

## Constitutionalism Reforms in Sri Lanka: A Case Study of Past, Present & Future

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### ABSTRACT

The constitution is meant to protect that self in its dignity and worth. The prime function of constitutional political order has been and is being accomplished by means of the system of regularized imposed upon those who wield political power (Friedrich, 1946). A constitution can be interpreted as a document including deep concepts, theories, value systems & identities that give a country authority and legitimacy, framed by consensus in a way that reflects the aspirations of the people in every country. A constitution is a guide and advisor in the governing process of a government. Solebury's constitution was introduced in 1947 in the study of Sri Lanka's constitution-making history. But it is a constitution given to Sri Lanka by the British, not a constitution created in Sri Lanka. In 1972, Sri Lanka's first national constitution was drafted. The constitution was drafted with the participation of a constitution-making body led by Colvin R.de Silva. After that, in 1978, the second republic government constitution was introduced and since then, twenty amendments have been implemented for the constitution. Therefore, this article can try to understand mainly past, present and future norms and changes in constitutionalism in Sri Lanka with the concept of constitutionalism.

**Keywords:** Constitutionalism, Reforms, Sri Lanka, Constitutional system, Separation of power

### 01. Identify the Constitution

It cannot be provided a genetic, universal interpretation of the constitution. Political scientists & scholars have put forward clarifications in relation to its environmental conditions in different states and situations. The constitution can be expressed as the document that

governs a country's basic & main law as well as its political grammar. In examining the definitions introduced by various philosophers regarding a constitution,

- "The way of life, the state has chosen for itself" – Aristotle
- "Constitution is aggregate of law and custom under which the life of state goes on" – Lord Bryce
- "A constitution may be said to be a collection of principle according to which power of government, the right of the governed and the relation between two are adjust" – C.F. Strong
- "The term constitution is used to denote all written and unwritten principles regulating the administration of the state" – K.C. Wheare & Hood Phillips (Phillips, 1787 & Wheare, 1964).
- "The fundamental and organic laws and principles of a country or state that create a system of government and provide a basis against which the validity of all other laws is determined" – (Weber's new world law dictionary, 2006)
- "The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties" – (Black's law dictionary,2009).

In some cases, such as, the United States the constitution is a specific written document. In others, such as the United Kingdom, it is a collection of documents, statues and traditional practices that are generally accepted as governing political matters. A constitution can be interpreted as legal, political and social infrastructure.

- **Constitution as a legal instrument:** A constitution often attempt, 'marries power with justice (Lutz 2006:17). It makes the operation of power procedurally predictable, upholds the rule of the law, and places limits on the arbitrariness of power. It is the supreme law of the land, and it provides the standards that ordinary have to comply with.
- **Constitution as social declarations:** constitution often attempt, to varying degrees, to reflect and shape society, for instance: by expressing the (exciting or intended) common identity and aspirations of the people, or by proclaiming and opening declarations, but can also be found in oaths and mottos or on flags and other symbols that are defined by the constitution. Other substantive provisions of the constitution, particularly, those defining socio-economic rights, cultural or linguistic policy or education, might also belong to this category (Lutz 2006:16-7).
- **Constitutions as a political instrument:** The constitution prescribes a country's decision-making institutions: constitutions 'identify the supreme power', 'distribute power in a way that leads to effective decision making' and 'provide a framework for continuing political struggle' (Lutz, 2006:17). The political provisions show how caste institutions (parliament, executive, courts, head of state, local authorities, independent bodies, etc.) are constituted, what powers they have and how they relate to one another.

Accordingly, the constitution of every democratic state in the world has more or less abolished the constitutional system of government to control the arbitrary power of an individual or group of communities. While there is a general consensus on what should be included and not be included in the constitution, the reason for this is the controversy over the

recognition of one constitutional issue. The points to be included in the constitution are two basic parts in terms of constitutional philosophy and political, social, and economic determines.

## **02. Necessity of the Constitution**

### ***I. The constitution is a statue of a country***

These are tools that serve as the governing body of a political and social organization or rule of law, and thus the ability to respond to a variety of conflicts and challenges.

### ***II. The basic structure of a constitution is shaped by the constitutional provisions of the constitution***

The constitution is important because it represents all the legal and cultural elements governing the people and government agencies. Confirmation of the fundamental rights of the people conflicts between the people can be prevented by ensuring the stability of the legislature, the executive and the judiciary. Also, the constitutional rule (niyamanaya) is important to control the arbitrariness of the state.

### ***III. Fundamental rights***

A constitution guarantees the rights and provisions of an individual or group in any country to ensure their well-being and dignity, thereby emailing them to uphold fundamental rights such as socio, economic and political.

According to the IDEA, the constitution is the rules of the game (IDEA, 2013). It does mean to imagine two teams playing a game of football. Suppose the team in possession of the ball could change the rules of the game and appoint its own referee. Then the game would hardly be fair. One team would always win, and the other would also lose or simply stop playing. This is like political life without a democratic constitutional order. The party, faction or group in power makes up the rules, and those in opposition are excluded from a game that is rigged against them. A democratic constitutional order acts like the rules of the game, and its guardians, for instance, a constitutional court, are like the referee. They make sure that everyone can play the 'political game' fairly.

This is because constitutional government ensures 'the fair and impartial exercise of power'; it enables an orderly, peaceful society, protects the rights of individuals and communities, and promotes the proper management of resources and the development of the economy (Ghai, 2010).

## **03. Constitutionalism**

In common usage, constitutionalism refers to governing the country in accordance with a constitutional system of government. However, it cannot be said that every state in the world has a constitutional system of government but a constitutional rule in the state.

- "Constitutionalism is a demand for public administration subject to permanent restrictions on the exercise of state power" (G.Sartori, 1998).
- "Constitutionalism is tantamount to a demand for a limited state" (M.Loughin, 2010).
- "Constitutionalism needs a legal scope to limit and regulate politics" (D.Grimn, 2016).

- “constitutionalism can be defined as the doctrine that governs the legitimacy of government actions, and it implies something far more important than idea of legality that requires official conduct to be in accordance with pre-fixed legal rules” (Prof.S.Rathnapala, 2020).
- “Constitutionalism means that the government to be instituted shall be constrained by the constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes” (H.Barnett, 2000).

According to these clarifications, it appears that constitutionalism aims to establish the legitimacy of the state by preventing the formation of an authoritarian government. There can be identified several theories on constitutionalism. That is, Genetic constitutionalism, Theocratic constitutionalism, Communitarian constitutionalism and Mixed constitutionalism, etc. legally and political ideology has also come forward regarding constitutionalism.

John Locke, considered the father of modern constitutionalism, marked the beginning of modern constitutionalism in 1688 with his ideas justifying the great revolution in England and the rights act of 1689 is considered its foundation. The existence of a constitution, as well as the rule of law, is essential for constitutionalism. But having a constitution alone does not protect constitutionalism. Can be identified several concepts of constitutionalism that seek constitutional devotion or respect. Its purpose is mainly to explain the relationship between the major institutions of the state, to protect the independence of the individual, to control the power, and to explain the basic values and principles that govern society.

Many principles such as people’s sovereignty, separation of power, the existence of a responsible government, the rule of law, the existence of an independent judiciary, respect for self – determination and protection of human rights is linked to constitutionalism and the existence of these principles can be seen in a state with constitutionalism rule.

#### **04. Analysis of Constitutionalism in Sri Lanka**

##### ***1. Separation of power***

The theory of separation of powers was put forward by Charles Montesquieu in 1708, and his explanation was that dictatorship was achieved through the unification of power. (The Spirit of the Laws,1748). Inspired by the British Westminster model, the 1948 Solebury constitution breaks down the legacy of the legislature, executive and the judiciary examines how practical and successful it. According to article 45 of the constitution, no bill is an act of parliament until it is approved by the queen. 45(2) articles, only members of the house of Representatives or the Senate could be members of the Cabinet. Under the 13(3) a Judicial officer can’t be a member of the Senate or the House of Representatives. Subsection of 5(3), 2(3) and 15(8), state that parliament shall not relinquish control over the executive in the event of an emergency.

However, there have been instances where the Governor has gone beyond the nominal executive role. In 1951, at the time of the sudden death of prime minister D.S.Senanayake the leader of the cabinet traditionally offered the post of prime minister, Dudley Senanayake, without appointing John Kothalawla.

Several issues have arisen regarding the devolution of powers under the Solebury Constitution. For instances include the cases of 'Allas Komasaris Vs. Ranasingha<sup>1</sup>', 'Rajina Vs. Liyanage<sup>2</sup>' & 'Kariyappar Vs. Wijesingha<sup>3</sup>'

According to article 134(1) of the 1972 constitution, the public security ordinance is considered a law enacted by the national state assembly. Therefore, the court can't question its validity. Under the 70(1)(ඉ) states that the separation of powers within the constitution is not functional by the inability of the judicial officers to obtain membership of the Royal council. Furthermore, article 05, states that the judiciary was concentrated in the National State assembly ('Jathika Rajya Sabawa') and not in the courts. Thus, it is crystal clear that the 1972 constitution is a weak constitution in terms of separation of powers. An issue that has arisen in relation to this constitution is the case of the associated Newspapers on the Special Provisions Bill. The petitioner contended that the Bill could not be introduced as the minister was a member of the executive and that the bill was subject to amendments to certain provisions of the company's constitution. But the court ruled that the act was valid because it denied the devolution of powers by this constitution.

Under the 1972 constitution, the judiciary did not even have the power of judicial review. The legislature or national assembly, 1972 has the power to bring back to the national state assembly even the bills which the constitutional court had previously exercised the power of observation, to pass and implement them by 2/3 and even to legislate in the past. The most powerful parliament in the world in the British parliament has a power that even the parliament doesn't enjoy, so it seems that this has been concentrated without allowing any devolution of power. According to Ivor Jennings, the British Parliament has the power to do anything other than make a woman a man. It can also be used to interpret the 1972 National State Assembly as defined.

Chapters 7,8 & 9 of the 1978 constitution describe the nature of the executive and its powers and functions, as well as the nature and powers of the legislature in chapters 10, 11 & 12. Chapters 15,16 clarify the nature, powers & functions of the judiciary. A total of 116 parliament members have pointed out to the president's removed to former prime minister Ranil Wickremasinghe without prior notice and give the post of Mahinda Rajapaksa illegal. (Hansard Document of Parliament, 2019.10.26). judges can be appointed only if the 19<sup>th</sup> amendment appoints the constitutional council and approves it. But under the 20<sup>th</sup> amendment, the executive has the sole power to reappoint judges.

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<sup>1</sup> Bribery tribunals were established under the Bribery Act. The appointment was made by the minister and not by the judicial service commission. The powers of the minister in this regard were challenged. Because the relevant institutions are tribunals, they should be appointed by the judicial service commission.

<sup>2</sup> The government brought in a special law to punish those involved in the failed attempt to overthrow the government. That is, the criminal law (Special Provisionals) act. The exciting rules were completely changed. An act specific to the relevant accused. The court ruled that this was an execution by the legislature. The royal court said that although the separation of powers was mentioned in the constitution, it was implicit in its basic structure.

<sup>3</sup> The bill states that those found guilty of bribery and corruption will lose their seats in parliament, local government or the Senate, and will lose their civic rights and the right to work for the government for up to seven years.

Problems arising out of the separation of power under the second republican constitution of 1978 include the hearing of the development council bill<sup>4</sup> and the (temporary) amendment bill on the prevention of terrorism<sup>5</sup>. Thus, it appears that in practical action the executive, the judiciary and the legislature are emerging. It can be concluded that the executive is interfering in other institutions and that there is a controversy surrounding the separation of power under the rule of constitutionalism.

The 1789 constitution of the United States was drafted in the same vein as Montesquieu's separation of power. The separation of power in America works in the same way, not only in theory but also in practice. The combination of the three powers of the legislature, executive and judiciary at the hands of an individual or group of people whether elected by popular vote or by nomination, will inevitably influence the emergence of a dictatorship.

To make it more successful, it also utilizes the system of balancing the checks with the principle of devolution. The legislature is governed by the executive and the judiciary, the executive by the legislature and the judiciary, and the judiciary by the legislature and the executive. Article 07 of charter one of the constitutions of the United States of America becomes law with the approval of the president. But even if the president opposes it and has the power to refer it back to the representatives that passed it, if 2/3 of the representatives passes the bill and 2/3 of the other panel passes the bill, the president's position becomes law and the act becomes law. It is not possible to withhold laws without the approval of the president of the United States. According to article 85 (2) of the 1978 constitution of Sri Lanka, the president has the power to hold a referendum on a bill rejected by parliament, even if the majority opposes it.

Although article 4 of state 2 of the US constitution states that the president, vice president and civic servants can be removed by impeachment, article 38(2) of the constitution of Sri Lanka states that the president can bring an impeachment motion, but this is not the case in the United States. For instances include the impeachment of President Andrew Johnson in 1864, Richard Nixon in 1973 & President Bill Clinton in 1998. Furthermore, article 02 of the second amendment of America limits the ability of the executive to make decisions on its own, requiring Senate approval for the president to enter into foreign agreements.

However, due to the expansion of the powers of the president of Sri Lanka under article 33(e) of the 1978 constitution, the executive can be seen to be acting arbitrarily even in making decisions. Example, Indo – Sri Lanka Act. The supreme court decision is an opportunity to demonstrate the practicality of separation of power to the United States. This marks the beginning of a judicial inquiry. "The balance of powers should be attended by mutual control

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<sup>4</sup> This was referred to the supreme court as an emergency bill to be passed by 2/3 vote. According to section 24 of this act, the development council can impose taxes in its area. This is power vested in parliament only under article 148 of the constitution. Accordingly, the bills are unconstitutional. Therefore, in accordance with article 83, it must be approved by a 2/3 majority in parliament and by a referendum. But only article 24 of the act was amended to make it unconstitutional. It was done by a by-law of parliament.

<sup>5</sup> A controversial issue arose over the division of powers between the executive and the judiciary. The minister was empowered to change a detention order issued by a high court judge. The supreme court ruled that the bill was unconstitutional as the judicial powers were exercised by the executive.

between separate organs of government” (Wade & Phillips,). The case of *Kibern V. Thompson* (1880, 103 US 168) is an example how the concept of separation of power and concept of check & balance can be put into practice in a modern democratic state, comparing Sri Lanka and the United State in theoretical & practical way.

## II. Practically Usage in The Rule of Law

“The rule of law is a political ideal that can more or less exist in a legal system” (H. Barnett, 2002). The rule of law is tantamount to democracy. Equality before the law, regardless of race, tribe, color, religion, wealth, social status, or political influence, is a hallmark of a civilized state (B.M. Marume, R.R. Jubenkanda, C.W. Namusi & N.C. Madziyire, 2016). The concept of the rule of law, an essential fundamental principle of the practical functioning of constitutionalism, was first formally introduced in 1885 by the English philosopher A.V. Daisy, he conceptualized the rule of law on the basis of three principles (A.V. Dicy, 1885).

1. Punishments for violation of the law only by the courts
2. The role of the judiciary in protecting individual rights
3. No one is above the law.

In this way, the rule of law can be simply defined as the protection of individual liberty, justice & rights through the rule of law, which governs the arbitrariness of the state and treats all equally before the law. For the rule of law in state to exist, the separation of power between different institutions and the functioning of an independent judiciary are essential. Considering how the concept of the rule of the law is being implemented in Sri Lanka, president Maithripala Sirisena has strongly emphasized the rule of the law throughout the 88 pages judgment in the case of *Rajavaritham Sampanthan V. Attorney General* ([2018] SC FR 531), which was filed in connection with the appointment of Mr. Mahinda Rajapaksha as prime minister.

In the case of *Sugathapala Mendis V. Chandrika Bandaranayake* ([2008] 25 LR 339), the president like other citizens upheld the rule of law as well as the judiciary, and in the case of *Wasudewa Nanayakkara V. Choksi* ([2008] 15 LR 134), the rule of law was established on the basis of the constitution of Sri Lanka. But in Sri Lanka, it is questionable whether the rule of law will actually work in practice. The appeal is filed in connection with the removal of judge Sriyani Bandaranayake without just appropriate reasons. Furthermore, another dimension of the executive’s challenge to the concept of the rule of law is that the Attorney General’s department is often governed by the executive. An example of this is the taking over of the attorney general’s department by the presidential secretariat during the period 2005 – 2015. Through this it is clear how the executive truly and practically challenges the concept of the rule of law.

“A person should obey the law not because the Swadhipatya Baladhariya orders him to do so, but he feels that the law is fair and that he must comply with the law” – Harald Laswell

When examining the incident of Gotabhaya Rajapaksha granting presidential pardon to Mr. Duminda Silva, a person convicted by the Supreme court, it is clear that a challenging situation has arisen regarding the rule of law. The fact that the aggrieved party filed a case against him after that shows the challenging circumstances prevailing in relation to the rule of law.

In the study of land mark V. gerad Mervin pereras' case judgement based on a case of a confusion of names. A man named Jeyaraj, who was convicted of murdering three people, is wanted and in the same area, a man named Gerard Mervin of the same name has been arrested without reason and subjected to inhuman torture. The high court judge gave the verdict and stated that Gerard Mervin was physically tortured by the Wattala Police, but it has not been proved beyond reasonable doubt that he was tortured by the defendants named in this case. The result was the acquittal of all the accused.

### **III. Constitutional Practice of Human Rights**

Human rights are the rights necessary to maintain human life with meaning and dignity. It has been mentioned in the constitution of 1978 itself. According to the 14 article of the fundamental rights in the chapter of the constitution, the constitution states that the freedom of movement and the freedom to live in the Prime minister's place in Sri Lanka are mentioned in the constitution itself. It is clear through.

In the year 2002, when a group of Tamils came from Batticaloa to cast their vote, the security forces did not allow them to enter the area where the polling station was concerned. They filled a case through the Supreme court that the obstruction of their free movement and not allowing them to vote was a violation of Article 14 of the constitution.

Due to the collapse of the criminal investigation process in Sri Lanka and the serious collapse of the judicial system in the past, many victims who turned to court proceedings for justice had to face many side effects for the mistake of seeking justice instead of getting justice. Landmark v. Sadun Malinga Case

Legally although all the points are mentioned in the constitution, in practice compared to other constitutions in the world, the current constitution of Sri Lanka has been subject to revisions at a higher speed and more times than the political societies with a basic law.

### **Conclusion**

“When India is said to be an agnostic state, it doesn't mean that the reality of an invisible soul or that religion applies exalts religion”<sup>6</sup>

Although the Indian constitution includes concepts of control of power for the protection of individual freedom, it is crystal clear that various problems have to be faced in the implementation of constitutionalism as a multi-religious and multi-cultural state.

A concept of constitutionalism which was born as a developmental human intellectual concept in the journey of the human existence and gradually with the growth of the human being, the environment around the human being has stepped towards a scientific and technological era, currently operates a very essential basic element for the survival and promotion of the security of a country. A country has a constitution, it cannot be said that constitutionalism operates in that country. In order for constitutionalism to work in practice, its

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<sup>6</sup> <http://www.legalserviceindia.com>



existing principles must be implemented in theory as well as practice. Constitutionalism directly and indirectly affects the current political changes and confusions in Sri Lanka. Therefore, constitutionalism is not just a constitutional decoration, but it is essential that it is implemented for the political stability, legal integrity and citizen's interest in Sri Lanka.

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