

The Fragmented Republic: Reflections on the 1972 Constitution of Sri Lanka

Welikala, Asanga, ed. *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*. 2 vols. Colombo: Centre for Policy Alternatives, 2012. pp. 1038.

“We seek your mandate to permit the members of Parliament you elect to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution. This Constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy; and it will also secure fundamental rights and freedoms to all citizens.”

Manifesto of the United Front of the SLFP, LSSP and the CP (1970)

Introduction

Like most ex-colonies Sri Lanka (then Ceylon) too idealized becoming a republic. It was with much fanfare and national fever that the first republican Constitution of Sri Lanka was adopted on 22 May, 1972. It was hoped (as the above political call indicates) that the establishment of a republic would herald the ‘era of the people’ when Sri Lankans would come onto their own. Paying obeisance to an alien Head of State and an equally alien apex court (the Judicial Committee of the Privy Council) was a thing of the past. It was only logical to expect that this extraordinary moment in the political life of the State would be the catalyst to begin nation building in earnest.

What the pomp and the pageantry that marked the beginning of the new republic concealed, however, was that the ‘people’s Constitution’ was adopted by a fragmented vote in the Constituent Assembly. The opposition United National Party (UNP) voted against it and the Federal Party (FP) which represented political sentiments of a vast majority of Tamils of the North had by then left the Constituent Assembly proceedings in protest and chose not to be present at voting (Constituent Assembly Debates 2007). The Constitution that represented the new republican *grundnorm* itself was on shaky foundations.

The republic turned forty in 2012. As in the life of a person, the onset of middle age in the life of a political era of a State is an opportune moment to reflect on the lessons learned and contemplate the course of future action. There are many questions to be answered--What does the republic mean to Sri Lankans? What has republicanism delivered?

Many political events have unfolded during the first forty years of the republic. Contrary to the expectation articulated in the above Manifesto that “...it [a republic] will secure fundamental rights and freedoms to all citizens” political life in Sri Lanka during that period was marked by violent conflict, further ethnic fragmentation, rule by exception (emergency rule) and a problematic human rights record that drew international attention. Political violence included a devastating nearly three decade long civil war (1983 -2009) in the North-East and an insurrection in the South (1987-89).

The 1972 Constitution lasted a mere six years. The second republican Constitution (1978) made key changes to the schema of its predecessor-- it centralized political power in a powerful executive presidency, gave constitutional imprimatur to a free economy and devolved powers to Provincial Councils via the Thirteenth Amendment to the Constitution. But fundamental features of the 1978 constitution that define the contours of the republic,

such as the unitary state, the Buddhism clause and dilution of checks and balances reflect and perpetuate the legacy of the 1972 Constitution.

The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice (the publication), an ambitious two volume publication edited by Asanga Welikala, provides us with an opportunity to revisit the constitutional legacy of the 1972 Constitution from multiple angles. The unique feature of the publication is just that—it is a multi-disciplinary inquiry into a constitutional past. The Editor points out that the publication is more an anthology of essays than an edited collection (31). The publication imaginatively brings together analyses of writers from a spectrum of disciplines. What could have, under ordinary circumstances, been a dry positivist analysis of the theory and the workings of a particular constitutional framework now takes on a dynamic and colourful tone in the hands of researchers from multiple fields of study such as constitutional law, political theory, anthropology and political history. Analyses of the publication's theme range from the politics of constitution-making to an ontological account of the Sri Lankan State. Contrary to the general expectation of an account/analysis of a constitutional past, there is very limited discussion on the apex court's constitutional jurisprudence. Significantly, the publication takes a novel approach of interrogating the impact of a constitution through personal interviews with political actors. This interesting methodology provides the reader with glimpses into the mindsets of diverse political actors whose narratives illustrate the deep suspicions and insecurities that inform ethnic politics of Sri Lanka.

The two volumes contain no less than twenty seven chapters which in turn are grouped into four parts. Part I deals with constitutional history of the 1972 Constitution. The Editor admits early on that the publication primarily focuses on the 1972 Constitution, as it was that which marked a decisive "constitutional moment" firmly creating a unitary constitutional order that "retained its essential substantive character" despite its replacement six years later by the second republican Constitution of 1978 (29). Parts II and III respectively explore constitutional theory and constitutional practice. Part IV presents personal interviews with four political figures representing varied political experiences and perspectives.

What this essay, as a book review, seeks to accomplish is to reflect on the publication in relation to three issues which, in the opinion of the author, are of critical importance to the continuing debate on constitutional reform in Sri Lanka. They are: the constitution-making process; the idea of republicanism inherent in the 1972 Constitution and perforce the nature of the autochthony sought to be achieved by the drafters; and finally an assessment of the Constitution through the prism of the concept of constitutionalism. Perhaps, the limited objective of the essay could be faulted for taking so rich an undertaking as the publication with its kaleidoscopic perspectives back to the realm of legalese. That may be so. But it does not intend to deny the value of the publication's multi-disciplinary approach. Rather, it is a less ambitious attempt by a student of constitutional law to reflect on the publication in relation to certain fundamentally problematic aspects of the 1972 Constitution and the specific republican order it established.

The Constitution-Making Process

Obsession with Constitutional Reform

Sri Lanka seems to have an obsession with constitution-making. In fact, those in the vanguard of the demand for self-rule in what was then Ceylon sought to achieve their political goals through constitutional means than through popular political movements as in India (de Silva, K.M. 518-19). They earned the dubious distinction of being referred to as 'the constitutionalists'. In the 63 years since independence in 1948 Sri Lanka has been governed under three constitutions. First was the Soulbury Constitution (1946/47)¹ that established

¹ The several components of the Soulbury Constitution comprise The Ceylon (Constitution) Order in Council (1946), The Ceylon (Independence) Act (1947) and The Ceylon (Independence) Order in Council (1947).

Dominion Status in Ceylon. The Soulbury Constitution, crafted by the eminent British constitutional law scholar Sir Ivor Jennings, served as the independence constitution. It was in operation for 24 years. Of the two republican constitutions, the epoch making first, lasted only six years. The second republican constitution adopted in 1978 has been in operation for 35 years, albeit with 18 amendments, and has the distinction of being the longest serving. However, all is not well with that constitution too. There have been strident demands by virtually every political party, including in the initial election manifesto of the incumbent President Mahinda Rajapaksa to abolish its major feature--the executive presidency (*Mahinda Chintana* 97). The debate to effect reforms that would constitute a constitutional arrangement to accommodate minority demands is still ongoing with no serious outcome in sight.²

Aside from demands for such "constitutional tinkering" there have been, in the interim, proposals to draft an altogether new constitution to replace the 1978 Constitution. A Parliamentary Select Committee was appointed in 1994 by the government of President Chandrika Kumaratunga to recommend proposals for constitutional reform. Pursuant to those deliberations, a set of constitutional proposals were submitted to the Parliament on 24 October, 1997.³ Multi-party discussions and agreement on those proposals resulted in the Draft Constitution of 2000 (Draft Bill No. 372 of 2000). It was presented by way of a Bill to Parliament on 3 August, 2000 with the support of minority parties. The proposals recommended the abolition of the executive presidency and extensive devolution of power to the periphery. The proposed Bill of Rights in the Draft Constitution was extremely progressive. In many respects, it could be said that the 2000 proposals constituted the most progressive constitutional framework presented thus far on devolution of power and fundamental rights protection. Unfortunately, however, narrow politics triumphed. The Draft Constitution could not be adopted despite the initial support of minority parties mainly due to the withdrawal of support of the United National Party which was the main opposition party then (PRIU, Constitutional Reforms since Independence).

If there were expectations that the present People's Alliance government of President Mahinda Rajapaksa would propose a new Constitution in the aftermath of the ending of the civil war in 2009, particularly in order to offer a new constitutional formula for power sharing, they were short lived. Instead, his government rushed through Parliament the Eighteenth Amendment to the 1978 Constitution as an urgent Bill. It dramatically bolstered powers of the executive presidency (Edrisinha and Jayakody). The existing two term limit of the presidency was abolished and the president was conferred with near total powers in making critical governmental appointments including those to the higher judiciary.

More recently, as the fourth anniversary of the ending of the civil war was being marked two parties have presented proposals for constitutional reform. One is a proposal for extensive amendment of the 1978 Constitution presented by the National Movement for Social Justice ("Sobitha Thero and team present constitutional proposal") and the other is a proposal for an entirely new Constitution proposed by the opposition United National Party ("Full Text of the Principles").

This constant preoccupation with constitutional reform points to the alienation of the people from the prevalent constitutional scheme. There does appear to be an abiding sense that the Constitution does not belong to the people and hence the people do not belong to the Constitution. How did this constitutional anomie, most of all in a republic, come about? A

² A Parliamentary Select Committee was appointed in 2011 to formulate a political solution to the ethnic conflict ('Parliamentary select committee will work on political solution - *President*'). However, the Tamil National Alliance, the major Tamil political party refused to nominate members to the Select Committee ('Sri Lanka Tamil party again refuses to name members to proposed parliamentary committee'). More recently, the government has proposed the establishment of another Parliamentary Select Committee to formulate a solution to bring about ethnic reconciliation ('Sri Lanka to Propose Establishment of a Parliamentary Select Committee').

³ The volume edited by Panditharatne and Ratnam provide analyses of various dimensions of the 1997 constitutional reform proposals.

common answer would point to discontent with the normative framework of the Constitution. The next logical question then would be who decided on the normative framework, and how? In other words, who made the Constitution and what was the process adopted? That remains, in my opinion, a question of singular importance that is not sufficiently focused on in Sri Lanka's political discourse.

The Need for a Theoretical Framework for Constitution-Making Processes

The linkage between the normative content of a constitution and the process followed for its drafting and adoption has not received sufficient scholarly attention that it deserves. Although there are case studies of constitution-making processes of individual States, as Jon Elster pointed out sometime back (and which largely remains true to date) "surprisingly, there is no body of literature that deals with the constitution-making process in a positive, explanatory perspective" (123). A deeper analysis of the inner dynamics of the politics of constitution-making and indeed the psychology of such politics is required. The absence of a developed body of literature in that regard is indeed surprising as common sense dictates that the maker of anything determines the content. And content in turn determines the quality of the product and, in this instance, its legitimacy. Generally, in constitutional reform discourse there is far too much emphasis on content than on the process of constitution-making (i.e., institutional modalities, composition and procedure).

But, as Elster explains, "the more democratic the substance of the Constitution, the more democratic is the process by which it is adopted" (125). According to his thesis reason, interest and passion are elements that move the psychology of constitution-making. Self-interest—whether in the form of class interests, interests of one's constituency or institutional interest (the institution one occupies)—often come to the fore as the reason for advocating a particular constitutional position, but such interests are generally articulated in terms of impartial values. Reason is adhered to when it serves one's interests. Rarely would reason triumph over self-interest. In the ideal world self-interest would coincide with impartial values such as democracy, equality, pluralism and so on (131-34).

Passion, the third element Elster refers to, is very potent. Passions such as ethnic or religious animosities, ardent beliefs in egalitarianism or nationalism are long-standing passions that would animate constitution-making. Elster also refers to sudden passions that flare up in a moment of crisis such as a foreign invasion, violent conflict, economic recessions and public scandals. He points out "if constitutions are typically written in times of crises, it is not obvious that the framers will be particularly sober" (135). The framer must be more sober and be more restrained than the framed (i.e., those who will be regulated by the Constitution). Constitutions should ideally respond to passions by building internal restraints (such as bicameralism, veto powers and complex amendment processes) that can avoid harmful action. Constitutions must similarly provide for protection against harm based on long-standing passions such as discriminatory and prejudicial actions against religious or ethnic minorities (Elster 135).

Often though, a new constitution is adopted as a response to upheaval. The sobriety that is required to provide a long-term vision for a constitution is in short supply in such situations. But eventually, a constitution will not elicit public enthusiasm and loyalty unless certain irreducible requirements are incorporated. And so, the required sobriety must eventually emerge from whatever the circumstances if the constitutional instrument is to gain legitimacy. Such a victory is exemplified by what the Constituent Assembly in India achieved while framing the republican Constitution (1950) in the aftermath of the devastation caused by partition and also other forms of political upheaval within the country. Up to date, the Constitution of India continues to be the political mainstay of that complex polity (Guha 309-12).

Based on his analysis Elster ventures forth to make a set of general recommendations that merit consideration. Among the final recommendations he proposes are: (i) Constitution-

making must not be entrusted to sitting legislatures--specially elected assemblies must be constituted for that purpose; (ii) in order to ensure a sufficient degree of representation election of constituent assemblies must be conducted on the basis of proportional representation; (iii) there must be both elements of secrecy (committee sittings) and publicity (plenaries) for the proceedings to ensure balanced discussion; (iv) the role of experts must be minimized as the process must not be steered mainly by technicalities (137-38).

At this juncture, one is also reminded of the theoretical framework propounded by Robert Dahl on the "democratic process" in his celebrated book *Democracy and its Critics* (Chapter Eight). He proposes the following criteria as constituting a framework that should inform the process of democratic decision-making: effective participation; voting equality in the decisive stage; enlightened understanding; control of the agenda and equal opportunity. We can see how both (Elster's and Dahl's) frameworks advocate a departure from the formal majoritarian and/or elite-based democratic processes. Dahl, in particular, envisages popular participation and also the ready availability of information in the public domain ("enlightened understanding") as essential ingredients of democratic decision-making. John Rawls has advanced the idea that it is essential for citizens to reach practical agreement on what he terms "constitutional essentials", viz., fundamental principles that specify the general structure of government and the political process and equal basic rights and liberties of citizenship that legislative majorities are to respect (227-30).

The Constitution-Making Process and the First Republican Constitution

The publication does not present a theoretical analysis of the process of constitution-making in Sri Lanka as such. The chapter by Nihal Jayawickrama on "Reflections on the Making and Content of the 1972 Constitution" (Chapter 1) in Part I on "Constitutional History" provides us with an insider's perspective on the making of the 1972 Constitution. In addition, two other chapters throw light on the recent constitution-making experiences in Kenya and, to some extent, South Africa (Chapters 17 and 22) and place the Sri Lankan experience in comparative perspective. Those two chapters are compiled under the rubric "Constitutional Practice".

Yash Ghai and Nicholas Haysom have played pivotal roles in the making of the Constitution of Kenya (2010) and the interim (1993) and current (1996) Constitutions of South Africa respectively and have influenced constitution-making elsewhere. The richness of their theoretical and practical insights is brought to bear in their chapters. Ghai's chapter, however, is more an explication of the fundamental features of the new Kenyan Constitution. A brief reference is made to the role played by the Constitution of Kenya Review Commission (CKRC), the Kenya National Constitutional Conference (Bomas) and the Committee of Experts (CoE). However, the chapter does not delve deep into their composition, working methods, inner dynamics and choice of institutional modalities. Such a discussion would have been very helpful to the readership in Sri Lanka. Elsewhere, however, Ghai (with Galli) has discussed what is termed "constitution-building"⁴--a broader concept than constitution-making--that envisions the manner in which a constitution takes root in a society and brings about democratization. The crucial need for public participation in processes that give an organic life to a constitution by grounding it in a specific social context is underscored and elaborated on.

⁴ "The concept of constitution-building is more complex than the process of constitution-making alone, although the latter is an inseparable part of it. As we use the term in this paper, constitution-building refers to the process whereby a political entity commits itself to the establishment and observance of a system of values and government. It is necessary to make a distinction between the written text that is the Constitution and the practices that grow out of and sustain the constitution. Constitution-building stretches over time and involves state as well as non-state organizations." (Ghai and Galli 9).

Haysom's chapter, on the other hand, specifically discusses constitution-making in divided societies providing illustrations from comparative experiences. The chapter offers insights into constitutional possibilities of acknowledging and managing diversity. It underscores that constitution-making should go hand in hand with nation building. Haysom then advances three principles that would provide legitimacy to both the process and the final product. The first is that the majority should accept the constitution either directly or through their representatives. This could be met where the constitution-making bodies are elected (constituent assemblies, legislatures) or where there are popular referenda to test the popularity of a draft constitution. Secondly, the process must ensure inclusiveness, meaning that full diversity of a society must find representation in the consultation, drafting or (why "and" was not used is questionable) adoption of a Constitution. The first and the second principles combined ensure breadth of acceptance. While gaining acceptance of the majority is important, it should not detract from the paramount importance of gaining support from diverse strands of society. Such a goal would prompt constitution-makers to seek consensus formulae. Haysom refers to the success of using "sufficient consensus" as a principle early on in the South African negotiation process to decide on the constitutional principles. Thirdly, the process must ensure direct popular participation. Direct representations made to constitution-making bodies either individually or through civic organizations should be encouraged and the multiple voices given due consideration. Haysom argues that in that manner the popular ownership, hence the effectiveness, of the Constitution is secured (888-92).

Those three principles must be observed at each stage of constitution-making. Furthermore, he points out that the principle in garnering popular ownership of a Constitution must extend to the language of the Constitution—it must be drafted in simple and accessible language. The South African Constitution (1996) is a supreme example of brevity, clarity and accessibility. Finally, he makes a point which is of poignant significance to Sri Lanka—"leadership is the key, as is maintaining a national vision, rather than sectarian triumphalism" (893).

In the backdrop of the processual frameworks and principles discussed above, Jayawickrama's account of the making of the 1972 Constitution in Chapter 1 makes for melancholic reflection. Of course, that Constitution was drafted well before the recent spate of democratic constitutions that prioritized inclusiveness in diverse/fragmented societies. Nevertheless, the political myopia with which the prime opportunity for nation-building in the new republic was squandered will continue to haunt us for time to come. The misgivings are amplified when one considers 'what could have been' given the ideological richness and intellectual potential that one could logically anticipate from the Left partners of the United Front Alliance who gave leadership to the constitution-making process.

The first attempt at reforming the Soulbury Constitution was made in the years 1957-59 on the initiative of then Prime Minister SWRD Bandaranaike. A Joint Select Committee of the Senate and the House of Representatives (under the Soulbury Constitution the legislature was bicameral) was appointed to look into the revision of the Constitution and other written laws. Jayawickrama points out that the membership of the 18 member Select Committee was very representative. All political parties in Parliament, the four major communities (and caste groups among the Sinhalese) and major religious groups all found representation in it. Of the 18 only 7 belonged to the ruling party. The proposals of the Committee on fundamental rights protection, for example, were quite advanced for their time. However, as one would expect from a group of political incumbents, splits within government ranks brought a premature end to this effort. A few months later the Prime Minister was assassinated.

The representative manner in which that first attempt at constitutional reform was made--albeit restricted to political incumbents of the day--is in stark contrast to how the first republican constitution came into being. In the lead up to the 1970 General Election the United Front Alliance (consisting the Sri Lanka Freedom Party-SLFP, the Communist Party

of Ceylon—CP and the Trotskyite Lanka Sama Samaja Party—LSSP) presented an Election Manifesto specifically calling for a mandate to adopt a new constitution with the objective of establishing a republic. The republic would be a social democracy securing fundamental rights and freedoms to **all** citizens. Jayawickrama points out that the LSSP, with its left ideological leanings, was keen to rupture legal continuity with the colonial political and constitutional order (54). The new republican constitution was not to have any links with its predecessor.⁵

To formulate the new constitution the Parliament elected at the 1970 General Election (held under the Soulbury Constitution) was transformed into a Constituent Assembly. It met in a location away from Parliament House. The assumption was that its mandate naturally flowed from the seemingly sound electoral victory given by the people to the United Front Government to adopt a republican constitution. In the first instance, it is an irony that the Parliament elected under the Soulbury Constitution was mandated to draft and adopt a new Constitution in order to change the existing *grundnorm* (i.e., Dominion status) through a legal revolution. Secondly, and more importantly, the representative nature of Parliament was terribly skewed by the first-past-the-post elections system under which the 1970 election was conducted. Even though the United National Party (UNP) garnered more votes than the SLFP, it secured only 17 seats to the 91 seats won by the SLFP (Department of Elections 1970). The coalition partners of the SLFP won 25 seats, thereby giving the coalition a vastly disproportionate lead (in terms of the number of votes they obtained) over the opposition. The Federal Party won 13 seats and the Tamil Congress won 3 seats.

The crux of the problem with the 1972 Constitution lies in that very fallacy—that the people gave a resounding mandate to adopt a new Constitution. Under election laws in operation at that time it was so technically, but in actual fact a large number of voters did not confer such a mandate. When Parliament metamorphosed into the Constituent Assembly it too automatically inherited this terribly distorted representation. The relevance of Elster's injunction that legislatures should not engage in constitution-making and the prescription that constituent assemblies must be elected by proportional representation is borne out by this example (137). Haysom too points out that increasingly there is skepticism and suspicion when legislatures engage in constitution-making (891-92).

Jayawickrama, undoubtedly with the benefit of hindsight, lists a catalogue of problems with the constitution-making process leading up to the adoption of the 1972 Constitution. First, he points out “the Constituent Assembly assumed the authority not only to draft and adopt a new Constitution, but also to operate it. In other words, the drafters were also to be the beneficiaries” (65). Secondly, the process to be adopted to draft the Constitution announced by the Minister of Constitutional Affairs was heavily weighted in favour of the government ranks. The Steering and Subjects Committee that would formulate a series of resolutions on the basic principles on which the Constitution was to be based consisted of 17 members out of whom 12 were cabinet ministers. Members from the Tamil Congress and Independent representatives too were part of the government parliamentary group. That left only three members from the opposition ranks—two from the UNP (MPs JR Jayawardene and Dudley Senanayake) and one from the Federal Party (MP SJV Chelvanayakam). The drafts of the basic resolutions to be considered by the Steering and Subjects Committee were first prepared by a drafting committee functioning in the Ministry of Constitutional Affairs and chaired by the subject minister, Dr. Colvin R. de Silva. Furthermore, Jayawickrama points out that “the draft resolutions had to be vetted by a group of senior SLFP Ministers and by the leadership of the LSSP and CP, prior to being channelled through a twelve-member Ministerial Sub-Committee to the Cabinet for formal approval before being tabled at

⁵ Welikala argues, however, that it was not necessary to effect this rupture as the Parliament of Ceylon could have replaced the Soulbury Constitution *in toto* as it did not contain entrenched provisions (Welikala Chapter 3).

a meeting of the Steering and Subjects Committee” (70) and that at each stage of the process the Minister of Constitutional Affairs was the driving force (68).

In effect, all initiatives presented for consideration came from the government. Even though the resolutions had to be eventually approved by the entire Constituent Assembly, the near-total domination of the Steering Committee and the Assembly by government ranks stripped the entire Constitution-making process of the required representative character and, hence, legitimacy. Jayawickrama points out that the “majority of the communications received from the public were (sic) rejected *ab initio* as being contrary to the basic resolutions” (81).⁶ The UNP too complained that none of the amendments it proposed was considered by the government and declared that it will not vote for the Draft Constitution (83-84). What Jayawickrama fails to mention at this stage of the chapter is that the Federal Party too had left the deliberations of the Constituent Assembly in June 1971 almost a year before the final draft was adopted on 22 May 1972. Those political tensions were added to by the general political climate in the country at that time. As Jayawickrama notes the new Constitution was adopted in the backdrop of a continuing state of emergency, even though the JVP insurrection had been crushed almost a year previously (77-79).

Clearly, the republican Constitution was made by the incumbent government intent on framing the Basic Law of the country in its own ideological image. As an insider, Jayawickrama’s misgivings on the 1972 Constitution-making process (120-23) surely must serve as a future warning against such political misadventures.

Subsequent attempts at constitutional reform too have not engaged in reflection on adopting modalities of constitution-making that are representative of the various strands of society. The making of the 1978 Constitution was also driven by the political agenda of the newly elected UNP government of 1977 headed by JR Jayawardena. There again the newly-elected government declared that it was given a mandate (a five-sixth majority) to adopt and operate a new republican constitution. A Select Committee of the National State Assembly (legislature under the 1972 Constitution) was appointed to draft the Constitution which was initially chaired by Jayawardena himself (Cooray 76-78).

More often than not, Parliamentary Select Committees, expert bodies and gatherings of party representatives (as in the All Party Representatives Conference--APRC) are the methods that have been generally used to elicit proposals for constitutional reform in Sri Lanka (PRIU Constitutional Reforms Since Independence). It is doubtful whether such top-down models will garner a sufficient degree of support from the various constituencies in the country especially given the current political complexities. Now that there are at least a few powerful comparative examples of participatory constitution-making (e.g. South Africa, Kenya), giving serious thought to inclusive modes of constitution-making should be a major feature of political discourse in Sri Lanka.

The Nature of Republicanism and Autochthony under the 1972 Constitution

Querying Republicanism in Sri Lanka

What is the legacy of republicanism in Sri Lanka? That is a very pertinent question to ask as we mark the fortieth anniversary of the Republic’s creation. What was precisely intended by its creators and how did republicanism impact on the Sri Lankan polity? What shape did the desired autochthony take, and why?

The republican moment in the life of a post-colonial state is indeed momentous. The primary focus is freedom from the shackles of colonial domination. So also in the case of the mandate sought by the United Front Alliance, the promise was in declaring a “free, sovereign and independent republic”. An alien Head of State, the equally alien apex judicial

⁶ For example, the Bar Council of Sri Lanka (the predecessor of the Bar Association of Sri Lanka) made well considered representations to the Constituent Assembly mainly on the process of constitution-making and the need to strengthen independence of the judiciary. It had, in fact, consulted constitutional experts in the Commonwealth before making representations. However, those efforts came to naught (Udagama 238-39) .

body (Judicial Committee of the Privy Council) and a notion that Parliament was restrained by Article 29 (2) of the Soulbury Constitution that was thought to be an entrenched clause were found to be particularly offensive features of the Dominion dispensation⁷.

The republican moment also generally marks the establishment of constitutional autochthony. Autochthony is sought to be achieved through a break with the authority of the previous dependent legal order and by formulating a new constitution based on the sovereign authority of the new order. Such a constitution will then incorporate the preferred normative framework of the 'indigenous' or the local polity. Eventually it may appear, however, that the challenge of severing links with the vestiges of colonial rule is relatively lighter than establishing a republican order that effectively facilitates nation-building. The desired autochthony must find the right balance.

Dr. Colvin R. de Silva, the intellectual and ideological force behind the republican idea, was emphatic that the republican constitutional order's primary objective was the recognition and consolidation of sovereign powers of the people. That was the rationale behind the unique features of the 1972 Constitution. Primarily among them was the supremacy of the legislature (the National State Assembly--NSA). It was considered the sole repository of the sovereign powers of the people (Articles 3 and 4) and was declared the "supreme instrument of State power" (Article 5). All State powers, including executive and the judicial powers, were channelled through the legislature. While executive power was channelled through the President and the Cabinet of Ministers, judicial powers were channelled to courts and institutions created by law (Article 5).

The logic of the supremacy of the legislature resulted in the removal of judicial review of legislation that was permitted under the Soulbury Constitution. However, pre-legislative review by the newly established Constitutional Court was permitted if the petition for review was submitted to court within a week of a Bill being placed on the agenda of the NSA (Article 54).

The introduction of a constitutional chapter on Fundamental Rights too was a novel feature (Chapter VI). Recognition of people's fundamental rights and freedoms was a key component of the republican idea based on the sovereignty of the people. The mandate sought by the United Front Alliance was to "*also* secure fundamental rights and freedoms to all citizens" (emphasis mine). The main objective according to the United Front Manifesto was to found a republic pledged to realize socialist democracy. Dr. de Silva was of the view that incorporating a Bill of Rights in the 1972 Constitution was a vast improvement over the Soulbury Constitution's scheme which only had Article 29 (2) for the protection of rights of 'persons of any community or religion' (9-11). In the publication's chapter on 'Fundamental Rights in the 1972 Constitution' Wickramaratne points out that the United Front was not in a mood to compromise its own views on fundamental rights. A proposal to guarantee rights to "all persons" instead of only "citizens" (having in mind the stateless Up-Country Tamil community) was rejected as was a proposal by the UNP to enshrine the right to property. However, as Wickramaratne rightly argues, contrary to the ideology of the Left partners of the coalition, the chapter on fundamental rights privileged civil and political rights over economic and social rights (741-44).

What the constitutional chapter on Fundamental Rights left out was amply provided for in the chapter on Directive Principles of State Policy. A feature borrowed from the Indian and Irish Constitutions, Directive Principles lay down guiding principles for legislation and governance. However, unlike fundamental rights non-compliance with the Principles cannot be canvassed before courts of law. Today, however, pursuant to jurisprudence of the

⁷ It is interesting that in a lecture delivered in 1987 Dr. Colvin R de Silva took the view that Article 29 (2) was not an entrenched clause and was capable of repeal by a two-thirds majority under Article 29 (4) of the Soulbury Constitution (de Silva, Colvin R. 23-24).

Supreme Court of India, Directive Principles and Fundamental Rights are considered to complement each other, the former providing guidance in the interpretation of rights.⁸ The United Front's goal of achieving socialist democracy in the new republic was spelled out in the Directive Principles (Article 16). The envisaged social democracy included –

- a. full realization of all rights and freedoms of citizens **including group rights** (emphasis mine);
- b. securing full employment for all citizens of working age;
- c. the rapid development of the whole country;
- d. the distribution of the social product equitably among the citizens;
- e. the development of collective forms of property such as State property or co-operative property, in the means of production, distribution and exchange as a means of ending exploitation of man by man;
- f. raising the moral and cultural standards of the people; and
- g. the organization of society to enable the full flowering of human capacity both individually and collectively in the pursuit of the good life.

Other principles articulated the need to strengthen the democratic structure of government and ensuring of equal opportunities. The republican ideal then seemed to have borrowed both from liberalism and principles of socialism. Or did it? Kumar David in his chapter in the publication on "The Left and the 1972 Constitution: Marxism and State Power" argues that the singular project of the LSSP leadership was none other than the desire to transform the State "from a liberal democratic state to an instrument that could be employed for movement toward socialism" (354-56). Elsewhere he points out that this design of the constitutional project was equally that of the Communist Party of Ceylon (342). As a fellow sojourner in the LSSP with Dr. Colvin R. de Silva, David's analysis provides authoritative insights.

It is interesting that the second republican Constitution (1978) adopted by a political dispensation with different ideals chose to retain not only almost all of the Directive Principles of its predecessor but also the caption "Democratic Socialist Republic". One cannot help but note the ironical (if not humorous) twist the 1978 Constitution gave to its predecessor's intentions-- "the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralized in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the people of Sri Lanka" (Article 27 (2) (f) . It was also perhaps ironical that it was the political dispensation with a capitalist orientation that thought fit to incorporate a catalogue of fundamental duties into the Constitution (Article 28) almost as if harking back to classical republicanism's focus on civic virtue.

As Welikala admits a serious *lacunae* in the publication is the absence of a chapter analyzing the contours and substance of the 1972 Constitution from the perspective of the theory (or theories?) of republicanism (40). A study in the hands of a political scientist would have proffered much thought for reflection. That is particularly so given the alarming manner in which the new constitution became an instrument of majoritarianism. Both theories of democracy and republicanism have grappled with the question of majoritarianism and have advanced various methods of accommodating minority interests in the State structure and governance (Choudhry; Pettit). In this context, chapters in the publication by Neil Walker and Stephen Tierney on the unitary conception of the United Kingdom Constitution and embedding normative principles within a plurinational

⁸ The Supreme Court of India has held that "The Fundamental Rights and Directive Principles constitute the "conscience of the Constitution..." There is no antithesis between the Fundamental Rights and Directive Principles...and one supplements the other" (*Kesavananda Bharati v. State of Kerala* per Hedge and Mukdherjee JJ. 1641).

constitution respectively are very instructive on “what ought to be”. However, a chapter that specifically examines the republican framework of Sri Lanka would have provided critical theoretical perspectives on “what is”.

As noted above, one of the Directive Principles of State Policy in the 1972 Constitution is the “full realization of all rights and freedoms of citizens **including group rights**” (Article 16 (1) (a) (emphasis mine). The chapter on Fundamental Rights and Freedoms recognized that “all persons are equal before the law and are entitled to equal protection of law” (Article 18 (1) (a)). The final draft of the Constitution approved by a majority vote the Constituent Assembly, however, was firmly located within an overarching majoritarian framework. The Constitution recognized Sri Lanka as constituting a unitary State (Article 2) with no devolution of power; the thrust of the divisive Official Language Act No. 33 of 1956 was elevated to a constitutional principle thus making Sinhala the official language of the State (Article 7); and the Republic was to give foremost place to Buddhism while ensuring religious freedom to all (Article 6).

Given the intensity of pre and post-independence ethnic politics this frontal rejection of minority demands sealed the fractious fate of the Republic. As Jayawickrama points out, the Federal Party decided to leave the deliberations in the Constituent Assembly only after the rejection of its proposal on language policy which proposed parity of status to both Sinhala and Tamil. The proposal was defeated 88-13 (108-11). According to Wickramaratne, a keen student of the drafting process, the Federal Party had commenced its positioning in the Assembly in a conciliatory manner (767-70). Recognizing that the demand for a federal State may not be received well, the Federal Party had suggested that, as an interim measure, the United Front agree to incorporate the promise made in its election manifesto to have local *Kachcheris* abolished and be replaced by elected bodies. That proposal for administrative decentralization was defeated. A small compromise that could have gone a long way in bridge-building was rejected. Eventually, as is common knowledge, the course of Tamil politics went well beyond the proposed decentralization to federalism and then on to a call for separatism.⁹

The reception that the Federal Party received was all the more unfortunate considering Prime Minister Sirimavo Bandaranaike’s public assurance that the new Constitution would (as quoted by Jayawickrama) “serve to build a nation ever more strongly conscious of its oneness amidst the diversity imposed on it by history” (62). By all accounts (chapters of David, Jayawickrama and Wickramaratne) it was the hard line position of Bandaranaike’s party (the SLFP) that prevailed. On the other hand, Dr. de Silva’s positions which reflected the thinking of the Left parties were progressive on all three critical issues-- the structure of the State, language policy and the State-religion nexus. But that stand was seriously compromised in the context of coalition politics. As David pithily points out “...the left’s grave error in the 1970s was not entering a coalition, but the way it conducted itself in coalition” (357). The “error” did have far-reaching political consequences for the new Republic.

The Primordial Nexus between Majoritarianism and the State

A purely technical reading of constitution-making or political currents will not serve us well in learning lessons for the future. Attempting to understand the reasons underlying this virtually primordial preoccupation in Sri Lanka of making the State overlap with

⁹ At this point it must be said that the editor’s decision to publish interviews with political actors representing various strands of political views and perceptions is greatly vindicated. The varying perspectives offered are instructive in gauging the extent of Sri Lanka’s ethnic divide. For example, Udaya Gammanpila, who offers a majority Sinhala Buddhist perspective, takes the position that the Federal Party’s decision to leave the Constituent Assembly proceedings was seen by the Sinhala community as reflecting Tamil arrogance by its refusal to work with the Sinhalese (Welikala Part IV).

majoritarian interests is of critical importance. The colourful multi-disciplinary combination of chapters in the publication is of great assistance here.

Chapters by Michael Roberts, Roshan de Silva Wijeyeratne and David Rampton offer interesting perspectives in that regard. Roberts traces the historical evolution and consolidation of the Sinhala identity and consciousness in Sri Lanka (Chapter 6). He argues that a central feature of that consciousness is the belief that it is the Sinhala who are ordained to protect the *Buddha Sasana* (Buddhist Order) for posterity within the specific geographical and political entity of the *Sihaladvipa*. The idea of the island as the land of the Sinhala is intertwined with the belief that it is the *Dhammadipa* (the land of the *Dhamma*). Periodic Tamil invasions of the island were then seen as a threat to this inheritance leaving an indelible stamp in the Sinhala consciousness of the Tamil as the “other”. The *Sihaladvipa* is imagined as a composite and unified territory. That political imaginary is redolent with visions of omnipotent kings (*‘cakravarti’* or *‘cakkavatt’* kings) who unify the country and guard that inheritance.¹⁰

De Silva Wijeyeratne in his provocative presentation of the “ontological account of the Sri Lankan State” (Chapter 10) maintains that the *cakkavatti* kings were modelled on the *Asokan* ideal and were embodiments of Buddhist identity. Modern day Heads of State of Sri Lanka, consciously or unconsciously, invoke that imagery, particularly the centralizing role of the *cakkavatti* kings and their pursuit of the role of guardianship of the faith. Drawing extensively from Bruce Kapferer, Wijeyeratne posits that the Sinhala conception of the State is intrinsically linked with the larger cultural sense of Sinhala “being”. Sinhalese kingships are according to Wijeyeratne “variations within the one culturally and historically formed cosmological understanding” (411). Any claim that questions this central vision of the State is demonized along the lines of that cosmology. Colonialism did upset that vision as did political demands of the Tamil community.

David Rampton too, in an altogether differently constructed chapter (Chapter 9), concludes that the dominance of the Sinhala Buddhist vision of the State in national politics and constitutional discourse prevented the republican Constitution of Sri Lanka from becoming an instrument of constitutionalism through which liberal peace-building could have been achieved. In a theoretical essay, arguing *contra* both Schmitt and Agamben, Rampton concludes that the state of exception and the constitutional reform it engendered in 1972 “has been entirely permeated by the hegemonic logic of Sinhala nationalism in the course of the postcolonial search for autochthony” (400). He critiques Schmitt and Agamben - who argue from differing angles the primacy of the role of the sovereign in periods of exception when the legal order breaks down--for not being alert to the role that is played by socio-political forces during states of exception as exemplified by the 1972 Constitution-making process in Sri Lanka (368-72).

Querying Autochthony

Eventually, one comes away with the idea that republicanism in the 1972 context in Sri Lanka simply meant moving away from the legacy of colonialism. It did not embody a grand political agenda for nation-building. The autochthony that was so anticipated ended up reflecting the thinking and aspirations not of the “indigenous whole” but of the majority community. The idea of citizenship in the republic itself was then fragmented into unequal parts making an overarching unifying civic consciousness impossible. As Rampton eloquently points out, the republican moment of 1972 was so different to that of India in

¹⁰ The author is reminded of the response of the lone student who supported the Eighteenth Amendment in one of her constitutional law classes when asked for reasons for his position: “We need another *Dutugemunu!*”. He was referring to the legendary Sinhala king who is revered by the majority Sinhala community for uniting the country in the second century BC after slaying the Dravidian king *Elara*. The Eighteenth Amendment to the 1978 Constitution, as discussed earlier in this essay, further concentrated powers in the already powerful executive presidency.

which “the founding moment...produced the re-imagination of Indian identity and an early consensus as to the plural contours of the state...” (381).

Constitutionalism & the 1972 Constitution

The concept of constitutionalism demands more than merely the supremacy of a Constitution. It requires that the substance of a Constitution provides sufficient means of limiting governmental powers in order to safeguard the rights and liberties of the people. Liberal safeguards such as separation of powers, checks and balances, an independent judiciary, protection of human rights are anticipated if a constitutional system is to pass muster. The analyses provided by many of the chapter contributors in the publication are located within the premise of liberal democracy. But was the 1972 Constitution intended to be constructed in the liberal mould? That requires investigation.

As previously pointed out, a central feature of the 1972 Constitution was the supremacy of the National State Assembly. Did that feature intend to mimic the idea of sovereignty of parliament in the British sense? Dr. Colvin R. de Silva took great pains to explain that the thrust of the 1972 constitutional design was the enthronement of people’s sovereignty. He went on to point out that this was an achievement not only against the colonial State but also against the entire political history of the country in which power lay in monarchs. It was this new found power of the people that was reposed in the National State Assembly. It was through that instrument that all other forms of State power could be exercised. Hence, the formulation of Article 5 of the 1972 Constitution provided that executive and judicial powers also would be exercised by the legislature through other organs of government (de Silva, Colvin R. 3-5).

The National State Assembly was the site that was thought to be pivotal in furthering the socialist agenda of the drafters. As 1972 Constitution established a parliamentary mode of government, the Prime Minister and members of the Cabinet (who collectively exercised executive power)¹¹ were also members of the legislature and were directly answerable to that body. The judiciary remained the “outside” body, unelected and not amenable to the tugs and pulls of electoral politics. The judiciary could potentially be the elite “spoiler” of the socialist reform agenda. The 1972 constitutional scheme, therefore, had a particularly restrictive impact on the judiciary. Judicial review of legislation that was permitted under the Soulbury Constitution was removed (Article 48 (2)). The newly created Constitutional Court was empowered to exercise pre-legislative review provided the court is moved within a week of a legislative Bill being placed on the agenda of the National State Assembly (Article 54 (2)). If the Cabinet deems that a Bill is “urgent in the national interest” citizens lost their right to petition the court (Article 55 (2)). What was particularly egregious from a liberal perspective was that the Cabinet was given extensive powers over the appointment, discipline and transfer of the lower judiciary (Articles 126-130). Similarly, civil servants--the other powerful hitherto independent professional group-- too were brought under political control via Cabinet oversight (Articles 111- 120). Both the independent Judicial Services Commission and the Public Services Commission established under the Soulbury Constitution were replaced by entities which did not possess the traditional guarantees of independence (Articles 111, 112, 125 and 127).

Although the novel feature of a chapter on fundamental rights was to be welcomed, the catalogue of rights given constitutional recognition was limited in many aspects (such as short shrift given to economic and social rights) and also there was no specific constitutional remedy provided for violations. Further, the chapter declared that all existing laws shall continue to operate notwithstanding any inconsistency with fundamental rights. Overall, the

¹¹ The President was a nominal Head of State who could act only on the advice of the Prime Minister per Article 27 of the 1972 Constitution.

chapter on fundamental rights did not offer a dynamic constitutional tool for rights protection.

While it could be argued that the supremacy accorded to the legislature was consonant with sovereignty of parliament in the British constitutional tradition, what needs to be noted is that the British tradition evolved over time. That evolutionary process gave rise to concomitant liberal traditions, constitutional conventions and a liberal ethos needed to sustain such a constitutional scheme. It was overly optimistic to expect such a system to take root and operate with the required liberal discipline in the new republic simply by virtue of a written constitution. As Coomaraswamy points out in the publication, for example, the new breed of republican parliamentarians were not necessarily schooled in the liberal tradition that would have enabled them to appreciate liberal constraints on legislative powers (131). Hence, strong liberal safeguards should have been incorporated into the Constitution. The absence (or dilution) of such safeguards robbed the 1972 Constitution of the stamp of constitutionalism and pretensions it may have had to being a liberal instrument.

Perhaps the 1972 scheme was a hybrid that pleased neither the liberals nor the socialists. As David points out, the scheme of the Left partners of the coalition was to use the republican constitution as an instrument to achieve social transformation they were ideologically committed to (354-57). It is evident that although the 1970s discourse on people's sovereignty was couched in liberal Lockean terms, its real complexion was guided by socialist ideals of people's power. That is why checks and balances and liberal guarantees that were anticipated were not forthcoming. But the compromises the Left made within the coalition to assuage its nationalist coalition partner (the SLFP) were too dire. Eventually, however, history had other plans as the coalition ended on a politically sour note a mere three years after the adoption of the 1972 Constitution. A further three years later the Republic had to contend with a new Constitution (1978) and the onset of the much maligned executive presidential system.

Conclusion

Even though heralded with much idealism and optimism, the republican moment of Sri Lanka was a missed opportunity of monumental proportions. The possibility of pulling the diverse strands of the Sri Lankan polity together and weaving a rich constitutional fabric through broad-based consultation and reflection was lost to parochial politics. The main problem, one can safely argue, was the desire of the incumbent coalition to push its political agenda on others and call it democratic constitution-making. That left the new republic bereft of a genuinely representative autochthony, equal citizenship and the protective shield of constitutionalism. The experience also established a political precedent for instrumentalizing constitution-making and, indeed, the very idea of a constitution.

In many respects, the making of the 1972 Constitution and its normative scheme make it an anti-model. So, why study it? The Constitution-making discourse, especially in divided societies, has progressed exponentially over the years and the world has exciting models and experiences to learn from. But the study of weak models is necessary to sharpen our understanding of what should be avoided in modern constitution-making for complex societies. In any event, country case studies offer more than lessons on good and bad constitutional practices. They offer portraits of the complex web of particular histories, socio-political dynamics and various other factors that shape constitutional moments and experiences. When constitutional case studies are presented in a mosaic of multi-disciplinary perspectives they are particularly enriching, especially to the conservatively trained, uni-dimensional world of the constitutional lawyer.

In that regard *The Sri Lanka Republic at 40: Reflections on Constitutional History, Theory and Practice* ably edited by Asanga Welikala has made a stellar contribution. An anniversary of a vital moment in the country's political history which under normal circumstances would have been largely forgotten has taken on a new meaning because of this publication. It has

given us, students of constitutional and political history of Sri Lanka, an unexpected opportunity to revisit and reflect on that moment with the benefit of rich theoretical and multi-perspective studies which are not readily available to the local readership. The reader is no doubt going to put the various chapters into subjective categories. To the present author reading of the extensive chapters was a stimulating intellectual exercise but it also ended up being a search for certain critical analyses necessary for political advocacy. This essay was an attempt at focusing on three such dimensions, which in the opinion of the author require direct enquiry. Theoretical analyses on modalities of constitution-making, the 1972 republican paradigm and its version of autochthony and the travails of ejecting constitutionalism in favour of other ideological models are, in my opinion, of critical importance to enrich current and future constitutional discourses in Sri Lanka. The publication does not directly provide those analyses, but several of the chapters discussed in this essay provide related and thought-provoking insights.

As this essay is written the constitutional reform debate has reached fever pitch in the country in the uncertain and problematic climate of post-war politics. Those developments, in the opinion of the author, further underscore the need to focus on the three dimensions discussed in this paper. As mentioned above, the opposition United National Party has put forward specific proposals for an entirely new Constitution and a civic organization has suggested amendments to the existing 1978 Constitution. The governing coalition's partners are demanding a radical diminution of the power-sharing scheme under the Thirteenth Amendment to the Constitution ("Urgent Bill to repeal certain clauses of the 13th Amendment"; "Sri Lanka house panel to study issues linked to 13A"). The opposition Janatha Vimukthi Peramuna has declared its intention to submit a new 'political package' to replace the Thirteenth Amendment ("Sri Lanka Marxists to bring package to replace the 13th amendment"). It has also been reported that the government wishes to establish a Parliamentary Select Committee to decide on a new constitution. It is to consist of 31 members of whom 19 are to be from the government ranks. The President has sent nominees from the government ranks to the Speaker. A senior Cabinet Minister has gone on record stating that even if the opposition does not join the effort the government members will go ahead with the deliberations ("Government names PSC members").

Once again, the sovereign *demos* are left out of the picture further confirming the lethal potency of the bad precedent established by the 1972 experience. Constitution-making in Sri Lanka, it appears, is still exclusively a matter for incumbent politicians.

And what of the *demos*? As this troubling scenario unfolds, one is struck by the need to expand the constitutional debate in Sri Lanka to another realm--that of examining the political complexion of the polity itself. The publication has mainly focused on elite politics in Sri Lanka. But what of people's politics? Do the political agenda of parties and political personalities coincide with the interests and wishes of the respective constituencies? What is the nature of the constitutional culture in Sri Lanka? Are the people sufficiently informed and invested in constitutional politics? What explains the absence of social movements in Sri Lanka? Is there space for liberal values in the popular political imagination? How strong is the idea of citizenship? Is there a misalignment between formal education and democratic pluralist constitutional ideals? Those are questions that require examination in order to understand the full equation of constitutional politics. With such an enquiry we can move our focus from constitution-making to constitution-building in Sri Lanka.

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Nelum Deepika Udagama, University of Peradeniya, Sri Lanka