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Evolution of Constitutionalism from the Colonial Era to the Modern Era: A Critical Reflection of Developments in Sri Lanka

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Abstract

Constitutionalism refers to a notion of limited government for the protection of individual rights and liberties. It has become a universal virtue in constitution making. While having a Constitution and acting according to such Constitution may provide Constitutionality of the action, Constitutionalism is a broad concept encompassing the several principles which include the rule of law, separation of powers, independence of the judiciary and the protection of fundamental rights and freedoms. The Constitutional history of Sri Lanka runs back several centuries and it could be found from the implementation of the 1833 Colebrook Constitutional Reforms. From 1833 to 1947 the Constitution of the country was commonly referred to as Constitutional Reforms and it was from 1947 that the word Constitution was properly used. At present Sri Lanka is governed by the 1978 Constitution. Throughout its Constitutional history, the idea of Constitutionalism has played a significant role whether it be due to the absence of Constitutionalism or because its presence. Most of the Constitutional reforms were unable to meet up with the core demands of Constitutionalism inclusive of Separation of Powers, Rule of Law, Independence of the Judiciary and Good Governance in real practice while some provisions were included. On the other hand, the current Constitution has to some extent complied with the broader notions of

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Constitutionalism. This essay looks at the historical development of the notion of Constitutionalism in Sri Lankan Constitutional developments from 1833 to 1978.

Keywords: *Constitutionalism, Individual Rights, Rule of Law, Seperation of Powers*

Introduction

The constitutional history in Sri Lanka dates back to the colonial period of the British rule. From 1833 to 1946 we had a number of constitutional reforms and it was only in 1972 that the dominion of Ceylon was able to implement a sui generis constitution in 1972 following the Westminster model.[1] The current constitutions, the Constitution of the Democratic Socialist Republic of Sri Lanka was implemented in 1978, only six years after the first sui generis constitution of 1972. When one looks at the constitutional history of the country it becomes evident that still the country has been unable to find a well-founded concrete model. For example, even the 1978 constitution has been amended 19 times since its inception and if one considers the frequency of amendments, the current constitution has been amended almost once in every two years in average.

A constitution is considered as the grundnorm of a legal system where all the other laws get their validation. It is the supreme law of the country which is there to limit the powers of the government and to protect and enhance the rights and freedoms of individuals. Viscount Bolingbroke[2] in the eighteenth century opined that a constitution is an assemblage of laws, institutions and customs, derived from certain fixed principles system, according to which the community hath agreed to be governed. K C Wheare opines that, having a constitution in place and acting according to it would only bring constitutionality and not

[1] L.J.M. Cooray, *Constitutional Government in Sri Lanka* (1st Edn, Stamford Lake 1984)
[2] Cited in, A. Tomkins, *Public Law* (1st Edn, Oxford University Press, 2003)

constitutionalism[3]. Constitutionality is all about doing as the constitution directs. Constitutionalism on the other hand is a normative and value coherent ideal that encompasses much more than ruling according to a constitution. It embraces several multi-layered concepts such as, separation of powers, rule of law, independence of the judiciary, accountability, fundamental rights and freedoms, equality and so much more.[4] Although commentators appear to find it difficult to define the term constitutionalism in essence it means government (or the institutions of the state) acting in accordance with the rules and principles enshrined in the constitution, thereby resulting in limited constitutional government.[5]

Constitutionalism, as political theory and practice, posits that the powers of government must be structured and limited by a binding constitution incorporating certain basic principles if the protection of values like human liberty and dignity is to be assured. This is a vision expressed in the first 'modern' constitutions, those of the United States (1789), and of France (1789, 1791), in contradistinction to the notion of the constitution-previously dominant, but still commanding some support in the United Kingdom-as merely describing how the state's functions are allocated and organized at any given time.[6] Constitutionalism is a doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules. For example, if a constitution has made provisions for discrimination, adhering to the provision itself and acting in accordance with the constitution would comply with the constitutionality of the action since the constitution provides for such action. However, if one were to act in a discriminatory manner citing the provisions of a constitution, it would not comply with constitutionalism since constitutionalism is not only about the legality but also about the

[3] K. C. Wheare, *Modern Constitutions* (1st Edn, Oxford 1951)
[4] Maru Bazezew, 'Constitutionalism' (2009) 3 Mizan L Rev 358
[8] M. Ryan, *Unlocking Constitutional and Administrative Law* (3rd Edn, Routledge 2015)
[6] A. Le Sueur, M. Sunkin and K. Murkens, *Public Law* (2nd Edn, OUP 2012)

values and virtues of action and discrimination is neither a value nor a virtue.

Rohan Edrisinha[7] explains that, the principle of constitutionalism, sometimes referred to as liberal constitutionalism, is the most basic and important concept for the limitation of power and the protection of individual autonomy. Constitutionalism seeks to explain the objectives of a good government. Carl Friedrich[8] opines the following; 'The core objective of Constitutionalism is that of safeguarding each member of the political community as a political person possessing a sphere of genuine autonomy. The Constitution is meant to protect the self in its dignity and worth. The prime function of a constitutional political order has been and is being accomplished by means of a system of regularized restraints imposed upon those who wield political power.'

According to De Smith[9] constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. The rules may be at one extreme (as in the United Kingdom) mere conventional norms and at the other directions or prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law.

The idea of constitutionalism through universal has several varieties of itself. Some speak of a political constitutionalism[10] where they argue that constitutionalism is founded upon the sovereignty of the parliament and that it gives power to the popular sovereignty of the people. Political constitutionalism rests on the premise that parliament is the ultimate

[7] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)
[8] Carl Friedrich, *Transcendent justice: The religious dimension of constitutionalism* (1st Edn, Duke University Press 1964)
[9] S A de Smith, 'Constitutionalism in the Commonwealth Today' (1962) 4 Malaya L Rev 205
[10] Marco Goldoni, 'Political Constitutionalism and the Question of Constitution-Making' (2014) 27 Ratio Juris 387

controller of the government where the parliament is able to control the government through its voting powers on either approving or disapproving governmental behaviour. According to political constitutionalism the judiciary is required to refrain from impugning the legislative branch since the judiciary is not part of the representative democracy.

On the other hand, those who speak of legal constitutionalism are sceptical about the possibility of parliament controlling the government and they see it the other way around where the parliament is always under the dictation of the government. They argue that, democracy is not only about counting votes at general elections or in the House of Commons, but also involves insisting on the protection of the rights that protect individual liberty. They insist that the judiciary has a key role to play in limiting the arbitrariness of the government.[11] However, the dichotomy between political and legal constitutionalism is more acute from a British context as they do not have a written constitution.

Either the study of the constitutional history of Sri Lanka or the study of constitutionalism in their own are intriguing. However, it would become more intriguing to study the applicability of the notion of constitutionalism in the constitutional history of Sri Lanka. Therefore, for the purpose of this study, the discussion is divided into three parts. First part will be dedicated towards the study between 1833 and 1946 when Ceylon (as it was known then) was under the total rule of the British. The second part will discuss the period between 1946 to 1972 where Sri Lanka enjoyed a dominion status. The third part is dedicated to study the two sui generis constitutions of 1972 and 1978.

Concept of Constitutionalism in the Colonial Years: 1833 to 1946

The year, 1833 marks the commencement of Constitutional government in the Colony of Ceylon. In that year the British government implemented the Colebrook-Cameron recommendations in the form of a constitution

[11] Marko John Supronyuk, 'Political Constitutionalism v. Legal Constitutionalism: Understanding the British Arrangement' (2015) 2 Edinburgh Student L Rev 1

for the Colony.[12]

From 1833 to 1910 the first constitution that was established by the Colebrook commission was in effect. While some small changes were proposed to the original enactment it was atypical colonial constitution where the Governor acted as the chief executive officer as the representative of the crown with the help of an executive council consisting of official members and a legislative council consisting of both official and unofficial members where towards the latter part of the constitutional reforms the unofficial members grew in number at the legislative council. The unofficial members were initially nominated to represent the different ethnicities in the country. In the constitutional reforms of 1912 for the first time some of the unofficial council members of the legislative council were elected through a vote.

With the cumulative reforms brought in 1920 and 1924 the local members became the majority in the legislative council and some of them were nominated to the executive council as well. However, the problem with this was the constant quarrel and arguments, which arose as a result of this duality of power. At the legislative council since the majority were locals, they vehemently opposed any new proposals brought forward by the governor to show faith and confidence in them to the public. The period after 1924 became totally unworkable since there was a duality of power and responsibility. The power was with the executive council and the responsibility was with the legislative council. Therefore, it was contended that the locals were put in a council with responsibility without power. The Donoughmore commission called the constitutional reforms that have been introduced in the country is an unqualified failure.

[12] Lakshman Marasinghe, 'The British Colonial Contribution to Disunity in Sri Lanka' (1994) 6 Sri Lanka J Int'l L 81

Sir Charles Collins[13] opines that, the system that prevailed from 1833 to 1931 suffered from the defects that are inherent in interim constitutions of the colonial era. In these constitutions though an unofficial majority comprising of the locals had the legislative responsibility they lack the executive power to implement what they have decided upon. Though they had both financial and legislative control, they could not take any action since the executive power was vested with the governor lead executive council. The common phrase used for this kind of a situation was 'responsibility without power'. Even the governor had his share of problems and difficulties since he could not work together with the unofficial member since they always opposed the governor even in instances where the governor acted bona fide in trying to help the locals. The constitutional reforms that were brought during this period was brought with the ambition of furthering the British interests in the island than providing and democratic means of governance for the country. Most of the provisions were aimed at the exploitation of the natural and human resources in order to accumulate wealth for the British crown.

If one applies the notion of constitutionalism into this context, one will find that such notion could not exist in this kind of a setting. One of the fundamental tenants of constitutionalism rests in the concept of separation of powers and that concept was totally absent in the constitutional framework during this period and the subsequent reforms that were brought. The executive branch and the legislative branch for the most part consisted of the same personnel. It was always the British influence that took center stage in the early years of the constitutional enactments. The notion of fundamental rights was not even used as a word in this period. The rule of law was present even during this period. The notion of everyone being equal before the law was admitted with regard to the locals at least. The idea of accountability a *sine qua non* of constitutionalism was absent during this period as many of the people who took decisions were not elected representatives of the people.

[13] Charles Collins, The Significance of the Donoughmore Constitution in the Political Development of Ceylon, Parliamentary Affairs, Volume IV, Issue 1, 1950, Pages 101–110,

The main issue regarding the constitutional reforms that were brought during the period was that they were relatively small in their contents. It was not like the constitutions that we find today. Most of these constitutional reforms were brought in for administration purposes and not as a constitution *per se*. The British anyway did not have a written constitution of their own and therefore, they did not take much trouble to enact a comprehensive constitution for the colonies that included Ceylon.

The 1931 constitutional reforms are a significant landmark in the constitutional history of the country. It came in a period when the British government was trying to find answers to the problem of local demand for more power and autonomy for managing their own affairs. However, the British could not opt for a Westminster type model since people of Ceylon did not have any political parties to who they could vote and elect a government. Therefore, the Earl of Donoughmore had a very difficult task of finding a suitable model to find a solution for all of these matters. The new constitution had to find a framework for devolution of power and responsibility, with self-government as the ultimate goal.[14] The system introduced under the Donoughmore reforms was a unique one where a body called the State Council was to take the dual role of the legislative and executive councils that has previously existed under the earlier constitutional schemes. The dual capacity of the State Council was specifically designed to give its members the ability of being a part of both the legislative and executive branches of the government. The Donoughmore constitution consisted of eight executive committees and each committee had to appoint a chairman out of the members who had decided to be a part of that committee. The chairman was considered as a Minister on the subject(s) on the committee to that he belonged. The decisions of the executive committees were to be reported to the Council in executive sessions for approval, and were then to go to the Governor for ratification.

[14] Charles Collins, The Significance of the Donoughmore Constitution in the Political Development of Ceylon, Parliamentary Affairs, Volume IV, Issue 1, 1950, Pages 101–110,

The Donoughmore constitutional reforms were revolutionary at the time since it introduced many features that accord with the general notion of constitutionalism. For instance, the members of the State Council were selected through universal franchise recognized under the Donoughmore reforms. There was both a separation of power and accountability of the members of the executive branch achieved through the use of a State Council where the members of the executive branch had to get the assent of the State Council in order to implement their decisions. The Government Service commission was established in order to give advice to the governor on matters related to appointment, transfer and disciplinary actions against government servants. This led to a more transparent form of government.

Compared to all the other constitutional reforms, the Donoughmore reforms were more appealing to the broader notion of constitutionalism. It gave the people the power to elect their representatives, the members of the State Council to have both power and responsibility at the same time, a commission to take unbiased decisions with regard to the public service. The executive committee system was successful in providing the much-needed education to the inhabitants of Ceylon to gain valuable experience in the administration of affairs of a country which was very helpful in building up the Ceylonese case for an independent country. The Donoughmore method is still highly phrased today for its ingenuity and the changes that it brought to the political domain of the country. The Donoughmore reforms, when compared to earlier constitutional reforms, were much more democratic and it really did have a good intention of giving the necessary experience for the locals in relation to attaining first-hand experience on running a country. The people who were selected as Ministers in their respective executive committees with their experiences became cabinet Ministers under later constitutional reforms brought under the Soulbury Constitution. All in all, the Donoughmore reforms were a moment of success in otherwise a century of failure.

The Dominion Era: 1946 to 1972

The Donoughmore constitutional reforms continued for a period of 15 years from the date of its inception. It has to be remembered that during this period the British were involved in the second world war and the pressure from the locals for a more autonomous form of government. With the political and administrative experience that was provided under the Donoughmore reforms, Soulbury constitution was designed based on a Westminster model with the ideal of parliamentary sovereignty in mind.

The Soulbury Constitution promoted a moderately conservative form of liberal democracy based on the British system of government. While traditional British Principles relating to Parliamentary Sovereignty and cabinet systems were adopted, the Soulbury Commissioners were keen to prevent ethnic tensions, encourage a national consciousness and create a constitution which would meet the requirements of a plural society.[15]

The Soulbury Constitution introduced a Parliament with two houses. The Senate consisted of 30 members. The members were elected using different procedures. 15 were elected by the House of Representative and the other 15 was nominated by the governor. The House of Representatives consisted of 105 members, out of which 95 were elected, 4 were selected from the Indian and Pakistani electoral districts and the governor had the power to appoint 6 members. The executive branch was elected from the parliament and the governor played a nominal role in comparison to earlier governors.

The Soulbury Constitution did not in the British sense create a constitution based on parliamentary sovereignty which according to Dicey meant the power of the parliament to make and unmake any law whatever and there being no other authority to compete or question such authority. Article 29 of the Constitution in particular, restricted the legislative

[15] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

power of the parliament where Article 29(2) declared that, no laws are to be made that would interfere with the rights of the minority.

The limitation upon the legislative power could be seen as complying with the broader notion of constitutionalism. This limitation was pointed out in the case of ***Queen v Liyanage***[16] where the Court opined that, we do not have a sovereign Parliament in the sense that the expression is used with reference to Parliament of the United Kingdom. In addition to this, the Soulbury Constitution was secular in nature and it tried to provide racial and religious equality. It upheld most principles of Constitutionalism, the supremacy of the Constitution, by enabling judicial review of legislation which even the sui generis constitutions of 1972 and 1978 failed to provide. It also provided a system of checks and balances by providing for an independent judiciary and public service. It also promoted the notion of accountability and transparency by providing that all wielders of executive power were both responsible and answerable to Parliament.[17]

The specific limitations on the legislative powers of the Parliament were introduced as a means of protecting the rights of the minorities who felt anxious since they were easily outnumbered in the Parliament. It is also noteworthy that the Soulbury constitution did not limit the scope of Article 29. For example, under the 1978 Constitution, only the fundamental rights violations which have occurred as a result of executive and administrative actions could be vindicated. However, Article 29 of the Soulbury Constitution did not stipulate any such limitations and this gave additional protection to the minorities. This was a special tool used by the British in providing a suitable model for a multi-ethnic and multi-religious country.

The endeavours of the Soulbury Constitution in protecting the rights of the minorities were seriously hampered by several decisions of both the local Courts and the Privy Council. The Citizenship Act No 18 of 1948,

[16] [1964] 66 NLR 78
[17] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

Ceylon Parliamentary Elections (Amendment) Act No 48 of 1949 and the Official Language Act No 33 of 1956 were the crucial legislations that invoked the jurisdiction of the Courts under Article 29 (2) of the Constitution.

In the cases of ***Mudannayake v Sivagnanasunderem***[18] and ***Kodakanpillai v Mudannayake***[19] the question of citizenship was questioned. Both the Citizenship Act No 18 of 1948 and Ceylon Parliamentary Elections (Amendment) Act No 48 of 1949 restricted the ability of Indian Tamils to vote. The Court in its decision adopting a strict and textual interpretation of the Constitutions held that both the legislations did not contravene the Article 29 of the Constitution. When the matter went to the Privy council, it too took a narrow view and opined that, 'it is perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals.

These two decisions were a black mark for the notion of Constitutionalism which was one of the main features of the Soulbury Constitution as mentioned above. Article 29 and the ability of reviewing legislations through a Court of law was specifically designed to protect the minority from the tyranny of the majority, a fundamental under the notion of Constitutionalism. However, neither the local Courts nor the Privy Council endeavoured to act in a manner to protect such interests.[20]

Perhaps the greatest setback for the Soulbury Constitution is the decision in ***Kodeswaran v Attorney General***[21]***.*** Kodeswaran challenged the official Language Act No 33 of 1956 in both the local Courts and in the Privy Council. The question posed from the Courts related to the validity of the Act and whether it infringes the Article 29 of the constitution. The Supreme Court held that since the case was filed against the Crown it could not be entertained as no Crown servant could sue the Crown.

[18] [1957] 53 NLR 25
[19] [1953] 54 NLR 433
[20] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)
[21] [1967] 70 NLR 121 (SC) and [1969] 72 NLR 337 (PC)

When the matter went before the Privy Council while deciding that a Crown servant has the right to sue the Crown it failed to pronounce anything concerning the constitutional validity of the alleged Act and it stated that, ' they express no opinion upon any of the other issues as to the constitutionality Act.

The Soulbury Constitution was brought with the ambition of providing adequate protection to the minorities while helping Ceylon to achieve its dominion status. However, the things did not work according to plan. This was not because the framers had bad motives, instead it was due to the wielders in power and the judicial attitude both in the Supreme Court and the Privy Council that lead to the ultimate decline of the Constitution. While the Soulbury Constitution being compatible with most of the fundamentals of Constitutionalism as we know it today in theory provided for a very good set of constitutional values that were not well managed and adhered to in actual practice.

The Sui Generis Era; From 1972, 1978 and Beyond….

The 1972 Constitution was implemented as the first sui generis constitution of the country. It followed the Westminster model in the strict sense. The 1972 constitution was enacted using a different method. At the time, it was argued that due to Article 29 of the Soulbury Constitution, it can not be repealed. However, during the general elections of 1970, the Sri Lankan Freedom party specifically asked for a mandate to implement a new constitution in its election manifesto and it was based on this manifesto that they created the 1972 Constitution. The 1972 Constitution was based on a Parliamentary model with a single house called the National Assembly. It was a Westminster model with an executive prime minister and a cabinet of ministers. The members were elected by the people under the first past-the-pole method for an electorate. The 1972 Constitution replaced the role played by the Queen by introducing a nominal President.

From the outset, the 1972 Constitution was incompatible with the notion of constitutionalism and this was due to several reasons. Firstly, the 1972 Constitution refuted the idea of separation of powers. Article 05 of the Constitution stipulated that, the National Assembly is the supreme body of the State power and it shall exercise the legislative, executive and the judicial power of the people. Further, according to Article 44 the National Assembly has the power to repeal or amend the Constitution without the need of a referendum. The argument for this was the fact that National Assembly being an elected body of the people it should have the highest authority and that no other person or authority should challenge that authority.[22] The 1972 Constitution was based on the principle of the Sovereignty of Parliament and therefore the notion of Constitutionalism was always going to conflict with such an ideal. To make things worse, the Constitution itself provided for discriminatory provisions against the minorities.

Article 07 of the Constitution empowered and endorsed the official Language Act, No. 33 of 1956 which made Sinhala, the official language of the country. Article 06 stipulated that; the government is to give prominence to Buddhism while protecting other religions as well. This affected the secularism of the Constitution and it can be said that the 1972 Constitution was not as secular as the Soulbury Constitution.

Another absent feature of the 1972 Constitution was the judicial review of legislation. The 1972 Constitution did not allow any ordinary Court to look into or inquire about the Constitutional validity of a particular bill that is placed before the Parliament and this function was delegated to a separate Constitutional Court. Article 54 stipulated that; the Constitutional Court had the power to determine the Constitutional consistency of a proposed bill. However, this was a mere decoration. Article 55 declared where a Bill is deemed urgent, the Constitutional Court had to give its decision in twenty-four hours and these so-called

[22] M.J.A. Cooray, *The Judicial Role under the Constitution of Sri Lanka* (1st Edn, Lake House Investments, 1982)

urgent bills were not left open for public scrutiny. Even though Article 54 (3) declared that no proceedings are to be taken with regard to a Bill which has been referred to the Constitutional Court till it gives a verdict on the matter, there were several incidents in which the National Assembly acted without the sanction of the Constitutional Court. The Sri Lanka Press Council Bill and the Associated Newspapers of Ceylon Limited (Special Provisions) Bill are two rather (in)famous examples for the above.

The notions of independence of the judiciary as a fundamental of constitutionalism were not present in the 1972 Constitution as it was under the control of the executive branch. Public service was also the same.[23] The 1972 Constitution introduced two separate commissions with regard to judicial and public matters. The judiciary was controlled through an advisory and a disciplinary commission. The same was present with regard to the public service.

Article 126 of the 1972 Constitution empowers the Cabinet of Ministers to appoint judges that have been nominated by the advisory commission. However, the Cabinet of Ministers can appoint persons not nominated by the advisory commission and such appointments need to get the concurrence of the National Assembly. The 1972 Constitution failed to provide adequate protection to fundamental rights of the individuals. While the constitution recognized fundamental rights under the constitution, it failed to provide for a vindictive mechanism. Therefore, the fundamental rights recognized under the constitution were not made justiciable.[24]

The 1972 Constitution failed to comply with any of the known fundamentals of the notion of Constitutionalism. There was an absence of separation of powers, independence of the judiciary and the rule of

[23] L.J.M. Cooray, *Constitutional Government in Sri Lanka* (1st Edn, Stamford Lake 1984)
[24] In the case of Peoples ***Bank v Jayaratne*** [1986] Sri L R 338, the Court held that even a District Court Would have the Jurisdiction to hear a Fundamental Rights petition. However, this decision is of only academic interest now.

law based on a constitution. The framers of the constitution wanted to bring forward the nationalistic flavour with an aim of getting the popular sovereignty. The framers of the constitution wanted to take a big leaf from the Soulbury constitution and it did not work. While the constitution helped to initiate a democracy based on socialism, it failed in its endeavour as people rejected this plan which was evident from the general elections of 1978 where, the then opposition, the United National Party swept into power with a 5/6 majority.

The 1978 Constitution was a novel invention. It was a combination of the Westminster model and a presidential model. The framers of the 1978 constitution got their inspiration from the French and the American models. There were mixed opinions on the 1978 constitution and while some phrased the creative nature of the constitution, others were sceptical about these new features and they feared that this could lead to authoritarianism.[25] The 1978 Constitution was specifically framed for achieving rapid economic development and it required strong leadership unfettered by the whims and fancies of the Parliament.

From the outset the 1978 Constitution at least in theory tried to be on par with the broader notion of Constitutionalism. Unlike in the 1972 Constitution where it was the National Assembly and not the Constitution which was supreme, where in contrast the 1978 Constitution made it clear in the preamble itself that, the Constitution is the supreme law of the country. The most radical change that was brought about with the 1978 Constitution was the executive presidency. The president was elected at a presidential election and he was to be the leader of the country with numerous powers and functions. In theory there was a separation of powers as Article 04 of the Constitution stipulated how the legislative, executive and the judicial powers of the people were to be exercised. In theory, though the Parliament was not as sovereign as it was under the 1972 constitution, still it had the power to remove the executive president through an impeachment motion with a 2/3

[25] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

majority. In theory the constitutionalism fundamental of separation of power was enshrined in the Constitution. However, in practice this separation of power became ineffective when the president was elected from the same party that had the majority in the parliament.

Another salient feature of the Constitution was the recognition of a set of justiciable fundamental rights. Unlike in the Soulbury Constitution which spoke of minority rights, the 1978 speaks of equal rights without any discrimination as enshrined under Article 12 of the Constitution. The fundamental rights chapter puts a restraint on the legislative power of the parliament whereby parliament is preluded from passing legislations which conflicts with the recognized set of fundamental rights. Article 83 of the Constitution precludes the parliament from intruding into fundamental rights recognized under Articles 10 (Freedom of thought, conscience and religion) and 11 (Freedom from torture). If the parliament intends to make legislations which conflicts with these rights it would have to get the sanction of the people at a referendum.

However, there are some limitations set out on the fundamental rights that are incompatible with the broader notion of constitutionalism. Firstly, the fundamental rights chapter does not recognize the right to life as being fundamental. Secondly, violations of fundamental rights through executive and administrative actions are justiciable. Therefore, violations of fundamental rights through legislative and judicial acts are not justiciable. In addition to this Article 15 of the Constitution sets out limitations on the enjoyment of those fundamental rights. With regard to the enjoyment of fundamental rights Article 16 is the most damaging. It is completely against the notion of constitutionalism as it allows for the operation of laws which are in force at the time of the coming of the constitution even when there is a contradiction with the fundamental rights chapter. Lastly, fundamental rights violations have to be petitioned only to the Supreme Court within one month from the date of infringement. This is a constitutional limitation imposed upon the enjoyment of fundamental rights that is not elsewhere. With

regard to the powers of the legislature, the parliament is by constitution allowed to make laws under Article 75 which includes the power to make retrospective laws and this is incompatible with the broader notion of constitutionalism. With regard to the judicial scrutiny of the legislations, the 1978 Constitution, unlike the Soulbury constitution only allows for judicial scrutiny of Bills that have been introduced into the parliament. Article 80 (3) of the Constitution prohibits judicial scrutiny of Acts passed by the parliament.

When it comes to the independence of the judiciary there are several provisions that have been enacted in the constitution itself. Sections 107 to 111C. It has to be mentioned that with the implementation of the 19th Amendment to the Constitution several initiatives have been taken to further strengthen the independence of the Judiciary. The appointment of judges to the Supreme Court and the Court of Appeal are made by the president. However, the appointing power of the president is exercised subject to the approval of the Constitutional Council which is established to act independently. The 19th Amendment can be seen as a step forward in making the 1978 Constitution more constitutionalism friendly. In addition to the above the 19th Amendment also brought into operation several independent commissions in areas such as auditing, elections, police etc to depoliticize those respective areas.

While the 1978 Constitution when compared with the 1972 Constitution is more constitutionalism friendly, it still has some areas to improve. The executive branch is still not under the total control of the legislative and judicial branches of the government. To comply with the broader notions of constitutionalism, the 1978 Constitution would have to still improve its mechanisms which are available to curtail the authoritarian exercise of the executive power.

Conclusion

The constitutional history of both Ceylon and Sri Lanka reveals that many of the Constitutional reforms and the constitutions that were

enacted which either sui generis or foreign have not complied well with the notion of constitutionalism. In the colonial period since the British drafted the constitutional reforms there was a little hope of finding a constitution that would be supreme and which would be drafted upon the broader notions of constitutionalism. As the British themselves did not have a written constitution, where parliamentary sovereignty and the rule of law ran supreme in its constitutional setting, it would have been foolish to expect a constitution which complied with constitutionalism. Regarding the constitutional reforms introduced by the British, the Donoughmore Constitutional reform is seen as the best in the line. However, it too lacked some of the basic notions of constitutionalism such as the separation of powers with a proper system of checks and balances and the independence of the judiciary.

The Soulbury constitution was implemented with the ambition of granting a dominion status to the country. The constitution made special provisions to protect the interests of the minority and it is the only constitution that allowed judicial review of legislation. Article 29 of the Constitution played a key role in protecting the minority rights. However, the judicial attitude both here and in the privy council undermined the potency of Article 29 where on many occasions the Courts refrained from interpreting the true scope and the spirit of the Article. While in theory, the Soulbury constitution did provide for some kind of constitutionalism by providing special protection to the minorities and in the same token by also reducing the legislative power of the parliament, it failed to adhere with the notion of constitutionalism in other aspects, such as the independence of the judiciary and the public service.

Both the 1972 and 1978 constitutions were implemented as sui generis. While the 1972 Constitution followed a strict Westminster model with centralization of power in the national assembly, the 1978 constitution was designed as a hybrid model constituting of an executive president and a prime minister. While the notion of constitutionalism was almost absent in the 1972 Constitution, the 1978 Constitution was both a creative and a

novel one. In comparison the broader notions of Constitutionalism such as, separation of powers, supremacy of the constitution, fundamental rights and the rule of law existed in theory at least. However, even the 1978 Constitutions in its actual practice at the hands of its wielders failed to comply with the broader notions of constitutionalism at a satisfactory level.

Most often than not, constitutions have been implemented not in line with the broader notions of constitutionalism due to several reasons. Firstly, where a constitution is implemented by a foreign power, it may fail to consider the broader notions of constitutionalism as it would be more interested in exploiting the country instead of creating a constitution that is constitutionalism friendly. Secondly, even where a constitution has been implemented as a sui generis product, it still may lack the necessary provisions to protect the minorities and it may sometime lead to an authoritarian kind of rule. The Sri Lankan experience is a classic example for both the above.