head of Government (Prime Minister) that is a cardinal feature of the Westminster model collapsed.²³
2. The breakdown of the separation was in favour of an effective transfer of power from the Prime Minister and Cabinet to the Governor General.
3. The Governor General began to use powers derived from the descriptive and otherwise purely ceremonial styles and titles of the office of Head of State (e.g., Commander-in-Chief) literally, substantively, and extensively.
4. The ambiguities arising from the fluid and convention-dependent operational culture of the Westminster executive began to be interpreted in favour of the accretion of power in the office as well as the person of the Head of State. This further entrenched the personalist as opposed to the institutionalist conception of public power, which while socially resonant in a traditional society, represented a setback for the project of constitutional modernity – the taming of naked power through the mediation of

efficacious institutions – that is the crucial underpinning of state-building in a post-colonial new democracy.

5. Given the ineffective performance of the democratically accountable arm of the executive (i.e., the Prime Minister and Cabinet) in the face of violent crisis and public disorder, the dictatorial deployment of power by the unelected Head of State was socially perceived in a positive light as efficient, effective, necessary, and even desirable.²⁴
6. The precedent was established for non-political arms of the executive, namely, the civil service, the police, and the armed forces to obtain and implement orders from the *de facto* rather than the *de jure* chief executive. Other non-state democratic institutions, in particular the press, took the same cue.²⁵
7. Necessity became a political doctrine that could now be plausibly invoked to legitimise self-referential sources of absolute power, and to justify their exercise in procedurally unlimited ways.
8. Cumulatively, these innovations in the use of executive power represented a negation of the central procedures through which the Westminster system delivers democratic accountability, namely, the intra-executive balance between the constitutional ('dignified') and administrative ('efficient') elements of the political executive, and in turn, due to the effective renunciation of power by Ministers, the disruption of the legislative accountability of the executive as a whole to Parliament.

It is undeniable that all these exceptional departures from the norm of constitutional government during the 1958-59 emergency established the seminal precedent for authoritarianism to become a socially acceptable style of governance, with deleterious consequences for the future of statecraft.²⁶ And Sir Oliver's conduct clearly captivated the ambitious J.R. Jayewardene, the future progenitor of monarchical presidentialism. In the Tamil nationalist challenge, he seemed to have seen a threat to the state akin to the Algerian crisis for the French Fourth Republic, and to 'do a de Gaulle' was for him the need of the hour.²⁷

There is no evidence that President Sirisena was consciously guided by these precedents in 2018. Even though Goonetilleke was clearly responding to a serious crisis of public disorder

which the elected government was manifestly unwilling or incapable of arresting, whereas Sirisena created the crisis himself in the pursuit of selfish political interests and a lack of constitutional literacy, what is important for the historical causality underpinning path dependency is not the motives of the key actors but the consequences of their acts in the precedents they set. It is in this sense that it is indisputable that in pursuing his political aims through unconstitutional means, Sirisena was the legatee of a political culture of executive power that understood the office of Head of State in terms that were personalised, unconstrained by legal rules or ethical norms, and legitimised not by the adherence to democratic constitutionalism, but by populist notions of social acceptance by which ends justify the means.

An Attempted Presidential *Autogolpe*: The 2018 Constitutional Crisis

In the backdrop of the steady deterioration of relations within the governing coalition since 2017, there had been speculation about the formation of new alliances between President Sirisena and former President Rajapaksa.²⁸ But as noted at the beginning of this chapter, the country was nonetheless taken by complete surprise by the presidential acts on the night of 26th October. Wickremesinghe's response was that he remained the Prime Minister as he continued to enjoy the confidence of Parliament, and had not therefore been lawfully dismissed. On 27th October, the President thus prorogued Parliament with the twin aims of preventing Wickremesinghe from demonstrating his majority in the House and to buy time for assembling a new majority for Rajapaksa.

While the President's unexpected actions threw the public into confusion over the weekend, many expected Sirisena and especially Rajapaksa to be able to demonstrate a majority in the House in short order. The element of total surprise, Rajapaksa's strongman reputation, the tradition of corrupt crossovers of MPs, the general tendency of public servants to follow presidential directions, and the listlessness and unpopularity of the reform government all pointed to this eventuality. Thus, even as the technical illegalities or procedural improprieties of the presidential actions on 26th October were being debated, the general expectation was that these questions would soon be overtaken by the brute political fact of a Rajapaksa

parliamentary majority, and thus a Sirisena-Rajapaksa government. On Monday 29th October, Sirisena and Rajapaksa started making appointments to the new Cabinet, while continuing strenuous attempts to induce crossovers from Wickremesinghe's coalition. While a small number of MPs did crossover, this was insufficient for a majority, and on 9th November, with still no majority in place, the President gazetted the dissolution of Parliament for an early election in January.²⁹

The dissolution order was swiftly challenged on 12th November in the Supreme Court by political parties and a civil society group. After hearing preliminary arguments in support of the applications, the Supreme Court on the same day issued an interim stay on the dissolution order until the court could determine the legality of the action after a full hearing. In the wake of the Supreme Court's interim order that Parliament had not been legally dissolved, Parliament reconvened on 13th November and passed a vote of no-confidence in Rajapaksa's purported government. Although pro-Rajapaksa MPs tried to disrupt the proceedings through violence and intimidation within the chamber, the vote was carried. The validity of the no-confidence motion was not accepted by the Sirisena-Rajapaksa group, and thus on 16th November, Parliament again passed a second vote of no-confidence in the purported Rajapaksa government, boycotted by pro-Rajapaksa MPs.

On 3rd December, the 122 MPs constituting the parliamentary majority against the purported Rajapaksa government, i.e., MPs from Wickremesinghe's UNP and minority party allies, the Tamil National Alliance (TNA), and the Janatha Vimukthi Peramuna (JVP), filed a petition in the Court of Appeal seeking a writ of *quo warranto* against Rajapaksa and his ministers. The purpose of the writ application was to determine the legal authority by which Rajapaksa and his ministers claimed to act as a government. As with the Supreme Court, the Court of Appeal also granted the petitioners an interim order restraining Rajapaksa from functioning as Prime Minister until it had heard and determined the case.³⁰ This not only deprived Rajapaksa of any plausible veneer of legality to continue occupying office, but coming in the wake of two defeats in Parliament on no-confidence motions and the Supreme Court's own interim order staying the dissolution, it showed conclusively that neither Parliament nor the courts were willing to accept the purported transfer of power on 26th October at face value.

Piling on the pressure, Parliament passed a vote of confidence in Ranil Wickremesinghe as the lawful Prime Minister on 12th December 2018, and on the following day, the Supreme Court delivered its judgment on the fundamental rights applications against the purported dissolution of Parliament by the President on 9th November. The Court found the presidential action to be illegal and unconstitutional.³¹ Moreover, on 14th December, the Supreme Court refused to vacate the Court of Appeal's interim order in the *quo warranto* application. On 15th December Mahinda Rajapaksa stepped down as Prime Minister, and on 16th December Ranil Wickremesinghe was reinstated by being sworn in before the President as Prime Minister.

Propitiously for the country's constitutional democracy, President Sirisena lost his high stakes gamble. However, what is very clear is how most if not all of the eight propositions about the use of Head of State powers established in the 1958 crisis discussed in the previous section directed his actions (and those of public servants) during the crisis, even if he did not avowedly seek guidance from specific precedents. In successfully withstanding the stress-test of the 2018 crisis, the 1978 Constitution demonstrated the resilience of the bulwarks bolted on by the Nineteenth Amendment. But the culture of leadership, governance, and statecraft shrouding the office of the Head of State remains encrusted with the path dependent precedents that enable backsliding and authoritarianism.

Moreover, the President faced no legal consequences whatsoever for his actions, even though the intentional violation of the Constitution and the abuse of power are express grounds of impeachment under the 1978 Constitution.³² Through a mixture of indifference and indolence there was no interest in pursuing the (admittedly) rigorous route to impeachment, which requires several parliamentary stages as well as a Supreme Court enquiry. Even less laborious procedures – such as a parliamentary summons to the President to answer questions – were not pursued. The implied reasons for not pursuing accountability were the absence of a two-thirds majority in Parliament for impeachment, and the need for Wickremesinghe to manage some kind of working relationship with Sirisena for the remainder of their terms of office. While these reasons were not without merit, self-interest may also have led the political elite to an unstated understanding that the coup crisis should establish no precedent for presidential accountability. The absence of accountability, however, only

encouraged an unchastened President to fresh mischief, and further constitutional destabilisation when the country encountered its next crisis.

Aftershocks: The Constitutional Fallout of the 2019 Easter Sunday Bombings

On 21st April 2019, Sri Lanka was hit with one of the worst terror attacks in its history, the first since the end of the war a decade ago in 2009, and the first with avowedly Islamist motives. On Easter Sunday, members of the National Thowheeth Jama'ath (NTJ) mounted simultaneous suicide attacks on a number of Catholic churches and hotels, with the eventual death toll over 250 killed and many more injured. The attacks caused maximum immediate impact by targeting religious observances and tourism, post-war Sri Lanka's best performing economic sector.

The attack, however, also had serious constitutional consequences, by exposing how the precarious post-coup relationship between President Sirisena and Prime Minister Wickremesinghe had rendered the semi-presidential executive almost entirely dysfunctional. The bicephalous design of the executive that demanded cooperation and cohabitation was now deeply cloven by party hostility and personal enmity. It emerged, for example, that the Prime Minister and the Minister of State for Defence had been excluded from meetings of the National Security Council (NSC) chaired by the President since the coup crisis the previous October. This had a direct bearing on serious lapses of coordination and execution in the national security apparatus, and, given it has been alleged that the attacks may even have been prevented but for these failures, for establishing responsibility for those failures.³³ In the aftermath of the attack, aside from the return, with unanimous parliamentary approval, to a state of emergency and the promulgation of swingeing emergency regulations,³⁴ the following matters might be noted:

- On 23rd May, a parliamentary select committee (PSC) was appointed to investigate the circumstances of the attacks. In evidence given to its early hearings by senior officials serving in the relevant period such as the Secretary to the Ministry of Defence, the

Inspector General of Police, and the Chief of National Intelligence, significant revelations were made about security breaches. The responsibility for these ultimately leads personally to the President, because he also serves as the Minister of Defence and the Minister of Law and Order.

- The President has tried multiple times to influence the Speaker to discontinue the PSC proceedings.³⁵ The President has no constitutional power to interfere in parliamentary proceedings, and any such attempt is also a statutory breach of the parliamentary privilege of exclusive cognisance.³⁶ The Speaker has so far rebuffed these inappropriate interventions. It has also been reported that the President may even have considered prorogation.³⁷
- On 7th June, the President summoned an emergency Cabinet and threatened non-cooperation with the government unless the PSC proceedings were terminated. The President's constitutional options for this course of action are questionable.³⁸ The Cabinet, on this occasion at least, did not submit to the President's threat.³⁹
- On 3rd June, in protest at the government's failure to address the climate of fear, persecution, and vigilante violence against the Muslim community, all nine Muslim Ministers in the government resigned.⁴⁰ Ministerial vacancies can only be filled by the President on the advice of the Prime Minister.⁴¹ Without the Prime Minister's advice, the President has purportedly appointed Acting Ministers to some of the posts vacated by the Muslim Ministers on his own volition.⁴² The Prime Minister has resisted this.⁴³

These developments amply demonstrate the points made in the previous section that the Sri Lankan Head of State is an office cloaked in an institutional culture of authoritarianism, indiscipline, illegality, and unaccountability.

Silver Linings: The New Framework of Horizontal Accountability

Presidential dominance of the institutional structure of the state had always been the hallmark of the 1978 Constitution, but this was aggravated by the Eighteenth Amendment (2010) introduced by President Rajapaksa, which decisively shifted the constitutional

character of the state towards a control model driven by populist politics.⁴⁴ The regime changing elections of 2015, and the Nineteenth Amendment that resulted from it, was a direct corrective response to this tilt to authoritarianism, the twin objectives of which were to restate a more balanced constitutional framework of executive horizontal accountability, by strengthening the position of the Prime Minister and Cabinet within the executive, and by strengthening the control by Parliament of the executive as a whole. While this analysis is of a semi-presidential republic, it would be readily apparent how it is relevant for discussions of horizontal accountability within parliamentary monarchies as well. As previously noted, this is not only because of the Gaullist-viceregal character of the Sri Lankan Head of State, but also because of the palpable influence of the country's Westminster legacy on the form and function of this particular model of monarchical presidentialism.

The Nineteenth Amendment transformed the 1978 Constitution from a 'president-parliamentary' to a 'premier-presidential' model of semi-presidentialism.⁴⁵ Robert Elgie defines the essence of semi-presidentialism as "where a constitution includes a popularly elected fixed-term president and a prime minister and cabinet who are collectively responsible to the legislature."⁴⁶ The 'premier-presidential' sub-type's distinctiveness is underscored by comparing it to the 'president-parliamentary' sub-type, where the Prime Minister and Cabinet are accountable jointly to both the President and Parliament. This was the model of the 1978 Constitution before the Nineteenth Amendment. While Elgie's definition reflects the essence of the post-Nineteenth Amendment constitution, a distinctive feature of Sri Lankan semi-presidentialism descends from its Westminster constitutional heritage. We have lengthily considered how this applies to the office of Head of State, but now we may consider how that inheritance could equally apply to the consolidation of constitutional democracy.

As noted, J.R. Jayewardene explicitly intended many of the Westminster model's operating principles to continue under the 1978 presidential constitution, and, I would argue, they have assumed more relevance than ever before after the Nineteenth Amendment. Accordingly, those principles find expression both in the text of constitutional provisions drafted in the style of Westminster-inspired written constitutions, as well as in the assumptions governing

the relation between President and Prime Minister and Cabinet, and between President and Parliament. Let us consider these two relationships in turn.

Prime Minister and Cabinet

The Nineteenth Amendment established a better intra-executive balance through both temporal and substantive limitations on the presidency. Temporally, it reintroduced the two-term limit (and reduced the term of the President – and of Parliament – from six to five years), which is a key feature of democratic presidential systems.⁴⁷ Substantively, two key changes abolished or reduced what were previously unlimited presidential powers.

Firstly, it strengthened the position of the Prime Minister by removing the unilateral power of appointment and dismissal from the President, and permitting the appointment of the Prime Minister impliedly on the confidence of Parliament, and his dismissal expressly only on the loss of the confidence of Parliament in the government as a whole, death, resignation, or on ceasing to be a Member of Parliament. The relevant constitutional provision is redolent of Westminster-style constitutional language: “The President shall appoint as Prime Minister the Member of Parliament, who, in the President’s opinion, is most likely to command the confidence of Parliament.”⁴⁸ A formulation meant to preserve one of the personal prerogatives of the Monarch (or other titular Head of State) where the appointment of the Prime Minister may require acting without advice, this has been interpreted by Sri Lankan Presidents to acquire a personal and subjective power of appointment, and a corresponding power of dismissal, without reference to the will of Parliament or other competing democratic principle. This was certainly the interpretation that Sirisena relied on when he purported to dismiss Wickremesinghe on 26th October 2018. While previous Presidents undoubtedly enjoyed this legal if undemocratic power under the 1978 Constitution, the Nineteenth Amendment abolished this and subjected the survival of the Prime Minister, other than in cases of death, resignation, or successful election petition, solely to the confidence of Parliament in the government.⁴⁹ In the repeated refusal to grant confidence to Rajapaksa during the coup crisis, Parliament consolidated this meaning of the constitutional provision

into a political precedent: through confidence, it is Parliament and not President that determines which MP is Prime Minister.

Secondly, the President is now required to act on the advice of the Prime Minister when appointing and dismissing Cabinet and other Ministers, although the President need only consult the Prime Minister when determining the number of Cabinet ministries, and the assignment and reassignment of subjects to Ministers. This did not go as far as requiring the President to always act on the advice of the Prime Minister, which would have transformed the presidential constitution into a parliamentary constitution. It is not a neat design that facilitates clarity and certainty in the relationship between President and Prime Minister, but it nevertheless represents a significant change. This intricate mode of sharing power between President and Prime Minister in relation to the composition of the Cabinet is the result of bargaining rather than principle during the enactment of the Nineteenth Amendment. It demands a high level of cooperation between the two offices, and is vulnerable to breakdown when that crucial working relationship breaks down, as demonstrated by the controversy surrounding the filling of vacancies created by the resignation of Muslim Ministers in the wake of the Easter Sunday attacks.

Parliament

The suite of changes introduced by the Nineteenth Amendment which had the effect of strengthening Parliament *vis-à-vis* the executive might be boiled down into three major principles. The first is the *Fixed Term Principle*. Before the Nineteenth Amendment, the President could dissolve Parliament at will after the first year of its six-year term, whereas after it, the President cannot dissolve Parliament during the first four and a half years of its five-year term, unless Parliament itself requests a dissolution by a resolution passed by a two-thirds majority. This significant limitation of the dissolution power is a major transfer of power from executive to legislature.

The second might be termed the *Consent Principle*, which has two limbs. The first requires the President to act on the advice of the Prime Minister in relation ministerial appointments, as discussed above. The second regulates the Head of State's appointment power in relation

to other high constitutional offices. Before the Nineteenth Amendment, in making appointments to high posts and independent oversight commissions, the President merely consulted the Parliamentary Council. After the Nineteenth Amendment, in making appointments to high posts and independent oversight commissions, the President has to either seek the approval, or act on the recommendations, of the relatively more efficacious Constitutional Council.⁵⁰ Although it has civil society representation, the Constitutional Council is primarily a parliamentary body whose independence is ensured by its inclusive multiparty composition. Its intercession in a critical range of decisions over key appointments has discernibly attenuated presidential discretion, and again, shifted power from executive to legislature.

But the most important change in this respect is the entrenchment of the *Confidence Principle*, as discussed above. Before the Nineteenth Amendment, the President appointed as Prime Minister the Member of Parliament who in his opinion enjoyed the confidence of the House, and the President dismissed and replaced Prime Ministers at any time. After the Nineteenth Amendment, however, while the President still appoints as Prime Minister the Member of Parliament who in his opinion enjoys the confidence of the House, the key change is that the Prime Minister cannot be dismissed by the President. The Prime Minister loses office only by death, resignation, by ceasing to be an MP, or when Parliament withdraws confidence from the government as a whole. This therefore imposes an indirect limitation on the appointing power by implying that, despite the subjective language about the President's 'opinion', a plausible appointment as Prime Minister can only be of an MP who enjoys the confidence of the House.

Defenders of President Sirisena's action during the 2018 crisis read the formulation 'in his opinion' entirely literally to the effect that any Member of Parliament whosoever can be appointed Prime Minister by the President. This was both erroneous and dangerous. It was wrong because in a modern constitutional system it does not imply the subjective opinion of the person for the time being holding the office of President. The power of the President of the Republic is a constitutional power to be exercised in the public interest, not something that is personal to him that can be used in any way that he pleases. Similarly, the phrase 'command the confidence of Parliament' is a constitutional term of art that comes from Sri

Lanka's legacy of Westminster-style constitutionalism, and it is meant to condition and limit the power of appointment of the Prime Minister to the Member of Parliament who can form a government by being able, usually, to rely upon the support – or at least the acquiescence – of the majority of the Members of Parliament. The victory of Parliament in withholding confidence from the President's appointee Rajapaksa, and reaffirming confidence in Wickremesinghe, cemented the principle that it is Parliament and not the President that decides which one of its Members commands its confidence to hold the office of Prime Minister.

All three principles were at the heart of the coup crisis. President Sirisena's purported acts on 26th October (dismissing the Prime Minister) and 9th November (dissolving Parliament) were contrary to the clear provisions of the constitution, as upheld by the courts. But Parliament was the first line of defence against the two presidential actions that constituted the attempted usurpation of constitutional power, and in this regard Parliament fully discharged its function of legislative checking under crisis conditions consistently: in the first vote of no-confidence in the purported Rajapaksa government on 12th November; in the second vote of no-confidence on 16th November; in the motions to withhold funds for the Prime Minister's Office and for Cabinet and other Ministries, respectively on 29th and 30th November; and finally in the affirmative vote of confidence in Prime Minister Ranil Wickremesinghe on 12th December.

Conclusion: What Lessons for the Future?

This discussion has established that in terms of institutional culture the present Head of State has to be understood in the historical context of the past Head of State. Such an historical institutionalist analysis displays an office that fuses the dignified and efficient functions, and draws upon local traditions of social hierarchy, in carving out for itself the dominant role in the politico-constitutional structure of the state. While the formally semi-presidential system of government under the 1978 Constitution, which makes the President both the Head of State and of the Government, accounts for much of this today, the informal precedents from Sri Lanka's Westminster phase of constitutional development laid down the basis for the

expansive claims to power of the office. Given the experience of presidential authoritarianism under this system since 1978, the recent Nineteenth Amendment to the Constitution sought to formally prune down the powers of the office. The survival, however, of the old informal conception of the office in spite of those formal constitutional changes facilitated President Sirisena's attempt at unconstitutional action in 2018. Fortuitously, the strengthened checks and balances of the Nineteenth Amendment framework proved resilient enough in the face of this backsliding attempt. Nevertheless, the aftermath of the coup crisis has made it unambiguously clear that the Head of State remains one of the most potent sources of executive aggrandisement and democratic backsliding in the politico-constitutional system.

Beyond formal institutions, the crisis also highlighted the central problem of political culture in a developing democracy. Constitutions can be remade and institutions might be reformed, but these measures are only so good as the animating values, ethics, practices, habits, and dispositions that constitute the culture of governance. Culture is a numinous entity that is difficult to define, and consequently even more difficult to reform. But the Sri Lankan experience of chronic democratic underperformance makes urgent attention to this issue unavoidable.⁵¹

Taming the semi-caged lion of presidentialism thus constitutes one of most pressing constitutional challenges facing democratic development and consolidation in Sri Lanka. In the Sri Lankan context at least, any form of presidentialism has to be seen as inimical to constitutional democracy, given the mass political culture of populism and ethnocentric nationalism that incentivises messianic styles of elite leadership.⁵² A return therefore to a parliamentary model of government seems essential, but the design of such a system will need to pay careful heed to the Eastminster past, in foreclosing the unintended survival of avenues to authoritarianism.⁵³

Notes

¹ Asanga Welikala, 'Paradise Lost? Preliminary Notes on a Constitutional Coup', *Groundviews*, 27th October 2018: <https://groundviews.org/2018/10/27/paradise-lost-preliminary-notes-on-a-constitutional-coup/>

² For fuller narrative and analytical accounts of the crisis, see Asanga Welikala (ed.), *Constitutional Reform and Crisis in Sri Lanka* (Colombo: 2019).

³ On 'executive aggrandisement', see Nancy Bermeo, 'On Democratic Backsliding', *Journal of Democracy* 27, 1 (2016), pp.5-19. Sri Lanka had a parliamentary system of government, first as an independent dominion from 1948 to 1972, and then as a republic, 1972-77. The 1978 Constitution established a semi-presidential republic, with a 'president-parliamentary' model between 1978-2015, and a 'premier-presidential' model since 2015.

⁴ Asanga Welikala, 'The Sri Lankan Culture of Constitutional Law and Politics: The Lessons of the Constitutional Reform Exercise of 2015-19 and the Constitutional Crisis of 2018' in Welikala (2019), op cit. n.2, Ch.7.

⁵ See esp. Harshan Kumarasingham, *A Political Legacy of the British Empire: Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: 2013), Ch.1.

⁶ The concepts of 'high politics' and 'path dependency' and the 'historical institutionalist' approach are associated with James Bulpitt's 'statecraft' theory. See James Bulpitt, 'The Discipline of the New Democracy: Mrs. Thatcher's Domestic Statecraft', *Political Studies* 34, 1 (1986), pp.19-39; James Bulpitt, 'Historical Politics: Macro, In-time, Governing Regime Analysis' in Joni Lovenduski and Jeffrey Stanyer (eds.), *Contemporary Political Studies*, Vol. II (Belfast: 1995), pp.510-520; James Bulpitt, 'Historical Politics: Leaders, Statecraft and Regime in Britain at the Accession of Elizabeth II' in Iain Hampsher-Monk and Jeffrey Stanyer (eds.), *Contemporary Political Studies*, Vol. 2 (Oxford: 1996), pp.1093-1106. Cf. Toby S. James, 'Neo-Statecraft Theory, Historical Institutionalism and Institutional Change', *Government and Opposition* 51, 1 (2016), pp.84-110.

⁷ See S.A. de Smith, 'Westminster's Export Models: The Legal Framework of Responsible Government', *Journal of Commonwealth Political Studies* 1, 1 (1961), pp.2-16.

⁸ See Asanga Welikala, 'Nation, State, Sovereignty and Kingship: The Pre-Modern Antecedents of the Presidential State' in Asanga Welikala (ed.), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Colombo: 2015), Ch.13.

⁹ See Oren Yiftachel, *Ethnocracy: Land and identity Politics in Israel/Palestine* (Philadelphia: 2006), pp.295-6; Guillermo O'Donnell, 'Delegative Democracy', *Journal of Democracy*, 5, 1 (1994), pp.55-69.

¹⁰ See esp. Kumarasingham (2013), op cit. n.5, Ch.6.

¹¹ Ibid; James Manor, 'Setting a Precedent by Breaking a Precedent: Lord Soulbury in Ceylon, 1952' in D.A. Low (ed.), *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85* (London: 1988); A.J. Wilson, 'The Governor General and the State of Emergency: May 1958 – March 1959', *Ceylon Journal of Historical and Social Studies* 2, 2 (1959), pp.160-181.

¹² Kumarasingham (2013), op cit. n.5, Ch.1. The 'dignified' and 'efficient' aspects of the Westminster system are as classically characterised by Walter Bagehot. For the useful distinction between 'transplanted' and

'implanted' Westminster models, Kumarasingham cites R.A.W. Rhodes and Patrick Weller, 'Westminster Transplanted and Westminster Implanted: Exploring Political Change' in Haig Patapan, John Wanna and Patrick Weller (eds.), *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* (Sydney: 2005).

¹³ Maurice Duverger, *La Monarchie Républicaine* (Paris: 1974).

¹⁴ A.J. Wilson, *The Gaullist System in Asia: The Constitution of Sri Lanka* (1978) (London: 1980), p.xiii.

¹⁵ *Ibid*, pp.50, 154.

¹⁶ See also, Asanga Welikala (ed.), *The Nineteenth Amendment to the Constitution: Content and Context* (Colombo: 2016).

¹⁷ Kumarasingham (2013), *op cit.* n.5, p.7.

¹⁸ On the abortive 1962 coup, see Donald L. Horowitz, *Coup Theories and Officers' Motives: Sri Lanka in Comparative Perspective* (Princeton: 1981).

¹⁹ In addition to the work of constitutional historians like Kumarasingham and political scientists like Wilson cited above, useful anthropological contributions are Roshan de Silva Wijeyeratne, 'Cosmology, Presidentialism and J.R. Jayewardene's Constitutional Imaginary', Ananda Abeysekera, 'The 'Line' between Religion and Politics', and Michael Roberts, 'Mahinda Rajapaksa as Modern *Mahavasala* and Font of Clemency? The Roots of Populist Authoritarianism' in Welikala (2015), *op cit.* n.8, Chs.14, 15, and 17; and Steven Kemper, *The Presence of the Past: Chronicles, Politics, and Culture in Sinhala Life* (Ithaca: 1991).

²⁰ Manor (1988), Kumarasingham (2013), both *op cit.* n.11.

²¹ Neil DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka* (Stanford: 2004).

²² Wilson (1959), *op cit.* n.11; Tarzie Vittachi, *Emergency '58: The Story of the Ceylon Race Riots* (London: 1958).

²³ This is the first of the five characteristics of the Westminster executive identified by Rhodes and Weller (2005), *op cit.* n.12, pp.2-6.

²⁴ See the evidence presented in Kumarasingham (2013), *op cit.* n.5, Ch.6.

²⁵ Vittachi (1958), *op cit.* n.22, pp.70-72.

²⁶ For the 'normalisation of the exception' problem, see Asanga Welikala, *A Permanent State of Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo, 2008), pp.104-108; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: 2006).

²⁷ See for his brief but illuminating remark in a 1993 interview with the author in Laksiri Fernando, 'Human Rights and the 1978 Constitution' in Welikala (2015), *op cit.* n.8, p.343, n.17.

²⁸ For the broader political context to the crisis since the election of the reform government in 2015, see Welikala (2019), *op cit.* n.2.

²⁹ Asanga Welikala, 'The Dissolution of Parliament in the Constitution of Sri Lanka', *Groundviews*, 12th November 2018: <https://groundviews.org/2018/11/12/the-dissolution-of-parliament-in-the-constitution-of-sri-lanka/>

³⁰ The Daily News, 'Writ of Quo Warranto against Mahinda and Others: Appeal Court Issues Interim Order', 4th December 2018: <http://www.dailynews.lk/2018/12/04/law-order/170231/appeal-court-issues-interim-order>

³¹ *Rajavarithiam Sampanthan & others v. Attorney General & others*, SC FR 351/2018, Supreme Court Minutes, 13th December 2018.

³² Constitution of Sri Lanka (1978): Article 38 (2) (a) (i) and (iv).

³³ Asanga Welikala, 'The Constitutional Implications of the Easter Sunday Terror Attack', *Groundviews*, 23rd April 2019: <https://groundviews.org/2019/04/23/the-constitutional-implications-of-the-easter-sunday-terror-attack/>

³⁴ Centre for Policy Alternatives, 'Understanding Emergency: Easter Sunday Attacks 2019', 25th April 2019: <https://www.cpalanka.org/understanding-emergency-easter-sunday-attacks-2019/>

³⁵ Press Release (in Sinhala) from the Office of the Speaker, 8th June 2019.

³⁶ Constitution of Sri Lanka (1978): Article 67; Parliament (Powers and Privileges) Act 1953: Section 3.

³⁷ The Colombo Telegraph, 'Sirisena Gets Desperate: All Out to Stop PSC into Easter Attacks', 5th June 2019: <https://www.colombotelegraph.com/index.php/sirisena-gets-desperate-all-out-to-stop-psc-into-easter-attacks/>

³⁸ Asanga Welikala, 'Averting a Second Coup? The Constitutional Principles governing the Relationship between the President and the Cabinet', *Groundviews*, 12th June 2019: <https://groundviews.org/2019/06/12/averting-a-second-coup-attempt-the-constitutional-principles-governing-the-relationship-between-the-president-and-the-cabinet/>

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- ³⁹ Colombo Page, 'Sri Lanka President threatens to boycott cabinet meetings if PSC continues the probe into Easter Sunday attacks – report', 8th June 2019: http://www.colombopage.com/archive_19A/Jun08_1559977634CH.php; Republic Next, 'Government deadlocks ends as Sirisena backs down', 19th June 2019: <https://www.republicnext.com/politics/government-deadlock-ends-as-sirisena-backs-down/>
- ⁴⁰ Dharisha Bastians and Mujib Mashal, 'All 9 of Sri Lanka's Muslim Ministers Resign, as Bombing Backlash Intensifies', *The New York Times*, 3rd June 2019: <https://www.nytimes.com/2019/06/03/world/asia/sri-lanka-muslim-ministers-resign.html>
- ⁴¹ Constitution of Sri Lanka (1978): Articles 43 (2), 44 (1), 45 (1), and 46 (3) (a).
- ⁴² Colombo Gazette, 'Acting Ministers appointed to replace Muslim Ministers', 10th June 2019: <https://colombogazette.com/2019/06/10/acting-ministers-appointed-to-replace-muslim-ministers/>
- ⁴³ Daily Mirror, 'Appointment of acting ministers contravene Constitution: PM writes to President', 13th June 2019: http://www.dailymirror.lk/breaking_news/Appointment-of-acting-ministers-contravene-Constitution:-PM-writes-to-President/108-169191
- ⁴⁴ Neil DeVotta, 'Control Democracy, Institutional Decay, and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka', *Pacific Affairs* 73, 1 (2000), pp.55-76
- ⁴⁵ Matthew Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: 1992).
- ⁴⁶ Robert Elgie, 'What is Semi-Presidentialism?', (n.d.): http://www.semipresidentialism.com/?page_id=2
- ⁴⁷ Asanga Welikala, 'The Legality and Legitimacy of Presidential Term Limits: A Response to Dr Nihal Jayawickrama', *Groundviews*, 25th August 2019: <https://groundviews.org/2018/08/25/the-legality-and-legitimacy-of-presidential-term-limits-a-response-to-dr-nihal-jayawickrama/>; Asanga Welikala, 'The Eighteenth Amendment and the Abolition of the Presidential Term Limit: A Brief History of the Gradual Diminution of Temporal Limitations on Executive Power since 1978' in Edrisinha and Jayakody (2011), op cit. n.29, Ch.V.
- ⁴⁸ Constitution of Sri Lanka (1978): Article 42 (4).
- ⁴⁹ Ibid: Article 46 (2).
- ⁵⁰ Dinesha Samararatne, 'The Constitutional Council and the Independent Commissions: The New Framework for Depoliticising Governance' in Welikala (2016), op cit. n.16, Ch.7.
- ⁵¹ See for exploratory forays into this under-researched problem, Jayadeva Uyangoda, 'Making Sense of the October Conflict and its Aftermath', Suri Ratnapala, 'Reform and Crisis: Reflections on the Culture of Constitutional Democracy in Sri Lanka' and Asanga Welikala, 'The Sri Lankan Culture of Constitutional Law and Politics: The Lessons of the Constitutional Reform Exercise of 2015-19 and the Constitutional Crisis of 2018' in Welikala (2019), op cit. n.2, Chs.4, 6, and 7 at p.314 et seq.
- ⁵² Archie Brown, *The Myth of the Strong Leader: Political Leadership in the Modern Age* (London, 2014), Ch.8.
- ⁵³ For a preliminary articulation of such a constitutional model, see Asanga Welikala and Harshan Kumarasingham, 'Soulbury Plus: Conceptual Foundations and Institutional Features of a Parliamentary-Constitutional State', CPA Working Papers on Constitutional Reform No.4, August 2016: <http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-4.pdf>