Chapter I

SRI LANKA: CONSTITUTIONS WITHOUT CONSTITUTIONALISM A TALE OF THREE AND A HALF CONSTITUTIONS

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> *The crisis of constitutionalism is to reconcile a passionate faith in the normative power of constitutionalism, with the intense scepticism and cynicism arising from the failure of constitutions in many societies to uphold human rights or democratic values, and the appalling disparity between constitutional theory and constitutional practices.*
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> *-Neelan Tiruchelvam*[1]

It is both ironic and significant that as Sri Lanka celebrated fifty years of independence two years ago and today, at the dawn of the new millennium, constitutional reform is at the forefront of the political discourse of the country. In the years preceding independence in 1948 too, the British colonial government and Ceylon's political leadership, with the assistance of the then Vice Chancellor of the University of Ceylon in Colombo, Sir Ivor Jennings, focused a great deal of attention on designing a constitution for an independent Ceylon. The challenge for the Soulbury Commission appointed to draft the independence Constitution was to craft a document which would meet the aspirations of all the communities of the country. Today, the country grapples with the same task.

Both the Soulbury Constitution and Sri Lanka's autochthonous constitutions of 1972 and 1978 failed in the task of facilitating nation building. As a brutal civil war threatens to divide the country, a

[1] Neelan Tiruchelvam, ***The Crisis of Constitutionalism in South Asia***

constitutional reform project which began in 1995 flounders.[2] While the country's political leadership struggles to achieve consensus on a new constitution which includes provisions for enhanced devolution of power, it seems clear that whatever consensus might be achieved will fall far short of the demands of the Liberation Tigers of Tamil Eelam (LTTE) which wields enormous military power in the north and east of the country as they wage their bloody struggle for a separate state in those regions. If negotiations with the LTTE were to commence, it seems clear that constitutional reform will figure prominently yet again with the devolution proposals of the current government or the new constitution forming the basis or starting point for negotiations. Constitutional reform is therefore destined to remain at the forefront of Sri Lankan politics for several years to come.

One of the main reasons why Sri Lanka's three post-independence constitutions have failed to fashion a united nation is that the constitution makers and Sri Lanka's political and legal elites have failed to appreciate fully the significance and import of Constitutionalism. British principles of constitutional law, including the obsolete doctrine of parliamentary sovereignty, have dominated the mindsets of these persons. Thus many of the constitutional safeguards of the Soulbury Constitution, though impressive on paper, failed to restrain majoritarianism. The framers of the two republican constitutions rejected basic principles of Constitutionalism in the documents themselves. Since 1972, it is therefore not surprising that there was not only an entrenchment of majoritarianism, but also a rise of authoritarianism and a corresponding decline in liberal democratic values in the country. There was, therefore, not only a gap between constitutional theory and practice as observed by Tiruchelvam, but a lack of appreciation of constitutional theory on the part of the political leadership of the country and the legal community.

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[2] Rohan Edrisinha (1988) "*Critical Overview: Constitutionalism, Conflict Resolution and the Limits of the Draft Constitution*", ***in The Draft Constitution of Sri Lanka,*** Panditaratne and Ratnam (eds), LST.

This paper will discuss a few key issues and themes that are important in critically evaluating Sri Lanka's constitutional evolution since independence. The constitution making project undertaken in the past five years is also assessed in the light of these themes.

Constitutionalism

The principle of Constitutionalism, sometimes referred to as liberal constitutionalism, is the most basic and important concept for the limitation of power and the protection of individual autonomy. Constitutionalism seeks to explain the objectives of a good constitution. The American constitutional theorist, Carl Friedrich has summed up the objectives:

> *"The core objective of Constitutionalism is that of safeguarding each member of the political community as a political person possessing a sphere of genuine autonomy. The Constitution is meant to protect the self in its dignity and worth. The prime function of a constitutional political order has been and is being accomplished by means of a system of regularised restraints imposed upon those who wield political power."*[3]

There are three main objectives:

1. It sets out the relationship between and among the main organs of government. The Constitution lays down the basic principles or framework of political society, the composition and powers of the political organs – the legislature, the executive and the judiciary – and their inter-relationship. Checks and balances to avoid a concentration of power depend on this inter-relationship.

2. It should promote individual autonomy. The more conventional definition of constitutionalism believes that the individual must be protected not only from other individuals/ groups in society but also from the State. Modern constitutionalism highlights both the negative

[3] Carl Friedrich, ***Transcendent Justice***

and the positive aspects of autonomy and recognises the Janus like nature of the State. The State can oppress but it is also indispensable as a facilitator of rights.

Therefore, constitutionalism's emphasis on individual autonomy and freedom must be broadened to include its enabling aspect. Thus the reference by Friedrich to the creation of a **'sphere of autonomy'** for the individual must be interpreted broadly to include more than mere freedom from external interference. This entails recognition of the needs of distributive justice and the fact that the State's relationship with the individual cannot be perceived entirely in negative terms. The State has a positive role to play in terms of ensuring the basic needs of citizens.

Jennifer Nedelsky, has captured this new, more complex dynamic in a paper aptly titled *Reconceiving Rights as Relationship*:

> *"This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy, but a precondition in the relationships – between parent and child, student and teacher, state and citizen – which provide the security, education, nurturing, and support that make the development of autonomy possible. And autonomy is not a static quality that is simply achieved one day...The whole conception of the relation between the individual and the collective shifts: we recognise that the collective is a source of autonomy as well as a threat to it.*
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> *The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined."*[4]

[4] Jennifer Nedelsky, ***Reconceiving Rights as Relationship:*** *p. 7.*

John Rawls makes a similar point when he argues that in addition to the traditional civil and political rights,

> *"...measures are required to assure that the basic needs of all citizens can be met so that they can take part in political and social life...the idea is not that of satisfying needs as opposed to mere desires and wants; nor is it that of redistribution in favour of greater equality. The constitutional essential here is rather that below a certain level of material and social well being, and of training and education, people simply cannot take part in society as citizens, much less equal citizens."*[5]

The Indian Supreme Court has demonstrated the importance of this wider conception of constitutionalism. In ***S. P. Gupta v. Union of India*** the Supreme Court justified its approach:

> *"Our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary... to transform the status quo ante into a new human order in which justice, social, economic and political, will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has, therefore, a socio-economic destination and a creative function....*
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> *Now (the British) approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals."*

The Indian Supreme Court has through Social Action Litigation used fundamental rights provisions and the Directive Principles of State Policy to protect human dignity and what it has deemed the basic needs of life, adequate nutrition, clothing, shelter and a clean environment. The enabling, empowering aspect of human autonomy and the

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[5] John Rawls, ***Political Liberalism***: p 168.

approach expressed by Nedelsky, have provided the philosophical basis for such activism.

3. A constitution also has a norm setting function. It should lay down certain values and principles by which a country is to be governed. These values should permeate all sectors of the community, including the government and the governed. The first article of the South African Constitution of 1996 provides an excellent example of how values can be incorporated as norms in a constitution.[6]

An important consequence flows inevitably from these basic principles. It is the Constitution, rather than any institution or person in society, that is supreme. This is a particularly important factor in the South Asian region where the former British Colonies inherited the pernicious British doctrine of Parliamentary Sovereignty, which holds that Parliament is supreme. Britain has a quaint and unique constitutional tradition; it has no documented constitution. Even though most of the independence constitutions of these countries, did not seek to imitate the British model, and adopted written constitutions, the political leadership and the legal communities in these former colonies seem to have imbibed a parliamentary sovereignty mindset which undermined the principle of constitutionalism.

Sri Lanka's Independence Constitution

The Soulbury Constitution promoted a moderately conservative form of liberal democracy based on the British system of government. While traditional British constitutional principles relating to the Parliamentary and cabinet systems were adopted, the Soulbury Commissioners were keen to prevent ethnic tensions, encourage a national consciousness and create a constitution which would meet the requirements of a plural society. Instead of incorporating a Bill of Rights into the Constitution, they opted instead for alternative approaches.

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[6] Article 1 of the South African Constitution is in Chapter 1 of the Constitution which is titled Founding Provisions.

The Independence Constitution attached considerable importance to nation building. Several features of the Soulbury Constitution, including the minority safeguards, were incorporated with this objective in mind. The minority safeguards failed primarily because the doctrines, attitudes and conventions of the British themselves influenced Ceylon's political and legal communities to such an extent, that the un-British approach of using a Constitution to protect minorities, failed.

The Soulbury Constitution was secular and sought to provide for racial and religious equality. It upheld the most fundamental principle of Constitutionalism, the supremacy of the Constitution, by enabling judicial review of legislation. It encouraged a system of checks and balances by providing for an independent judiciary and public service. It sought to promote accountability and transparency by providing that all wielders of executive power were both responsible and answerable to Parliament.

The main constitutional protection for minority interests was Section 29(2) which constituted a fetter on the legislative power of Parliament. Section 29(1) provided that Parliament could make law for the 'peace, order and good government' of the island. This phrase has been construed by the courts as amounting to full, plenary legislative powers. Section 29(2) provided however that Parliament could not confer upon any community or religion, a benefit which was not conferred on other communities or religions and the constitution also provided that any law made in contravention of (2) would be void. Section 29(4) enabled constitutional provisions to be amended by a two-thirds majority of the legislature and an interesting question arose as to whether Section 29(2) could be amended by this procedure. Lord Pearce, delivering the opinion of the Judicial Committee of the Privy Council, observed in an obiter dictum that Section 29(2) referred to:

> *"entrenched religious and racial matters which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se, they accepted the constitution, and these are therefore unalterable under the constitution."*[7]

Minority interests, therefore, were sought to be protected by constitutional limitations on legislative sovereignty. Therefore, the Parliament of Ceylon could not be considered sovereign in the same sense as the British Parliament. This was acknowledged by the courts of Ceylon. In ***The Queen v. Liyanage***,[8] T.S. Fernando J. observed,

> *"Nor do we have a sovereign Parliament in the sense that the expression is used with reference to the Parliament of the United Kingdom."*[9]

It must be noted however that this limitation on parliamentary sovereignty was not a devious attempt by tile British authorities to retain a foothold in Ceylon. Rather it was an attempt by them to create a constitutional dispensation which would suit the multiethnic and multi religious context in Ceylon. The British positivist constitutional tradition which stresses illimitability and indivisibility[10] as essential characteristics of sovereignty, was rejected for Ceylon as it was deemed crucial to allay minority fears by providing them with a fortress of entrenched rights which could not be invaded by the will of the majority. The Soulbury Commission acted with wisdom and foresight in so doing.

Notwithstanding this enlightened constitutional provision and the *obiter dicta* of several British and Ceylonese judges pointing out the shackles on parliamentary sovereignty, in general, the courts of Ceylon failed to exploit the full potential of this section. Ceylonese judges, no doubt

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[7] ***Bribery Commissioner v Ranasinghe*** (1964) 66 NLR p 78.
[8] (1962) 64 NLR p 313.
[9] at p. 350.
[10] Austin, *Lectures in Jurisprudence*, VI, 5th Ed.

steeped in the British Constitutional tradition with its doctrine of the sovereignty of Parliament and attendant dangerously illiberal notions such as Parliament can do anything except make a man a woman and a man, failed to maintain the balance between majoritarianism and constitutional limitations to protect individual freedom and minority rights.

An example of the courts failing to interpret section 29 effectively can be seen in two cases dealing with citizenship and franchise. The Citizenship Act No. 18 of 1948 and the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949, while purporting to lay down guidelines for the acquisition of citizenship and the right to vote, in effect drastically restricted the voting rights of the Indian Tamil Community. It was perhaps not an insignificant factor that the opposition parties derived considerable support from this community. These Acts were challenged in ***Mudanayake v. Sivagnanasunderam***[11] and ***Kodakanpillai v. Mudanayake***[12] on the grounds that they contravened section 29. Lawyers challenging the legislation argued that the court had to go beyond the text and examine the context in which section 29 had been included in the constitution and its purpose, which was to protect minority interests. They also pointed out that while in some cases the question as to whether a statute is *ultra vires* or not is apparent on the face of it, in other case like the one under consideration, the courts had to consider the practical effect of the legislation. Several American cases were cited to buttress this contention.[13]

The Supreme Court, however, adopting a narrow and technical approach declared that as the statutory provisions were free from ambiguity, the scope and effect of the legislation should be ascertained from the actual words of the provision. Therefore motive and practical effect were deemed irrelevant. The court also refused to admit affidavits which sought to establish the harsh operation of the legislation on the India Tamil community or various documents on

[11] (1957) 53 NLR p 25.
[12] (1953) 54 NLR p 433.
[13] Lane v. Wilson 307 U.S. 268. Yick Wo v. Hopkins 118 U.S. 256.

constitutional reform and other political documents, which indicated the rationale for Section 29.

When the matter went before the Privy Council on appeal their Lordships position was slightly less narrow, though perhaps more naive. The Privy Council conceded that there may be situations where legislation though framed in a way not directly to affect protected rights, may indirectly do so, in which case it would be constitutionally invalid. In considering such a question it held that legislative materials such as reports of Parliamentary Commissions would be admissible. However they dismissed the appeal on the grounds that the maxim *omnia praesumuntur rite esse acta* was applicable to the act of a legislature and that they were therefore unwilling to attribute illegal motives to it concluding that

> *"it is a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals."*[14]

The Sri Lankan Supreme Court and the Privy Council adopted a superficial and unrealistic approach in the citizenship case, where there was a definite plan to alter the balance of representation in Parliament. That these decisions influenced subsequent Sri Lankan political developments is clear from the fact that there was a substantial shift of political power to the detriment of minority interests. These decisions perhaps also contributed to a lack of confidence in this constitutional provision and the judiciary as an effective bulwark against the tyranny of the majority, as successful litigation tends to create 'a ripple effect' where other aggrieved individuals or groups are encouraged to assert their rights and challenge suspect legislation.

Thus emboldened, Sinhalese-led governments sought to further introduce legislative measures to the detriment of the minorities. In 1956, the government introduced the Official Language Act which made Sinhala the sole official language. Although communal riots

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[14] (1953) 54 NLR p 435 per Lord Oaksey.

erupted as a result, the Act's constitutionality was not challenged until much later, when a Tamil public servant was notified by a government circular that a certain degree of proficiency in Sinhala was a prerequisite for promotion.[15] The circular was impugned on the ground that it was issued pursuant to the Official Language Act which it was argued violated section 29 and also because it was in breach of a fundamental term of the contract between the plaintiff and the State, (at that time, the Crown in Ceylon) which was entered into before the enactment of the Official Language Act. The plaintiff claimed that he was otherwise eligible for promotion and that his increments had been wrongly withheld.

The original court held with the plaintiff on both grounds. On appeal by the State, the Supreme Court, in a classic example of restraint and timidity, set aside the judgment on the ground that a public servant had no right to sue the Crown for the payment of arrears of salary and stated that it was therefore not necessary for them to consider the crucial constitutional issue. When the case went before the Privy Council, it reversed the decision of the Supreme Court on the question of the availability of an action against the Crown, and sent the case back to the Supreme Court so that full argument could be heard on the constitutional issue. The Privy Council was unwilling to consider the matter until the Supreme Court first did so.

The Constitution framed to 'consolidate and preserve the nation of Ceylon, a nation transcending ethnicity and religion, failed. The failure of the minority safeguards in the Soulbury Constitution and the tendency to define the nation of Ceylon in majoritarian terms created bitterness and frustration among many moderate Tamils. G.G. Ponnambalam in his resignation speech in Parliament on 2nd November 1954 observed,

> *"[a]fter five years of cooperation, I yet see unmistakable signs of desire for the establishment of racial hegemony under the guise of majority rule....I now find myself a more determined advocate of Tamil nationalism."*

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[15] See ***Kodeswaran vs. AG*** 70 NLR 121 (SC) and 72 NLR 337 (PC).

The struggle for a Tamil nation which had been temporarily abandoned in an attempt to facilitate the Ceylon nation project was revived first in the form of a campaign for a federal state and later a separate state.

Fortunately however, the judiciary acted creatively to protect the rule of law, independence of the judiciary and check the arbitrary exercise of governmental authority. Several constitutional provisions sought to protect the independence of the judiciary and insulate it from political and other influences.

While constitutional provisions safeguarding the independence of the judiciary were adequate, the courts had to deal with the issue of the entrenchment of judicial power. Section 55 of the Constitution provided that judicial officers must be appointed by the Judicial Service Commission. In a series of cases[16] the courts of Ceylon, held that if an official was required to engage in functions of a judicial character, his appointment would only be valid if it was made by the Judicial Service Commission. The courts no doubt felt that this would ensure that the administration of justice was not subject to undesirable extraneous influences. However the Constitution did not expressly provide that the courts should be the exclusive repository of judicial power. The courts established this principle through a process of imaginative and creative constitutional interpretation.

An example of this is the opinion of the Judicial Committee of the Privy Council in ***R. v Liyanage***.[17] The judicial committee was called upon to consider the constitutionality of the Criminal Law (Special Provisions) Act of 1961 which purported to regulate the trial of a group of persons charged with conspiracy to overthrow illegally the government of Ceylon. The legislation was striking in that a wide range of safeguards ordinarily available to accused persons were excluded and the penalties appreciably enhanced for this specific trial. Lord

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[16] ***Senadheera v. Bribery Commissioner*** (1961) 63 NLR313, ***Ranasinghe v. Bribery Commissioner*** (1964) 66 NLR 73, ***Jailabdeen v. Danina Umma*** (1963) 64 NLR 419, ***Ratwatte v. Piyadasa*** (1966) 69 NLR 49, ***United Engineering Working Workers Union v. Devanayagam*** (1967) 69 NLR 289.

[17] (1965) 68 NLR p. 284.

Pearce in a landmark judgement held that the legislation was unconstitutional. He stated that a separation of powers could plausibly be inferred from the structural framework of the Constitution, at least to the extent that judicial power was vested exclusively in the judicature and that therefore Parliament was precluded from passing a law which, in effect, amounted to a 'legislative judgment'. The Judicial Committee placed considerable emphasis on the cumulative effect of the several statutory provisions:

> *"The pith and substance of both Acts was a legislative plan ex-post facto to secure the conviction and enhance the punishment of those particular individuals... The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences."*[18]

The refreshing boldness and creativity with which the Privy Council inferred the existence of a doctrine of separation of powers and the entrenchment of judicial power moved S. A. de Smith to describe the decision as

> *"the most remarkable exercise in judicial activism ever by the Privy Council".*[19]

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[18] (1965) 68 NLR p. 284.

[19] S.A. de Smith (1966) ***The Separation of Powers in a New Dress***, 12 McGill L.J. 491 at 492.

The Senate

Although the Donoughmore Constitution of 1931 did not provide for one, the Soulbury Commissioners recommended the creation of a Senate. There were several reasons for this proposal:

a) The desire to harness the services of eminent and mature persons who would otherwise be prevented from participating in the parliamentary arena because of their aversion to the rough and tumble of electoral politics.

b) The desire to provide a further protection for minority interests.

c) The need for a check against hasty and ill conceived legislation.

d) The belief that the standard of debate and the contributions made in the second Chamber would bolster the political education of the public.

e) The fact that second chambers are an integral feature of almost all vibrant liberal democracies in the world.

The Senate consisted of 30 members, 15 of whom were nominated by the Governor-General, who as in all else, acted on the advice of the Prime Minister. The other 15 members were elected by the House of Representatives.[20]

Perhaps because of its method of composition which allowed the government in power excessive influence in the nomination of Senators and due to its limited powers, the Senate did not function as an effective check on the Lower House.

During its twenty five years of existence only twice did the Senate confront the wishes of the House of Representatives. However the contributions made by its members in the legislative process through

[20] See Sections 8,9,10 of the Soulbury Constitution.

the detachment, experience and knowledge they brought to bear in the debates and deliberations, were extremely significant.

The Public Service

One of the cardinal features of the Soulbury Constitution was its attempt to develop an independent public service based upon the British notion of an impartial civil service. The rationale for this system was that public servants should be free to offer their political heads candid advice and thereafter carry out the policy decisions made by the political leadership whether they personally agreed with those policies or not. Public servants were assured of protection from vindictive actions or reprisals from wielders of political power.

The objective of creating an independent public service was accomplished principally by the creation of an independent Public Service Commission. The Commission consisting of a Chairman and two other members was appointed by the Governor General and was responsible for the transfer, dismissal and disciplinary control of public servants.[21] The record of the Public Service Commission under the Soulbury Constitution was impressive. There were several instances when the Commission refused to yield to political pressures pertaining to the transfer and dismissal of public servants, thereby bolstering the morale of public servants and helping to preserve the integrity and independence of an important arm of government.

Another reason for the Soulbury Commission's emphasis on an independent Public Service Commission was to allay the fears of minorities who had since the end of the 19th century occupied important positions in the public service.[22]

The Soulbury Constitution contained several positive features including judicial review of legislation, which sought to promote

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[21] See sections 60(1).

[22] See A.M. Navaratna-Bandara, '*Ethnic Relations and State Crafting in Post-Independence Sri Lanka*' in ***Facets of Development of Sri Lanka since Independence: Socio-Political, Economic, Scientific and Cultural***, W. D. Lakshman and C. A. Tisdell (eds) (University of Queensland): p. 159.

constitutionalism and the rights of minorities. Unfortunately the judiciary failed to interpret many of these provisions imaginatively. The activism displayed by the judiciary in the ***Liyanage*** case was unfortunately not employed to protect the rights of minorities. This coupled with a tendency on the part of the political leadership to promote majoritarian democracy provoked a deterioration in relations between the majority community and the main minority in the country. Tamil parties and politicians who attempted to reach accommodation with successive governments during this period failed and the more confrontational politicians of this era were vindicated in their positions. A bold and creative attempt to introduce substantial devolution of power and address Tamil grievances through the Bandaranaike-Chelvanayakam Pact of 1957 failed due to pressure from Sinhala hard line groups.

The First Republican Constitution of 1972

The First Republican Constitution made the situation worse. Not only did it abolish many of the minority safeguards, including Section 29 of the Soulbury Constitution, but it also entrenched majoritarianism in the supreme law of the land. The secular character of the state was severely undermined by the provision which gave Buddhism the foremost place. The language of the majority, Sinhalese, was made the sole official language. While the Soulbury Constitution quite rightly considered it unnecessary to specify explicitly the nature of the State, the new Constitution proclaimed that Sri Lanka was a unitary state. As one looks back at the evolution of Sri Lanka's ethnic conflict, one is almost shocked by the short-sighted, populist motivations to the introduction of these features. The introduction of the Constitution of 1972 was a major landmark in the process of national disintegration.

Yet it was trumpeted by its framers as the people's home-grown (autochthonous) Constitution. The independence Constitution was damned as a relic from the colonial past. The fact that the nominal head of state was the Queen, was used to underscore the alien aspect of the Soulbury Constitution. The problem however was that the nationalist impulse behind the new Constitution, was a Sinhala nationalist one.

How autochthonous was the First Republican Constitution anyway? In terms of substance, the new Constitution, despite the 'nationalist' rhetoric of its framers, introduced the British doctrine of Parliamentary supremacy, which had been rejected by the Soulbury Constitution. In terms of process, while the Constituent Assembly consisted of the elected representatives of the people, ultimately, at the time of adoption, the new Constitution probably commanded less popular acceptance and support than the Soulbury Constitution did at the time of its adoption. The new Constitution was opposed by parties representing the Tamil people and by the main opposition party, the United National Party. The Soulbury Constitution was on the other hand, accepted, perhaps with varying degrees of enthusiasm, across the ethnic and political divide.

The First Republican Constitution also was designed to facilitate the introduction of the United Front Government's radical economic agenda. This initiated an unfortunate trend in Sri Lankan constitution-making, which Neelan Tiruchelvam, has described as the instrumental use of constitutions. Sri Lanka's two 'home-grown' constitutions were both designed as instruments for achieving political or economic goals. Soon after the General Election of 1970, Pieter Keuneman, a prominent Minister in the new coalition government, declared that the country needed "a Constitution that will be an accelerator, not a brake on progressive development."

Since the United Front Government was committed to a radical political programme which contained a blend of nationalism and socialism, it viewed the judiciary with considerable suspicion. The possibility that the Supreme Court, despite its attempts to evade the issue, might finally declare the Official Language Act unconstitutional, and the traditional view of the judiciary as upholders of the status quo and generally conservative in political orientation, prompted the framers of the new constitution to whittle down the powers of the judiciary and declare in no uncertain terms that supreme power resided in the elected representatives of the people. The doctrine of separation of powers was, therefore, explicitly rejected. Judicial review of legislation, the mechanism for the protection of the supremacy of the constitution and constitutionalism was also repudiated. As Felix R.

Dias Bandaranaike, a leading figure in the United Front Government explained,

> *"We are trying to reject the theory of the separation of powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you saying that a judge once appointed should have the right to declare that Parliament is wrong."*[23]

To further underscore this approach the Constitution introduced a validation or savings clause for all existing legislation that is probably unparalleled in a constitutional democracy. In addition to the provision barring judicial review of legislation, as if that were not sufficient, Article 18 of the Constitution protected laws which were inconsistent with the chapter on fundamental rights.

> *"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."*

These features of the new Constitution seriously undermined the supremacy of the Constitution and Constitutionalism.

The Independence of the Judiciary

Radhika Coomaraswamy has described the judiciary under the Constitution of 1972 as "the most crippled arm of government."[24] Several Constitutional provisions gave the executive branch of government power over minor judicial appointments; the Judicial Services Commission which had hitherto performed this function was replaced by an Advisory Board and Disciplinary Board[25] which lacked

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[23] M. J. A. Cooray, ***The Judicial Role under the Constitutions of Ceylon / Sri Lanka***, p 222.

[24] Radhika Coomaraswamy, ***Sri Lanka, The Crisis of the Anglo-American Constitutional Traditions in a Developing Society***, p. 29.

[25] Sections 125 and 127.

the powers and independence of the commission. The Advisory Board was a consultative body which merely advised the Cabinet of Ministers with regard to the appointment of inferior court judges and judicial officers. The Board had the power to transfer such officers, but an officer could appeal to the Cabinet of Ministers against such a decision of the Advisory Board. Furthermore the Cabinet of Ministers had substantial powers with regard to rules of conduct of judges, rules of procedure etc., while the National State Assembly wielded considerable influence in the dismissal of judges of lower courts.[26] The cumulative effect of these provisions in particular, served to undermine the independence and autonomy of the judiciary and provide the executive and legislative arms of government with excessive influence in the judicial domain.

The most striking feature of the constitution of 1972 was the fusion of powers in the Legislature through the exaltation of the notion of parliamentary sovereignty. The constitution unequivocally declared that sovereignty resided in the people and was inalienable.[27] However in practice this meant that sovereign power was exercised by the people elected by the people, the National State Assembly.[28] Section 5 of the Constitution stated that the National State Assembly combined and concentrated within itself the legislative, executive and judicial power of the people. A limited concession was made in that the executive and judicial power were expected to be exercised indirectly. The executive power was to be exercised by the National State Assembly through the President and Cabinet of Ministers. The judicial power of the people was exercised by the National State Assembly through courts and other institutions created by law.[29] However, the framers of the First Republican Constitution made quite certain that no institution could thwart the will of the elected representatives of the people.

Apart from the strengthening of the legislative arm of government (which indeed could be considered a move closer to the British

[26] Sections 125, 126, 129 and 130.
[27] Section 3.
[28] Section 4.
[29] Section 5.

Constitutional tradition which does not have a separation of powers or judicial review of legislation) and the repudiation of the notion of an independent public service, the First Republican Constitution did not possess very many characteristics that were 'home grown' or sprung from the native soil despite the frequent use of the adjective 'autochthonous'.[30] The powers of the President were almost identical with those of the Governor-General of the previous Constitution. Several British Constitutional conventions were incorporated into the new constitution. The British Cabinet system of government which had been introduced under the Soulbury Constitution and its attendant conventions and practices, continued virtually untouched. The President acting on the advice of the Prime Minister appointed members of the National State Assembly to take charge of Ministries identified by the Prime Minister.[31]

The First Republican Constitution was also primarily responsible for the introduction of a strong centralised political structure with few checks and balances. As if the creeping majoritarianism in the area of language and religion were not enough, the framers introduced a provision which declared that Sri Lanka was a unitary state. The decision to insert the unitary label into the First Republican Constitution seems almost perverse in that it was a direct affront to Tamil aspirations at the time. The Sinhalese political leadership had in the 1950s and 1960s, attempted to address the Tamil people's grievances through the Bandaranaike-Chelvanayakam and Senanayake-Chelvanayakam Pacts both of which included substantial devolution of power. The Federal Party, the main Tamil party at the time, campaigned at the 1970 general election on a platform of Federalism. Its manifesto declared,

> *"The Tamil-speaking people of Ceylon also believe that the Federal-type of Constitution that would enable them to look after their own affairs alone would safeguard them from total extinction. Only under such a Constitution could the Tamil*

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[30] For a definition of the term 'autochthonous', see K. C. Wheare (1960) ***The Constitutional Structure of the Commonwealth:*** p. 89.
[31] Section 94.

speaking people of this country live in dignity and with our birthright to independence as equals with our Sinhala brethren."

Significantly the manifesto included a categorical assertion against separation.

"It is our firm conviction that division of the country in any form would be beneficial neither to the country nor the Tamil speaking people. Hence we appeal to the Tamil speaking people not to lend their support to any political movement that advocates the bifurcation of the country."

There was no overwhelming need to introduce the unitary label. The Soulbury Constitution contained no label, which is the practice in most constitutions in the democratic world. It amounted to a slap in the face of the Tamil political leadership. To make matters worse, it was introduced as Basic Resolution No. 2, very early in the proceedings of the Constituent Assembly.

The unitary postulate was reinforced by Section 45 (1) of the Constitution which stated that:

"The National State Assembly may not abdicate, delegate or in any manner alienate its legislative power, nor may it set up an authority with any legislative power other than the power to make subordinate laws."

The introduction of unitarism and the exaltation of the language and religion of the majority in Sri Lanka's first autochthonous Constitution must surely be pivotal landmarks in the slide to the disintegration of Sri Lanka.

In keeping with the ethos of centralisation and concentration of power in a single institution, Parliament became a unicameral house.

The Public Service

The concept of an independent public service commission and public service was repudiated by the new constitution. It was made clear, in no uncertain terms, that the public service was to be firmly under the control of the executive branch of government. The Constitution provided that the Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of State officers, and in discharging this responsibility would only be responsible to the National State Assembly.[32] Ever conscious of the 'threat' from the judiciary to undermine the 'popular will', the constitution also provided that no institution administrating justice had the power or jurisdiction to inquire into, pronounce upon or in any manner call into question any jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, Minister, the State Services Advisory Board, the State Services Disciplinary Board or a State Officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of State officers.[33] The State Services Advisory Board and Disciplinary Board consisted of persons appointed by the President. Their powers were extremely limited and bore no comparison with those enjoyed by the Public Service Commission.[34]

The independence of the public service was further debilitated by the provision that every state officer holds office during the pleasure of the President.[35] Thus in the area of the public service there was an abrupt departure from the British and Soulbury traditions to a more political and pliant public service.

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[32] Section 106(1).
[33] Section 106(4)
[34] Sections 111 and 112.
[35] Section 107(1).

Fundamental Rights

A Chapter setting out a list of fundamental rights and freedoms was incorporated into the Constitution for the first time.[36] This was perhaps the only significant aspect of this Chapter as it had little or no impact on the lives of citizens in this country. Section 18(2) contained a blanket limitation on these rights and freedoms so as to render them almost nugatory, if the executive or legislature thought it fit so to do.

Section 18(2) provided that the exercise and operation of the fundamental rights and freedoms shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of the rights and freedoms of others or giving effect to the principles of State policy.

Whereas the rationale for incorporating a Bill of Rights into the supreme law of the land, is to provide an individual with a circle of protection free from encroachment from the State or other person or institution, this sweeping provision virtually meant that fundamental rights could only be enjoyed if the National State Assembly permitted it, as the grounds for restriction were so broad, nebulous and subjective. Furthermore by not setting out any enforcement mechanism the impression was created that these rights were not justiciable. The Supreme Court however in *People's Bank v. Guneratne*[37] upheld the view that the fundamental rights incorporated in Section 18 were enforceable before the District Court. The impact of this decision however was negligible and perhaps only of academic interest as the decision was delivered just before the Constitution was replaced by the Constitution of 1978.

The first republican Constitution was therefore, fundamentally flawed from the perspective of constitutionalism in a number of respects. The document itself undermined the principle of the supremacy of the constitution and sought to exalt the status of the legislature. Since the

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[36] Chapter VI, Section 18.
[37] (1986) SLR p. 338.

United Front Government was elected in 1970 with a two thirds majority in Parliament, there was no need for it to reach out to either the main opposition party or minority parties, and thus the tradition of the instrumental use of constitutions commenced. Majority aspirations, executive convenience and the interests of the regime in power, were the overriding concerns of the framers of the constitution.

The Second Republican Constitution of 1978

It could be argued that the second Republican Constitution of 1978, introduced by the United National Party government of J.R. Jayewardene was a more creative document than its predecessor. The constitution adopted several features from the French and American Constitutional traditions while retaining several British features as well. According to its champions, it suited the needs of Sri Lankan society, but according to its detractors was a foundation for authoritarianism.[38]

Stability for rapid economic development seemed to be the dominant consideration of the framers of the new constitution. Jayewardene himself pressed for the establishment of political stability by providing for strong leadership, an executive freed from the whims and fancies of Parliament.[39] Apart from the issue of whether the executive should be thus insulated from the wishes of the representatives of the people in a liberal democratic society, it is pertinent to ask whether the Ceylon/Sri Lanka prior to 1978 was particularly unstable. The changing of governments through peaceful, free and fair elections at periodic intervals should surely not be considered a symptom of instability. A more sophisticated definition of the term stability which encompassed the existence of conditions that did not disrupt national life or the liberal democratic process should have been adopted rather than one which was preoccupied with the survival of governments. Recent political developments in Sri Lanka fortify this contention.

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[38] Chanaka Amaratunga (1989) "Alternative Institutional Forms for the Sri Lankan State", in **Ideas for Constitutional Reform** op.cit., p. 345.
[39] *Ibid* p. 354.

The introduction of the Executive Presidency, which is perhaps the most radical change introduced by the Constitution of 1978, undermined the notion of parliamentary supremacy by reposing considerable power in one person, who in effect, combined the ceremonial or titular functions of the former President or Governor General, with the substantive powers of the former Prime Minister. The President is elected directly by the people for a six year term and cannot serve more than two terms.[40] While the constitution originally contemplated a fixed term of office with the new president assuming the office on the 4th February following election, the Third Amendment to the Constitution now permits a President who has completed the first four years of his term to seek re-election. The President presides over the Cabinet, decides the number of Ministries, appoints from among the members of Parliament, Ministers of the Cabinet and other Ministers and is not even bound to consult the Prime Minister regarding these appointments.[41] Indeed when President Premadasa constituted his first Cabinet, he had not even appointed a Prime Minister. The Prime Minister and the Cabinet of Ministers hold office at the will and pleasure of the President. The Constitution also permits the President to assign himself any portfolio or function.[42]

The considerable powers reposed in the President go far beyond those enjoyed by the President of the Fifth Republic of France. Furthermore various provisions concerning immunity drawn up to protect the nominal or the ceremonial Head of State, who was expected to be a non-partisan, ceremonial figure, were applied to the Executive Presidency, notwithstanding the phenomenal increase in its powers. Provisions in the standing orders of Parliament forbidding reference in Parliament to the conduct of the Crown or its representative have been applied to the Executive President. The constitution also provides that while any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or

[40] Article 31.
[41] Article 44.
[42] Article 44.

private capacity.[43] Granting such immunity to a politically partisan figure who wields enormous powers is totally unjustified. It has been argued that the conferment of such immunity permits the President to make highly tendentious and even defamatory statements about political opponents during election campaigns which if made by any other person would constitute a violation of the laws governing elections or defamation.[44]

The President of the Second Republic also enjoys limited powers over financial supply which vitiates the principle applicable in most liberal democracies that the legislature has complete control over finance. Article 150(3) provides that where the President dissolves Parliament before the Appropriation Bill for the financial year has been passed, he may authorise the issue from the Consolidated Fund, and the expenditure of such sums as he may consider necessary for a period of time until the new Parliament is summoned to meet. This provision could enable a President faced with a hostile legislature, to make use of powers to dissolve Parliament, and rule the country for several months without Parliament. The reduction of parliamentary control over finance is made worse by the fact that Sri Lanka's last two Presidents have opted to hold the finance portfolios themselves.[45]

The Devaluation of Parliament

This concentration of power in one person was all the more serious because the powers and effectiveness of a rival source of political legitimacy, the parliament, were whittled down considerably.

Apart from the power of dissolution which the President possessed, the role of a member of Parliament changed drastically under the new constitution. The traditional British idea of the Member of Parliament as an independent legislator who is expected to cast his

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[43] Article 35.

[44] Chanaka Amaratunga, "*Alternative Institutional Forms for the Sri Lankan State*", *op.cit.*, p. 350.

[45] President D. B. Wijetunga, 1993-94 and President Chandrika Kumaratunga, 1994.

vote in a way which he/she thinks would be in the best interests of the country, was repudiated, and the notion that an M. P. is merely a representative of a party and that Parliament consists of an aggregation of political parties gained constitutional recognition. The Burkean tradition expressed in the words,

> *"I am not first the Member for Bristol, I am not first a Whig, I am first a Member of Parliament",*

tolerated dissent, permitted a member of Parliament to even take up positions independent of his party, criticise their party leadership and even cross the floor. Members of the legislature enjoyed far more independence and security of tenure under the Donoughmore, Soulbury and First Republican Constitutions.

Under the Second Republican Constitution when a Member of Parliament is expelled from his/her party or resigns from it he/she virtually automatically loses his/her seat in Parliament. This, coupled with the fact that most party constitutions in Sri Lanka grant overwhelming powers to the party hierarchy, means that the party leadership exercises tight control over its members in Parliament. A Member of Parliament knows that s/he can be subjected to disciplinary action for a variety of reasons and thereafter a replacement nominated by the Secretary of the party. The party leadership is not even restrained by the prospect of a by-election in these circumstances and therefore can quite easily nominate a less troublesome party loyalist.

The only remedy that a dissident Member of Parliament has is an appeal to the Supreme Court. However the Supreme Court in a number of decisions has adopted the position that its responsibility is merely to determine whether the expulsion of the member from the party has been in accordance with the provisions of the party constitution and principles of natural justice. The Supreme Court has displayed little sensitivity to the importance of Members of Parliament possessing freedom of conscience and ultimately functioning as representatives of the people, rather than as ambassadors of political parties.

In ***Gunawardena and Abeywardena v Fernando***[46] which must rank as one of the Sri Lankan judiciary's most outrageous constitutional determinations, the Supreme Court described a Member of Parliament as a cog in the party wheel. In ***Dissanayake v Kaleel,***[47] where a group of government Members of Parliament joined the opposition in an attempt to impeach the incumbent President who was a member of the same political party. The Supreme Court in a judgment which indicated little sensitivity to the far reaching constitutional implications of its approach, took the view that under an electoral system based on proportional representation, the party was pre-eminent and therefore a Member of Parliament was generally bound to vote according to the will of the party leadership. The view that a Member of Parliament was primarily an ambassador of his/her party has undermined the important function of Parliament as a deliberative assembly and has in the last twenty years contributed significantly to its devaluation and lack of prestige as an effective check on the executive.

The supremacy of Presidential power over Parliament can also been seen in relation to the Public Security Ordinance, where the President is entitled to introduce regulations which have the effect of over-riding, amending or suspending the operation of any law enacted by Parliament. Though theoretically it can be argued that Parliament has the power to review the existence and duration of the state of emergency, the control exercised over Parliament by the President or the leadership of the majority party, makes this a remote possibility.

The combination of the 'over-mighty Executive' and a devalued Parliament has hastened the march towards authoritarianism in Sri Lanka. It is interesting to note that when former President J. R. Jayewardene and President Premadasa introduced a resolution for the creation of an Executive Presidency in the Constitution Assembly appointed to draft the Constitution of 1972, their then leader, Dudley Senanayake observed prophetically,

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[46] SC 51/87 (Spl.). Supreme Court Minutes of 18.01.88.
[47] 1993 2 Sri LR 135.

"The Presidential system has worked in the United States where it was the result of a special historic situation. It works in France for similar reasons. But for Ceylon it would be disastrous. It would create a tradition of Caesarism. It would concentrate power in a leader and undermine Parliament and the structure of political parties. In America and France it has worked but generally it is a system for a Nkrumah or a Nasser not for a free democracy."[48]

The Referendum

Another device which bestows considerable power in the Executive President is the referendum which enables the President to place a particular proposal before the people for approval. The manifest populist or Gaullist dimensions of a referendum are clear from the provision that enables the President to even appeal to the people over heads of the members of the legislature.

A salutary feature is the use of the referendum to grant extra protection to certain fundamental constitutional provisions. These provisions can only be amended if the proposed change not only enjoys a two-thirds majority in Parliament, but also receives the endorsement of the people at a Referendum.[49]

Unfortunately, the one exercise of this novel feature experienced to date was not a happy one. Though heralded as an ultra-democratic device, it was used to remove a fundamental right possessed by the people of Sri Lanka, unbroken for a period of over fifty years, the crucial right to vote to choose one's representatives in Parliament, thereby contributing further to the steady decline of liberal democracy in the country.

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[48] Dudley Senanayake, *Daily Mirror* of 8th October 1971.
[49] Article 83.

Proportional Representation

A positive feature of the new constitution was the introduction of a system of proportional representation for elections to Parliament. Though introduced into the Constitution in 1978, the new electoral system was unfortunately resorted to for the first time at the 1989 Parliamentary elections.

The new system was intended to remedy some of the glaring deficiencies in the 'first past the post' Westminster model electoral system which existed since independence. The main weakness in the old system was that parliamentary seats were allocated in a manner totally disproportionate to the votes polled. For example in the General Election of 1970, the United Front Government won 77% of the seats in Parliament with 49% of the votes polled, while the United National Party obtained 11% or the seats despite winning 38% of the votes. In the election of 1977, the United National Party secured over 83% of the seats in Parliament with 51% of the vote and the Tamil United Liberation Front obtained 11% of the seats with just 6% of the vote.[50]

The system of proportional representation helps to achieve a greater balance between the popular vote and the strength of Parliamentary representation, and ensures that a wider spectrum of political opinion would secure representation in the legislature.

A major change brought about by the new electoral system relates to the constituency. In place of a single member electorate, the district functions as the effective constituency. Voters in each of the 24 electoral districts can choose between competing lists of candidates put forward by political parties and groups. The constitution provides that a voter may express his preference for individual candidates in the list.[51] This is an improvement on the system originally envisaged, where the party would indicate the order in which the candidates would be

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[50] Chanaka Amaratunga and Rajiva Wijesinha, "*Political Pluralism as a Necessary Condition of Liberal Democracy: Proportional Representation and the Sri Lankan Experience*" in ***Ideas for Constitutional Reform***. *op.cit.*, p. 183-203.

[51] Article 99 (2) as amended by Section 7 of the 14th Amendment to the Constitution.

selected. The subsequent amendment was an improvement in that the voter's determination rather than the party's high command became crucial in deciding which candidates enter Parliament.

Another weakness of the proportional representation system originally envisaged by the framers of the Constitution was a high cut off point of 12.5%. This provision was particularly detrimental to smaller parties and independent groups. However a subsequent amendment reduced the cut off point to 5% enabling smaller parties to obtain representation at the Parliamentary Elections of 1989.[52] Thus while the system of proportional representation operative in Sri Lanka has several shortcomings, it is clear that the system is markedly better than the previous one.

The Judiciary

The constitutional provisions relating to the judiciary are an improvement on the provisions of the previous constitution. The constitution provides that judges of the Supreme Court and Court of Appeal, who are appointed by the President, hold office during good behaviour and shall not be removed except by an Order of the President made after an address of Parliament supported by a majority of the total number of members of parliament has been presented to the President for removal on the ground of proved misbehaviour or incapacity.[53] Other traditional safeguards are also included.[54]

The jurisdiction of the Supreme Court is comprehensively outlined. One of the important functions of the Supreme Court relates to the interpretation of the Constitution and protection of fundamental rights.[55]

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[52] Article 99 (6) as amended by Section 7 of the 14th Amendment to the Constitution.
[53] Article 107.
[54] Article 107, 108, 112.
[55] Articles 118, 120.

Unfortunately, however, the new Constitution did not reintroduce judicial review of legislation. The constitutionality of legislation can only be challenged prior to enactment, when it is a Bill before Parliament. Since legislation is often rushed through Parliament and members of the legislature are hardly given enough time to read the proposed legislation, this prevents rigorous scrutiny of legislation which could violate the constitution.

Fundamental Rights

The provisions in the Constitution of 1978 too are a slight improvement on those of the previous Constitution. The rights and freedoms are spelled out in greater detail, the restrictions more narrowly tailored and most important of all, an enforcement mechanism is set out in the Constitution.[56] Several fundamental rights applications were made to the Supreme Court and a body of case law developed in this area.

Still however, there is an excessive obsession with executive convenience and the Constitution confers too much discretion on the executive to decide when and how fundamental rights should be abridged. Furthermore Article 126 of the Constitution imposes various limitations on applications for redress of violations of fundamental rights which have served as an unnecessary obstacle to the development of a dynamic and comprehensive human rights jurisprudence in Sri Lanka. Coupled with this, the judiciary has failed through creative and liberal constitutional interpretation to exploit the tools at its disposal.[57]

The creation of an office Ombudsman, though hailed as a major innovation to promote checks and balances, has proved disappointing. This is because he is a watchdog without teeth. This suggests that the framers of the constitution were not serious in their intention to crate an effective check on executive and administrative action.[58]

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[56] Article 126.

[57] Rohan Edrisinha, '*The Role of the Judiciary in the Protection of Human Rights*' in ***Ideas for Constitutional Reform***, op.cit. pp. 595-615.

[58] Sam Wijesinha, '*The Changing Face of Parliament*' in ***Ideas for Constitutional Reform***, *op.cit.*, p 105-107.

The Public Service

The Constitution of 1978, like its predecessor opted to reject the idea of an independent public service. Though a Public Service Commission was reintroduced, its powers were severely limited as it is dependent for its power on Cabinet delegation.[59]

Devolution of Power

Though the Jayewardene Government toyed with the idea of decentralisation or devolution of power in the early 1980s it was the pressure on the Government after the tragedy of July 1983 and the pressure from the Indian Government that prompted Jayewardene to introduce constitutional reforms which violated the whole ethos of his Constitution and his political instincts. A system of devolution of power was incorporated into a Constitution which had been designed to centralise power.

The Thirteenth Amendment to the Constitution failed to introduce substantial and secure devolution of power. It provided for a veneer of devolution while retaining vast powers with the centre. The Amendment, ultimately, failed to grant complete control over any subject to a Provincial Council. It was also easy for the centre to retake power; this could, in the areas of health and education, for example, even be done by a Central Government Ministerial directive. There was also no clear division of power between the central government and the Provincial Councils. The Thirteenth Amendment contains three lists spelling out the subjects devolved to the Provincial Councils (List 1), the subjects retained by the centre in the Reserved List (List II) and also a Concurrent List (List III). Ultimately all the subjects specified in the Concurrent List, were under the control of Parliament.

A major flaw in the Thirteenth Amendment to the Constitution was that the first phrase in the Reserved List completely undermined powers apparently devolved in the Provincial Councils List. It provided for

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[59] Article 57.

National Policy on all Subjects and Functions, (even those Subjects in the Provincial and Concurrent Lists) to be determined by the central Parliament. A clear example of how devolution of power was undermined by the use of this provision was the National Transport Commission Bill which was presented in Parliament by the Minister of Transport and Highways on 23rd July 1991. The preamble of the Bill began with the words "Whereas it is the National Policy of the Government of Sri Lanka...." Thus the central Parliament successfully encroached into the Provincial sphere by cloaking itself with the protection of the national policy rubric in the Reserved List.

Under the Thirteenth Amendment and the Provincial Councils Act,

a) *the Central Parliament and Provincial Councils were not co-ordinate sovereignties;*

b) *there was no clear division of power between the centre and the provinces;*

c) *the powers of Provincial Councils could be reduced or abolished by the central government acting unilaterally;*

d) *there was no subject over which a Provincial Council can claim to exercise exclusive competence or jurisdiction;*

e) *central government institutions either directly or indirectly exercised considerable control over Provincial Councils.*

It was, therefore, not surprising that Tamil political parties called for 'substantial devolution of power' totally rejecting the existing constitutional framework. The problem was not confined to a lack of political will to devolve power alone. The constitutional provisions are fundamentally flawed. They permit the centre both to retain power and also undermine devolved powers so easily, that they cannot result in substantial devolution of power.

The Constitutional Reform Project 1994-2000

Constitutional reform figured prominently in the Sri Lankan elections of 1994. The People's Alliance sought a mandate from the people to abolish the Executive Presidency and promulgate a new Constitution designed to restore to the people their sovereignty. The People's Alliance also campaigned vigorously on the importance of a political solution to the ethnic conflict. Since it was recognised that constitutional reform would form a major part of such a political solution, there was, by implication, a promise to introduce a new Constitution which would be a radical departure from the Second Republican Constitution of 1978. There were thus, two main motivations for a new Third Republican Constitution. It was expected to respond to:

a) authoritarianism;
b) the ethnic conflict.

There were several grounds for optimism. The emphasis on the link between authoritarianism and the over-mighty executive Presidency[60] suggested that Sri Lanka's constitution makers would get it right the third time round, and design a constitution which imposed adequate restraints on the wielders of political power. Furthermore, the fact that the new Government did not command a two-thirds majority in Parliament meant that the Government would have to reach out to the Opposition and the minority parties, thereby preventing the introduction of a partisan and essentially majoritarian Constitution, like in 1972 and 1978.

Unfortunately however, despondency and frustration have replaced optimism. The process appeared to be stuck at the beginning. In October 1997, the Minister of Justice, Constitutional Affairs, Ethnic Affairs and National Integration, Professor G. L. Peiris presented to Parliament, a document titled **The Government's Proposals for Constitutional Reform**. The United National Party, the main

[60] C.R. de Silva (1989)*"The Overmighty Executive? A Liberal Viewpoint"* in ***Ideas for Constitutional Reform,*** Chanaka Amaratunga (ed), (Colombo).

opposition party, thereafter, released some draft proposals of its own, which were sketchy and woefully inadequate.

Process

The constitution making process in Sri Lanka in the past five years has suffered from serious defects which have contributed to the disappointing document which was released to the public in October 1997. The initial mistake, which few people realised at the time, was that a Parliamentary Select Committee, rather than a Constituent Assembly, was assigned the responsibility for drafting the new Constitution. The People's Alliance election manifesto promised that a Constituent Assembly consisting of Members of Parliament would be convened to formulate and adopt the new Constitution. For reasons that were not clear, the Government decided not to convene a Constituent Assembly but opted for a Parliamentary Select Committee instead. Since the deliberations of the Parliamentary Select Committee were closed to the public, there was no public scrutiny of the constitution making process. Whenever a 'consensus' was reached, it was announced at a press conference but the positions of the parties, the views of the individual members of the Select Committee, were not made known to the public. This was unsatisfactory for several reasons.

Apart from the question of legitimacy, the closed process encouraged irresponsibility on the part of several parties represented in the Select Committee, in particular, the United National Party. The United National Party participated in the proceedings without presenting its own proposals or committing itself to any of the decisions reached by the Select Committee. Often its representatives gave tacit approval to some of the less controversial decisions made, but subject to the qualification that the Executive Committee of the party had to confirm the decision at the end of the constitution drafting process.

Substance

In terms of substance, the draft Constitution of October 1997 was certainly an improvement on the Constitution of 1978. There were improvements in the Chapter on Fundamental Rights, the abolition of the Executive Presidency avoided a concentration of power in a single institution, devolution of power to the provinces/ regions was strengthened, and an independent public service restored.

However, when viewed from the perspective of modern Constitutionalism, or as the basis for the introduction of pluralism and liberal democratic values, or as a foundation for conflict resolution and a durable solution to the ethnic conflict, the new draft Constitution was woefully inadequate. The draft Constitution was clearly a reconditioned version of the Constitution of 1978. The basic structure remained the same and indeed vast chunks were reproduced verbatim.[61] It seems clear that the framers of the new Constitution have not focused on the fundamentals of Constitutionalism and have ignored modern trends in constitutional jurisprudence.

What is disappointing with the provisions of the new draft Constitution is that they do not overcome all the defects of the previous constitutions, outlined above. Comprehensive judicial review of legislation has not been proposed. An extremely limited kind of judicial review has been proposed. The basic rule that flows conceptually from a constitutional tradition that upholds the pernicious doctrine of parliamentary sovereignty, continues. Once a law is passed by

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[61] The draft Constitution is disappointing in a number of respects. Apart from those highlighted in the paper, provisions on the Independence of the Judiciary, the Constitutional Council, the Ombudsperson and the Electoral system are particularly weak. Both parties promised in their manifestoes to incorporate the positive aspects of the system of proportional representation and the simple plurality system by introducing the mixed German system of representation. The draft reproduces verbatim the present chapter on proportional representation. The invidious provision which enables a party to cause the expulsion of dissidents from Parliament and which transformed Sri Lanka from a representative democracy to a 'party democracy' and the Parliament from a deliberative assembly to a docile congress of party ambassadors is reproduced despite vocal opposition to it by the People's Alliance before the election.

Parliament, it cannot be questioned on the ground of unconstitutionality. The farcical one week period for pre-enactment review has been extended to two weeks. An exception is made for a law if it is contended that it violates just one chapter of the Constitution; the chapter on Fundamental Rights. The Supreme Court may entertain such a challenge if it is made within a period of two years after the enactment of that particular law.

However, even if the law is declared unconstitutional, the new Constitution protects all previous action done pursuant to the impugned Act. Thus conduct which flows from an unconstitutional law may remain legally valid. Such a position is unsatisfactory as it is not only conceptually untenable if the principle of the supremacy of the Constitution is upheld, but it also fails to act as a deterrent to the introduction of unconstitutional legislation. It is surprising that while Professor Peiris correctly describes the Thirteenth Amendment as a sham, citing the example of the National Transport Commission Act to demonstrate how easy it is for the Central Parliament to undermine devolution of power, he steadfastly refuses to introduce the mechanism which acts as the most effective check on the temptation to concentrate power in the centre: judicial review of legislation.

Another shocking example of deviation from the acceptance of the supremacy of the Constitution, which clearly reflects the obsession with executive convenience and disdain for human rights on the part of the architects of the Constitution, is the reproduction of the obnoxious provision that validates all existing laws, both written and unwritten, notwithstanding inconsistency with the provisions in the chapter on Fundamental Rights.[62]

[62] Article 28 of the new Draft Constitution. Article 16 of the Constitution of 1978.

Human rights activists and academics lobbied strongly for the repeal of the article. The visiting Commonwealth group of Constitutional experts expressed their surprise at the provision at a seminar on the new constitution in August 1997.[63] Both Professor Peiris and Mr. Zuhair M.P. of the Sri Lanka Muslim Congress, defended the provision stating that it was necessary to protect the personal laws of the country, the Muslim Law, Thesawalamai and the Kandyan Law. Mr. Zuhair argued that since the proposed Preamble to the Constitution recognised Sri Lanka as a plural society, it would be wrong to seek to impose change on a community. Change should be initiated if at all, he said, from within the community itself.

While the Zuhair argument raises fundamental questions which again, perhaps should have been debated openly during the constitution-making process, it is understandable that it may be considered desirable to immunise the personal laws from human rights scrutiny. Article 28, however, protects ALL existing law. If the purpose of the article is to protect the personal laws, then it is clearly overbroad. Though certainly not the ideal, the article could be replaced with one that merely protects the three bodies of personal laws.[64] Unfortunately, Professor Peiris has ignored the compromise formula (and indeed nearly all the recommendations made by the Commonwealth experts). He subsequently repeated the protection of the personal laws rationale for Article 28.[65]

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[63] Consultation on the Draft Constitution was convened by the Commonwealth Human Rights Initiative and the Law and Society Trust on 9th and 10th August 1997. A team of Commonwealth constitutional experts participated in the consultation. Professor G. L. Peiris and the Leader of the Opposition, Ranil Wickremasinghe spoke at the inauguration. The Commonwealth panel of experts included Stephen Toope (Canada), Justice P. N. Bhagwati and Upendra Baxi (India), Cheryl Saunders (Australia), Patricia Hyndman (United Kingdom), Justice Pius Langa (South Africa), Kamal Hossein (Bangladesh) and Lakshman Marasinghe.

[64] When I asked Mr. Zuhair, at the conference, whether he had any objections to such a course of action, he stated that he had none.

[65] Professor Peiris completely ignored the compromise formula and repeated the need for Article 28, in a speech at a seminar on Good Governance at the Marga Institute. The October draft provides for a Commission to review all existing law and report to the President. This is both totally impractical and inadequate.

The examples outlined above, which demonstrate an almost cavalier attitude to the principle of the supremacy of the Constitution, raise doubts as to whether those responsible for drafting a new Constitution for Sri Lanka are really committed to the values of Constitutionalism.

Devolution of Power

The People's Alliance Government responded to the demand for substantial devolution of power after it was elected to power. In order to avoid confusion, it is important to note that there were three main sets of proposals on devolution of power released to the public. They were

a) *The Devolution Proposals – 3rd August 1995;*

b) *The Legal Draft on Devolution – 16th January 1996;*

c) *The Provisions on Devolution in The Government's Proposals for Constitutional Reform – October 1997.*

On 3rd August 1995, the government released a text of Devolution proposals which sought

> "to redefine the constitutional foundation of a plural society within a united and sovereign Republic of Sri Lanka,"

and which set out several principles. The proposals also included the basic framework with regard to the structure of devolution, finance, law and order, land, education, the administration of justice, the public service, a commission on devolution and the division of powers on the basis of two lists of subjects: the Regional List and the Reserved List (Central Government List). The proposals merely set out broad principles.

The Legal Draft of 16th January 1996

The Legal Draft released in January 1996 did not only contain the detailed provisions on devolution of power (Chapter 3 of the proposed Constitution). It also included the Preamble to the Constitution, Chapter 1 which spelled out the basic features of the Constitution, and Chapter 2 which dealt with Buddhism.

There were several positive provisions in the Legal Draft. The deletion of Articles 2 and 76 of the Constitution, which entrenched the unitary character of the Constitution, removed an unnecessary obstacle to substantial devolution of power. The proposals contained several clauses designed to allay the fears of sections of the community who consider devolution of power a stepping-stone to secession. The abolition of the Concurrent List and the attempt to remove the ambiguity shrouding the division of powers were other positive features.

The provisions relating to finance were also a significant improvement on those in the Thirteenth Amendment. The Regional Councils were given greater revenue raising powers. A major weakness in the Thirteenth Amendment and the Provincial Councils Act was the ambiguous role of the Governor in the area of finance. The new proposals are not only clearer but also removed the Governor from this area altogether.

There were glaring omissions, however. A cardinal defect was the absence of mechanisms to represent regional interests at the centre. The deliberations of the All Party Conference in the 1980s recognised the need for provincial/regional interests to be represented at the centre. The polarisation between the centre and the provinces was one of the main reasons for the failure of the Provincial Council system. An elected Senate or Council of Regions, consisting primarily of persons elected from the regions, would serve as a check on central governmental intrusion into the regions' legitimate sphere of authority.

For some inexplicable reason, the idea of a Devolution Commission, which was contained in the August 1995 proposals was dropped from the January 1996 Legal Draft (and remains absent from the October 1997 Draft). The rationale for such a Commission must surely have been to provide for a powerful body which could deal with disputes between the centre and the regions and between regions through dialogue and mediation. The Commission could also have provided a forum for coordination and liaison between the centre and the regions, and also, between regions.

Another weakness in the devolution proposals was that there were inadequate checks on the possible abuse of the central government's power to intervene in a region in a situation of emergency. Few would argue against permitting the central government to intervene in a situation where the unity and sovereignty of the country are in jeopardy. The central government must be able to respond swiftly, decisively and effectively. But since this power of intervention has been abused so much in India, there was understandable concern at the possibility of abuse.

Quite amazingly, even the provisions of the Thirteenth Amendment, presently in operation, contain better safeguards to prevent Provincial Councils from arbitrary dissolution. In a situation of emergency, the President may by Proclamation assume to herself the administration of the Province, while the powers of the Provincial Council are taken over by Parliament. The President has no power to dissolve a Provincial Council even in such a situation.

Thus, the present provisions, which are tighter, more specific and yet enable the centre to respond in a crisis, are preferable to the provisions in the January 1996 Legal Draft.

The Legal Draft of January 1996, though it courageously deleted the commitment to Sri Lanka being a unitary state, fell dishearteningly short of introducing a federal form of government. A federal constitution would have galvanised the support of the minority political parties, the pro-federal constituencies in the south, the peace constituency and moderates throughout the island.

The Constitution was not supreme and there was no judicial review of legislation. There were no provisions for regional representation at the centre. The Constitution, including the entire scheme of devolution, could be changed by Parliament acting unilaterally. There were no effective mechanisms for centre-regional collaboration. The myth that the proposals introduced a federal form of government merely because the label 'unitary' has been tossed aside, was the starting assumption of several critics of the proposals, including the Sinhala Commission. The basic premise of their arguments was, therefore, flawed.

The Draft Constitution of October 1997

The October 1997 Draft Constitution incorporated the provisions on devolution of power into the whole document. For example, the provisions designed to protect the unity and territorial integrity of the country were included in the chapter on the State, Sovereignty and the People, (Chapter 1), provisions on the Regional Judiciary were added to the Chapter on the Judiciary (Chapter XIX), while the powers of the President to dissolve Regional Councils were merged into the chapter on Public Security (Chapter XXIII). A separate chapter on State Land, Waters and Minerals was introduced.

Several changes were however made to the January 1996 Legal Draft, most of them positive, but some negative. An example of the latter were the changes to the preamble to the Constitution. No reasons were given for the deletion of several paragraphs which highlighted the plural character of the Sri Lankan polity. The new Preamble is vacuous and inane.

The Chief Ministers' Conference was given the power to settle by mediation, disputes between the centre and a Regional Administration.[66] The Parliamentary Select Committee also accepted a proposal from the UNP to introduce an Executive Committee system at the Regional level. The relevant provisions

[66] Article 140 (3) (b) of the October 1997 Draft Constitution.

provide for the portfolios in the Regional Board of Ministers to be assigned to political parties in proportion to the votes received by them at the Regional Council elections. [67] They also provide that an Executive Committee consisting of members of the Regional Council

> *"shall be charged with the administration of the subjects and functions assigned to the Ministry and the Minister shall exercise power in relation to such subjects and functions in the name of the Executive Committee."[68]*

The Executive Committee system has been hailed in many quarters as a bold initiative at power sharing at the regional level and a demonstration of the Government's willingness to accommodate proposals of the UNP. A more cynical (realistic?) assessment is that national parties, with little principled commitment to devolution of power were quite willing to experiment with the exercise of executive power at the regional level, perhaps aware that the ultimate beneficiary of a weak, fragmented regional executive, would be the central government.

In an attempt to provide for checks on the President's power to either assume all or any of the functions or powers of the Regional Administration or any other Regional body, or to dissolve a Regional Council in emergency situations, the October Draft Constitution added a provision which requires a Tribunal consisting of a nominee of the President, a nominee of the Chief Minister of the relevant region and a third member selected by the two nominees, to consider whether the assumption of such powers or functions or whether the dissolution should continue to operate. It is submitted that such an informal arbitral mechanism is unsuited for determining such issues and that permitting judicial review would have been a better option.

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[67] See Articles 134 and 135 of the October 1997 Draft Constitution.

[68] Article 135 (2).

In a dramatic pendulum swing from one extreme to another, the regions have been granted veto power over constitutional amendments affecting the chapter on Devolution of Power to the Regions, and the two Schedules to the Constitution which spell out the parameters of the regions and the division of powers between the centre and the regions. [69] A more orthodox constitutional amendment procedure which includes approval of a special majority of the regions and the approval of a second chamber with special weightage to protect minorities, would have provided a more acceptable degree of rigidity and protected devolution of power.

The unusual and ad hoc nature of the changes outlined above suggest the absence of a overarching vision or philosophy behind the new Constitution. Not surprisingly the opponents of devolution of power have severely attacked the changes.

The draft Constitution of October 1997, despite the claims of government propagandists, seems unlikely to form the basis of a lasting and durable peace for several reasons:

1. It fails to respond to several of the key demands of the Tamil political parties and groups.

2. It falls short of a Federal Constitution based on the equality and dignity of all Sri Lankans.

3. The L.T.T.E. is not part of the constitution making process.

The framers of the Constitution have failed to respond to the larger issues of self-determination and claims to nationhood. They have not addressed the issue of redefining the Sri Lankan nation state and national identity. The overwhelming mandate received by the Kumaratunga Administration, in 1994, for constitutional reform for democracy and peace, and the opportunity it created, has been squandered by a constitutional reform project which lacked vision, imagination, commitment to principle and professionalism.

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[69] See Article 101 (2) and (3) of the October 1997 Draft Constitution.

The gulf between the proposals put forward by the Government and proposals from persons who have connections with the L.T.T.E. remains huge. The constitutional model developed by a firm of British solicitors [70] provides for a confederation of the Union of Ceylon consisting of the Sinhala and Tamil nations, two internally autonomous States. Visuvanathan Rudrakumaran, a lawyer based in the United States has often referred to the need for the Tamil people's right to self-determination to be recognised as part of a political solution.[71]

> *"The essence of self determination is the people's desire to be the active agents of their history. Tamils are endowed with objective characteristics, such as a distinct language, they are united by an intuitive sense of oneness, and they have a historical relationship to a clearly defined territory. Therefore based on an analysis of who are the historical bearers of the right to self-determination, and under relevant UN resolutions and the International Court of Justice's opinion in the Western Sahara case, Tamils constitute a 'people' and are the legal recipient unit of the right to self determination."*

There has been little effort to attempt to bridge the chasm between the competing positions or to present alternative proposals which may accommodate some of the concerns and aspirations of the other side. A classic example of this inflexibility and the unwillingness to explore the meanings of ambiguous terms and concepts is the breakdown of the Thimpu talks in July 1985. [72]

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[70] A Proposal for the Resolution of the National Conflict in Sri Lanka prepared by Bates, Wells and Braithwaite Solicitors for the Sri Lanka Peace Support Group, a group of concerned academics, professionals and clergy from the international community, and sent to President Kumaratunga and V. Prabakaran on 20th December 1995.

[71] Presentation at a symposium on the Tamil National Question, organised by the International Tamil Foundation, in London,U.K. on 21 July 1996.

[72] See Ketheswaran Loganathan, ***Sri Lanka: Lost Opportunities***: p 97-108, where he argues that both sides were 'reluctant negotiators' and wanted the talks to fail.

The four cardinal principles placed before the Sri Lanka Government delegation at the Thimpu talks by the six Tamil organisations represented there (the TULF, LTTE, EPRLF, EROS, PLOTE and TELO) were:

1. Recognition of the Tamils of Sri Lanka as a distinct nationality;

2. Recognition of an identified Tamil homeland and the guarantee of its territorial integrity;

3. Based on the above, recognition of the inalienable right of self-determination of the Tamil nation;

4. Recognition of the right to full citizenship and other fundamental democratic rights of all Tamils, who look upon the island as their country.

The first three principles were rejected by the Government delegation on the grounds that they necessarily implied the destruction of a united Sri Lanka. The leader of the delegation, H.W. Jayewardene said,

> *"...If the first three principles are to be taken at their face value and given their accepted legal meaning, they are wholly unacceptable to the Government. They must be rejected for the reason that they constitute a negation of the sovereignty and territorial integrity of Sri Lanka, they are detrimental to a united Sri Lanka and are inimical to the interests of the several communities, ethnic and religious in our country."*[73]

Mr. Jayewardene assumed that they had an accepted legal meaning and that they would necessarily violate the sovereignty and unity of the country. This is not so. However, the gulf between the two sides remains wide. The LTTE alternative to a separate state seems to be a

[73] See Ketheswaran Loganathan, op. cit. p 105.

confederation of the Sinhala and Tamil nations, while the Government of Sri Lanka and other mainstream political parties in Sri Lanka find it difficult even to embrace the idea of a federal state based on the Indian or Canadian models. Despite the rhetoric of its patrons, the proposed new Constitution with its new devolution arrangements is unlikely to satisfy Tamil aspirations and if finally adopted, will merely constitute a consensus in the 'south' for the commencement of negotiations with the LTTE.

Constitutions without Constitutionalism

The main focus of the constitution reform project in the past five years has been on constitution making for conflict resolution. As suggested above, however, it is important to assess the provisions in the document on devolution realistically. Perhaps as a result of this focus some of the other important constitutional issues have failed to receive adequate attention. The opposition political parties must share a major part of the responsibility for this unfortunate trend. The main opposition, United National Party, failed to present any constructive alternative proposals while the minority parties seemed only interested in those parts of the constitution dealing with devolution of power.

No political party raised the fundamental questions relating to constitutionalism and the supremacy of the constitution discussed above. It seems as if the instrumental use of a constitution has become accepted as inevitable and even legitimate. The proceedings in the Select Committee of Parliament as gleaned from the occasional press conferences and discussions in the media indicated that the parties were concerned primarily with the nature of the State, the structure of government, and the powers of the various organs of government, rather than on values and principles and the norm setting function of a constitution.

Constitution making in Sri Lanka since independence appears to have been dominated by a particular mindset or attitude, that of executive convenience. Far from reflecting those of the people, Sri Lanka's home-grown constitutions have reflected the dreams and aspirations of the people in power. Both in 1972 and 1978, governments in power

possessed massive majorities in Parliament and therefore could virtually enact constitutions of their choice. As a result, there has almost always been a concentration of power either in the legislature (1972) or the executive (1978), political control of important institutions such as the public service and the judiciary is common and the authority and power of the judiciary has been diluted in various ways.

Since the People's Alliance Government could not obtain a two-thirds majority in Parliament, there was optimism that at last Sri Lanka will adopt a consensus document as a constitution. The lack of commitment on the part of the main opposition party is primarily responsible for the delay in reaching such a consensus. But whatever consensus has been reached so far seems to be on the basis of the lowest common denominator as no party in the Select Committee of Parliament has proposed let alone supported some of the essentials of constitutionalism discussed above.

The proposed new Constitution prohibits judicial review of legislation. It seems likely that the inadequate improvement of the October 1997 Draft Constitution i.e. the limited two year period for review of laws which violate the chapter on fundamental rights, has been withdrawn by the Government as part of its review process of January/February 2000. The validation clause which saves all laws which are inconsistent with the chapter on fundamental rights is reproduced from the previous two constitutions. Another unique feature of Sri Lankan constitutional jurisprudence is that all three autochthonous documents contain provisions expressly stating how the legislature can pass laws which violate the constitution yet without actually amending the constitution. This is unsatisfactory for a variety of reasons. The constitution can no longer be an accurate indicator of the broad principles and values by which the country is governed as there could be many ordinary laws in force which are inconsistent with the supreme law. It promotes a culture of deception. It also sends the wrong signal to Parliament and the Executive. It suggests that the constitution itself recognises that its creature, the Legislature, can violate the 'creational document'. The fact that a provision of this nature is contained in all the constitutional documents prepared by Sri Lankan constitution makers is evidence that

executive convenience rather than the supremacy of the constitution has been their dominant objective.

The provision which permits the Executive President to appoint judges to appellate courts without consulting anyone remains in the proposed new constitution despite the development of guidelines and principles in this area which have gained international acceptance. The modern constitutions adopted in countries such as Nepal, Thailand, Ghana, Namibia, South Africa and in central and eastern Europe all contain provisions safeguarding the independence of the judiciary which are generally compatible with these guidelines. The safeguards in the proposed new Constitution fall short of these modern developments. Provisions safeguarding the independence of the judiciary are particularly important in the Sri Lankan context as successive governments have attempted to intimidate the judiciary and judges whose independence has angered the executive have often been penalised.[74]

What is even more distressing is that none of the political parties represented in the Select Committee canvassed these issues or many of the other basic issues which are addressed by constitution framers in recent years. Whatever consensus has emerged among the political elite in Sri Lanka is based on executive convenience and lingering attachment to the notion of the supremacy of Parliament rather than the supremacy of the Constitution. The aversion to judicial review of legislation can also be understood as a hangover from British constitutional theory.

[74] Justices Raja Wanasundera and Mark Fernando, the most senior judges of the Supreme Court when the office of Chief Justice became vacant in 1988 and 1998 respectively, were not appointed to the office of Chief Justice.

Conclusion

Constitution making in Sri Lanka has in the past thirty years, in particular, faced a crisis of first principles. Constitutional fundamentals have either been inadequately comprehended and appreciated or deliberately ignored by Sri Lanka's constitution makers. Sri Lanka desperately requires a new Constitution, but it must be a document that responds to the twin challenges faced by the country: the crisis of authoritarianism and the crisis of ethnic harmony and national unity. In the past five years perhaps the understandable emphasis on the latter consideration has precluded adequate attention on the former.

Sri Lanka's political leadership and legal community have also failed to recognise the different grundnorm or assumptions upon which a system based on the supremacy of the constitution relies.

Friedrich Hayek in his book, The Constitution of Liberty, contrasts the doctrine of parliamentary sovereignty with constitutionalism and argues that constitutionalism ultimately affords greater protection to the people than the apparently more democratic principle of parliamentary sovereignty.

> *"The conception of a constitution thus became closely connected with the conception of representative government, in which the powers of the representative body were strictly circumscribed by the document that conferred upon it particular powers. The formula that all power derives from the people referred not so much to the recurrent election of representatives as to the fact that the people, organised as a constitution-making body, had the exclusive right to determine the powers of the representative legislature. The constitution was thus conceived as a protection of the people against all arbitrary action, on the part of the legislative as well as the other branches of government."*[75]

[75] Hayek, ***The Constitution of Liberty***: p 178.

This important principle needs to be grasped by Sri Lanka's political leadership and legal community.

Sri Lanka's constitution-makers need creativity and imagination to develop constitutional initiatives to respond to the complex challenges posed by Sri Lanka's ethnic conflict. The new Constitution, in addition, must also conform to constitutional first principles and modern trends in constitution making. The gulf between constitutional theory and practice referred to by Tiruchelvam will then be bridged. This blend of the traditional and the modern, the orthodox and the unorthodox, is vital if Sri Lanka is to adopt a Constitution for the new millennium, a constitution for peace and democracy.