

Sri Lanka's 18th Amendment: A Charter for Dictatorship

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Sri Lanka's claim to be a democracy has been tenuous for years, but the passing of the Eighteenth Amendment to the Constitution by parliament on 8 September 2010 dealt it a fatal blow. It changed Sri Lanka into a de facto dictatorship like Zimbabwe and Myanmar, where it is abundantly clear that elections alone cannot unseat Mugabe or Than Shwe.

Background

The constitution of 1978, enacted by a government headed by J.R.Jayawardene of the United National Party (UNP), created an Executive President who wielded almost absolute power. As Jayawardene (who became the first occupant of the post) boasted, he had the power to do anything other than change a man into a woman or vice versa. The dire consequences of this enormous concentration of power became evident very soon, with assaults and murders of trade unionists and the sacking of tens of thousands of striking workers, a rigged and violent referendum in 1982, and escalating attacks on Tamils, culminating in the massacres of 1983. Like the 1972 Constitution, the 1978 Constitution affirmed Sinhala as the only official language and the special place of Buddhism.

The systematic violation of human rights and destruction of democratic space resulted in a civil war waged by the Liberation Tigers of Tamil Eelam (LTTE) in the North and East, and a Sinhalese insurgency of the Janatha Vimukthi Peramuna (JVP) in the rest of the country. Under Jayawardene and his successor, Ranasinghe Premadasa, tens of thousands of both Tamils and Sinhalese were tortured and killed by the state. Presidential immunity meant that they could not be prosecuted for any of the ghastly crimes committed during their regimes so long as they were in power. The only provision that saved this dispensation from being an out-and-out dictatorship was the limitation of the presidency to two six-year terms. In other words, at the end of twelve years, the president would be out of power and susceptible to prosecution for crimes committed while in power.

The Indo-Lanka Accord of 1987 was followed by the enactment of the Thirteenth Amendment to the Constitution, under pressure from India. This declared that Tamil 'shall also be an official language' of Sri Lanka, with English being a link language. It established Provincial Councils in all the provinces, and provided for the merger of two or three adjoining provinces to form a single administrative unit. This provided constitutional validity to the merger of the Northern and Eastern Provinces which had been agreed in the Indo-Lanka Accord, with the proviso that a referendum in the Eastern Province would be held within a year. Various powers were devolved to the provincial

councils in the Provincial Council List, and a parliamentary bill on any subject in the list had to be referred to all the provincial councils for their agreement before it could be passed.

The Thirteenth Amendment fell between two stools. It hardly needs to be said that it failed to satisfy the demand of the LTTE for a separate state. But both Tamil and Sinhalese moderates noted that the exact division of powers between the centre and provinces was not made clear, there was no subject over which the provincial councils could exercise exclusive jurisdiction, and even the devolved powers could arbitrarily be controlled, reduced or abolished by the centre acting at the behest of the president. For Sinhala nationalists, on the contrary, the amendment gave too much power to the merged Northeastern Province, aiding and abetting Tamil separatists.

The UNP was ousted from power in the parliamentary elections of August 1994, with a narrow victory for the People's Alliance, which included the Sri Lanka Freedom Party (SLFP), Lanka Sama Samaja Party (LSSP), Communist Party of Sri Lanka (CPSL) and a few others. This was followed by the landslide victory of Chandrika Kumaratunga in the presidential election in November. Kumaratunga's platform was one of peace with justice for Tamils and a restoration of democracy. In pursuance of the first objective, a ceasefire with the LTTE was declared in January 1995, and peace talks were begun. In pursuance of both, various democratic rights and liberties like freedom of expression and trade union rights were restored in the parts of the country under government rule, and a process aimed at enacting a new constitution inaugurating greater devolution to the provincial councils was initiated.

The peace process ended and war resumed in April 1995, when the LTTE broke the ceasefire by attacking the Sri Lanka Navy. However, efforts to bring about constitutional change continued. The 1995 proposals were unprecedented in their recognition of Tamil grievances and aspirations, and were welcomed by both Tamil moderates and Sinhalese progressives. For example, they deleted articles in the constitution that entrenched the unitary character of the state, abolished the concurrent list that created ambiguity in the division of powers between the centre and provinces, and emphasised the plural character of Sri Lanka. Sinhala nationalists were predictably unhappy with the draft. Under pressure from them, some of the progressive features were left out, while regressive features were either introduced or taken over from the 1978 constitution by the time the proposals were introduced in parliament in 1997. The LTTE rejected the proposals out of hand, and in 1999 murdered Tamil politician and lawyer Neelan Tiruchelvam, who had worked on drafting it. In 2005, it succeeded in killing Lakshman Kadirgamar, the other Tamil politician and lawyer who had backed the draft constitution.

Discussions continued, and by 2000, after Kumaratunga had survived an LTTE assassination attempt with the loss of an eye and had begun her second term as president in 1999, the proposals included abolition of the executive presidency. A problem faced by the Kumaratunga administration was that the proposals, being a substantive change in the constitution, were required by the 1978 Constitution to be passed by a two-thirds majority in parliament as well as a majority in a referendum, which meant that the support of the largest opposition party, the UNP, was critical. The promise of such support was held out, but it never materialised. When the draft was presented to parliament in 2000, shortly before parliamentary elections were due, the UNP led by Ranil Wickremesinghe howled it down rather than presenting any coherent amendments or arguments against it. Thus an attempt to abolish the executive presidency came to nothing despite strong popular support for it.

However, in a rare moment of consensus the Seventeenth Amendment, which curtailed the powers of the executive president substantially, was passed unanimously in 2001. This amendment, drafted by the Organisation of Professional Associations (OPA) and championed by the JVP which had abandoned armed struggle and entered parliament, provided for the appointment of an independent

Constitutional Council of ten people, in which the majority of members would be 'persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party' and would include at least three persons representing the interests of minority communities. No person could be appointed to or removed from the following Commissions except on a recommendation of the Council: the Election Commission, Public Services Commission, National Police Commission, Human Rights Commission, Finance Commission, Delimitation Commission, and Permanent Commission to Investigate Allegations of Bribery or Corruption. Further, no person could be appointed to the following offices without the approval of the Council: the Chief Justice and judges of the Supreme Court, President and judges of the Court of Appeal, members of the Judicial Services Commission other than the chairman, Attorney-General, Auditor-General, Inspector-General of Police, Ombudsman and Secretary-General of Parliament. The powers, functions and duties of the Election Commission included prohibiting the use of state property to promote or prevent the election of any candidate, party or independent group, and the power to appoint a Competent Authority to take over the management of the Sri Lanka Broadcasting Authority and Sri Lanka Rupavahini Corporation (state TV) should they contravene its guidelines. Thus the president's sweeping powers to control all these posts and functions was withdrawn during Kumaratunga's presidency, although she proved incapable of abolishing the executive presidency itself as she had promised in her 1999 manifesto.

Mahinda Rajapaksa's First Term

Mahinda Rajapaksa's manifesto for the presidential elections of November 2005, 'Mahinda Chinthanaya', also promised to abolish the executive presidency. Thus his election as president can be understood as a mandate from the electorate to carry out this constitutional change. In May 2006, an All-Party Representative Committee (APRC) was constituted with the task of preparing proposals for a new constitution, and a panel of sixteen experts was appointed to assist it. The Tamil National Alliance (TNA), at that time seen as the parliamentary voice of the LTTE, was not included. The proposals were supposed to constitute a political solution to the ethnic conflict as well as strengthen democracy in a more general sense. The panel was unable to come to a consensus, but by December a multi-ethnic majority of eleven members presented a report that was widely hailed by progressives of all communities as being a major step forward.

Subsequently, Chairman of the APRC Tissa Vitharana of the LSSP produced an amalgam of the two reports which relied heavily on the Majority Report, and each chapter of the proposals was discussed with a view to arriving at a consensus. It soon became evident, however, that President Rajapaksa and his party, the SLFP, were determined to sabotage the process, producing nonsensical and reactionary proposals that were guaranteed to be rejected by progressives of all communities. The UNP too failed to come up with any constructive suggestions, and instead dropped out of the committee. A final report prepared by the Chairman on the basis of discussions in 128 meetings was presented to the president in 2009. The draft included the abolition of the executive presidency and substantial devolution of power to provincial councils, but did not see the light of day until July 2010, when two members of the APRC, R.Yogarajan and M.Nizam Kariapper, released it to the public.

Rajapaksa's lack of interest in proposals for a more democratic constitution was underscored by his attitude to the Seventeenth Amendment. The three-year terms of members of the Constitutional Council expired in 2005, but he failed to appoint people to fill the vacancies as required by the 17th Amendment. Consequently the Council ceased to function, and new appointments to the various posts and commissions that were supposed to be carried out with its recommendation or approval were carried out unilaterally by the president instead.

The OPA protested in the strongest possible terms, pointing out that one of the most obnoxious misuses of presidential power 'is the practice of appointing or promoting relatives, friends, business associates and even those with strong criminal connections to positions of authority and fiscal responsibility. Another is the undervaluing and disposal of the Country's assets to cronies and rogue businessmen. The third is the collection of enormous bribes connected with the award of major tenders of various kinds, including arms and other military purchases. Misemploying government resources, including the media, to distort electoral processes is a fourth substantial domain of malfeasance. The resulting lack of anything resembling good governance has had a destructive effect in every sphere of national life.' They complained, 'It is deplorable that the President prefers not to honour the very Constitution that he promised to uphold when he took his oath of office... The continued violation of the 17th Amendment has destroyed all semblance of democracy, good governance and respect for the Rule of Law. It is time that President Rajapakse reflects on his actions and those of his government, and their long-term effect on the national institutions of this country. He needs to pull us back forthwith from the brink over which we are poised to descend precipitously into lawless dictatorship.'

The regime's failure to engage constructively with the APRC process helped to strengthen the LTTE, since its refusal to carry out or even contribute to a process of political reform would have convinced Tamils in LTTE-held territory that they had nothing to hope for and a great deal to fear if they fell into government hands. This allowed the LTTE to take around 300,000 Tamil civilians hostage in 2009, which, given the regime's determination to wipe out the LTTE at any cost, resulted in massive civilian casualties at the end of the war. In a sense the Vanni Tamils were proved right in their distrust of the government, because they were detained en masse after the end of the war in internment camps, a procedure that could arguably be characterised as a crime against humanity according to the definition of the International Criminal Court, since it involved 'severe deprivation of physical liberty' and 'severe deprivation of fundamental rights' of a civilian population for months on end.

The end of the war two years before presidential elections were due allowed ample time for President Rajapaksa to withdraw war-time curbs on democratic rights, demilitarise, carry out a public debate on the APRC proposals, amend them as required, and abolish the executive presidency as he had promised. Instead, he plunged into preparations for a presidential election, in the expectation that post-war euphoria amongst the majority of Sinhalese would give him a huge majority over his main rival, Wickremesinghe. To his consternation, army general and war hero Sarath Fonseka announced his retirement from the army and candidacy in the presidential election, supported by most of the opposition parties as the common candidate of the Democratic National Alliance (DNA). The regime went into overdrive to defeat him, using state resources and media to campaign for the incumbent and circulate rumours that Fonseka was a tyrant, a traitor, and ineligible to stand for election, assaulting, killing or forcibly disappearing journalists who failed to fall in line, and attacking - in some cases with lethal force - opposition election rallies.

After the election was held on 26 January 2010, the Campaign for Free and Fair Elections (CaFFE), a civil society group, confirmed that many Internally Displaced Persons were deprived of their franchise while people who had died or left the country remained on the voting lists, and that counting agents of opposition candidates were chased away from the counting centres while unauthorised persons were allowed to enter. The results, instead of initially being announced at the counting centres as usual, were announced only after being centralised; demands by CaFFE that carbon copies of the results at each counting centre be submitted for inspection were refused, giving rise to suspicions of fraud in the counting process. In a despairing address to the public when announcing the election results, Election Commissioner Dayananda Dissanayake complained that his guidelines to the state media had been ignored, many state institutions had operated in a manner

not befitting state organisations, his team of presiding officers and assistant election commissioners had been harassed in several areas, and under the circumstances he could not ensure the safety of even a single ballot box.

Despite these irregularities, Fonseka polled 4.17 million votes against Rajapaksa's 6 million. Shortly afterwards, he was arrested and threatened with court martial and possible execution. While in remand, he won a seat in the parliamentary elections of April 2010 and was able to attend and participate in sittings. Although the serious charges meriting a death sentence were dropped for lack of evidence, a military court appointed by Rajapaksa convicted him of meddling in politics while in uniform and of relatively trivial corruption charges, stripped him of his rank, medals, pension and parliamentary seat, and sentenced him to three years in jail. According to Fonseka's daughter Apsara, the defence lawyers were not allowed to present their statements, call their witnesses, or even be present at his trials, and the Asian Human Rights Commission compared them to Stalin's Moscow trials. The irregularity of the proceedings and vindictiveness of the punishment, given both rampant corruption and political dabbling by many others in the armed forces, make it obvious that Fonseka's real crime was standing for election against Rajapaksa. The coalition headed by Rajapaksa, the United People's Freedom Alliance (UPFA), won the 2010 parliamentary elections, but fell short of the two-thirds majority required to carry out constitutional change.

Who is to Blame?

This is the context in which the Eighteenth Amendment was rushed through as an urgent bill. The bill sought to bring about two changes to the constitution: nullify the Seventeenth Amendment by replacing the Constitutional Council with a toothless Parliamentary Council, and abolish the two-term limit on the presidency. This would allow the president to appoint people to all the positions and posts mentioned in the 17th amendment constitutionally, and ensure that he could remain president for life (with lifelong immunity) by manipulating elections and making nonsense of the independence of the judiciary. Why was it so urgent? Owing to a convoluted constitutional amendment introduced by Jayawardene, Rajapaksa would not even begin his second term until November 2010, so what was the urgency to decide that he could stand for a third term?

There seem to have been three compulsions. One, his waning popularity would mean that the longer he waited, the more difficult it would become to pass such an amendment. Two, rushing the amendment through parliament without a public debate would forestall objections. (It all took place within ten days; petitioners at the Supreme Court, who argued that as an amendment which affected both fundamental rights and powers devolved to the provincial councils it should have been subjected to a referendum and sent to the provincial councils for prior approval, were given the text of the amendment only after their plea began; the Supreme Court itself was given the text only the previous day, despite which it ruled (contrary to earlier rulings) that a two-thirds majority in parliament was sufficient; and MPs were given the text only after the debate began, one day before their votes were to be cast.) The third probable reason is that Jayawardene is reported to have contemplated such an amendment towards the end of his second term, but by then, Premadasa was waiting in the wings to replace him, and would not agree to it. So this could well be a move on Rajapaksa's part to pre-empt bids by other members of his party - or even his family - to replace him. In the process, of course, his 2005 election pledge to abolish the executive presidency was thrown to the winds.

There is no doubt that the primary responsibility for this travesty of democracy lies with Rajapaksa and his party. But they lacked a two-thirds majority, and could not have pushed through the amendment without many accomplices. As a member of Jayawardene's and Premadasa's

governments, opposition leader Ranil Wickremesinghe participated in the horrors they perpetrated, including the anti-Tamil pogroms of 1983 and the torture and extrajudicial killings of Sinhalese in the late 1980s. As leader of the opposition, he sabotaged the constitutional proposal of 2000 (which would have made the 18th Amendment impossible if it had gone through), and played a negative role in the APRC process. He has been criticised for being absent at the debate on the 18th Amendment instead of arguing and voting against it, but what could he possibly have said that would not have sounded hypocritical? The UNP's failure to stand for anything but a desire for power has meant a steady haemorrhage of defectors to the ruling alliance where the real power lies, and they helped to push the amendment through.

Then there was the LTTE. Prabhakaran's stubborn refusal to consider anything other than an exclusively Tamil totalitarian state in the areas it controlled detached the issue of justice for Tamils from the goal of democracy for all, where it rightfully belonged. This blocked attempts to push through a democratic solution to the civil war and abolish the executive presidency in the decade from 1994 onwards, when Sinhala nationalism was in abeyance. And the return to war and terrorist attacks helped to stoke Sinhala nationalist sentiments and legitimise the ruthless drive to exterminate the LTTE as well as the anti-democratic measures taken before and after the end of the war.

Other accomplices included the Supreme Court judges who allowed the amendment to be rushed through, politicians from minority parties who voted for it, and politicians from the Socialist Alliance who also voted for it, despite the fact that the Politburo and Central Committee of the LSSP (led by Tissa Vitharana) and Democratic Left Front (DLF, led by Vasudeva Nanayakkara) had decided to abstain. One is reminded of Stanley Kramer's 1961 film 'Judgment at Nuremberg', which tells the story of the trial of four German judges guilty of complicity with the Nazi regime. One of them, Ernst Janning, was once a champion of justice, yet played a major role in turning the German legal system into an instrument of Nazism. How could these eminent and apparently decent men have been complicit in the ghastly atrocities committed by the Nazi regime? The mystery is solved only when Janning makes a statement, showing how actions which at first seemed trivial and innocuous - like swearing an oath of allegiance to the Nazis - led to deeper and deeper entanglement with the regime. Even when the full horror of Hitler's agenda became clear to them, they justified staying at their posts with the argument that they were trying to prevent matters from getting even worse. Of course, that turned out to be a delusion. What really could have prevented matters from getting worse would have been clear opposition to the fascist transformation of the state and society, but that was the course they did not take.

Are the majority of Sinhalese people complicit in turning Sri Lanka into a dictatorship? Two days before the amendment was passed, liberal commentator and peace activist Jehan Perera asked community leaders in various parts of the country what they thought of it, and they replied that they did not know enough about it to have an opinion. He also got the impression that they were afraid of voicing opposition. This account rings true. If judges of the Supreme Court and parliamentarians did not get the text of the amendment until the last minute, how could ordinary people in the provinces know what it contained? And if they had seen war hero Sarath Fonseka incarcerated and threatened with death for opposing the regime, wouldn't they fear that the same or worse could happen to them? In both 1999 and 2005, the Sinhalese majority voted massively for presidential candidates who promised to abolish the executive presidency. In 2010, a large part of the 4.17 million votes for Fonseka were cast in the fear that if Rajapaksa came to power, he would become a dictator: a fear that proved only too well-founded. Millions more did not vote for either of the main contenders, believing that Fonseka could turn out to be as bad as Rajapaksa. They either cast their votes for candidates who could not hope to win or abstained, resulting in an abnormally low voter turnout. If protest votes and abstentions are added up, they come to a substantial majority who were opposed

to dictatorship.

Seeds of Hope

Sri Lanka may now be a dictatorship, but it does not follow that the aspiration for democracy among its people is dead. There was a chorus of protest against the 18th Amendment and the manner in which it was being passed from the Civil Rights Movement, Organisation of Professional Associations, Bar Association and law students, Centre for Policy Alternatives, National Peace Council, eminent academics and intellectuals, religious leaders, trade unionists, media persons, and many other concerned citizens. In parliament, it was opposed by the DNA (now reduced to the JVP, Sarath Fonseka and two others) and the TNA, despite the vulnerable position of both; thanks to first-time TNA MP M.A.Sumanthiran's well-argued and eloquent speech in parliament, objections to the 18th Amendment were actually voiced in the debate and went on record. The leader of the New Left Front, Vikramabahu Karunaratne, called on people to wear black in protest against the amendment. Nineteen LSSP and DLF Poliburo and Central Committee members condemned the decision of the executive committee of the Socialist Alliance to vote in favour of the 18th amendment ignoring their decision not to participate in the voting, and called upon all progressive forces to oppose the 18th Amendment and fight against the establishment of an authoritarian state by united action with all who stood against this menace.

Whether these protests die down or grow, making use of the remaining democratic space before it is shut down, depends on many things. It is an irony that the only parties defending democracy in parliament were the JVP and TNA, which have both espoused decidedly undemocratic politics in the past. In the circumstances, all freedom-loving people have good reason to be grateful to them. The JVP has distanced itself from armed struggle, which is a positive development, but unless its leaders and Sarath Fonseka abandon their Sinhala nationalism, they will not be able to carry forward the struggle for democracy. On the other side, the TNA has distanced itself from the goal of Tamil Eelam, which is a major step forward, but unless it also abandons its residual Tamil nationalism, its capacity to fight for democracy will be limited. Finally, the capacity of dissident leftists of the LSSP and DLF to act as a rallying point for all those opposing the descent into authoritarianism would depend on their ability to distance themselves from elements in their own parties who are wedded to the very forces that are driving the country into totalitarianism. There is potential for a powerful democracy movement. Only time will tell whether it will materialise.

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P.S.

* From Kafila.org:

<http://kafila.org/2010/10/06/sri-lankas-18th-amendment-a-charter-for-dictatorship-rohini-hensman/>