

## **Editor's Introduction**

In 2012, Sri Lanka marked the fortieth anniversary of the founding of its republic. With the promulgation of the first republican constitution on 22<sup>nd</sup> May 1972, Ceylon severed its remaining constitutional links with Britain that had survived the grant of independence as a dominion in 1948. Both the process adopted in the making of that constitution as well as its substance were historic – a decisive ‘constitutional moment’ – reflecting dramatic political currents that had dominated the late-colonial and post-independence period, and establishing a constitutional order that has, despite being replaced by a second republican constitution in 1978, retained its essential substantive character as a highly centralised unitary state to the present.

The republic established in 1972 marked the triumphant ascendance of postcolonial Sinhala-Buddhist nationalism with the entrenchment of its three major constitutional goals: the recognition of a special place for Buddhism and the Sinhala language, and the centralised unitary state. In doing so, the republican constitution also marked a watershed in Tamil nationalism in terms of constitutional demands for accommodation, from federal autonomy to armed secessionism. Subsequent political history as shaped by this decisive constitutional moment entailed a long and extremely bloody war, a number of failed attempts at constitutional solutions, and a final military showdown which has seemingly ended with the defeat of militant and secessionist Tamil nationalism, and an ever more triumphant and vindicated Sinhala-Buddhist nationalism in control of the state.

In terms of the challenges of ethnic, religious and cultural pluralism that post-war Sri Lanka must settle in order that causes of past conflict are not reproduced in the future, the historical, political and constitutional issues that prevailed in 1972 are as relevant as ever. This edited

collection seeks to bring together a series of reflections on those issues on the 40<sup>th</sup> anniversary of the Sri Lankan republic, with a view to informing the contemporary debate on reconciling the constitutional form of the Sri Lankan state with its rich societal pluralism.

I am confident that there will be a wide and varied audience for the interdisciplinary reflections included in this collection, both in Sri Lanka and abroad. The 40<sup>th</sup> anniversary is a major historical landmark in itself, and there is renewed interest in the Sri Lankan constitutional reform debate given the absence of a post-war settlement that could provide the stability and reconciliation needed to sustain peace and political justice after the conclusion of military hostilities. The different analytical approaches represented in the multiplicity of disciplines to which the authors belong would have relevance and appeal across the social sciences, including law, politics, sociology and history.

One of the major problems with legal research and scholarship in Sri Lanka is the absence of a vibrant culture of publication and publishing, and the constraints on informed debate on constitutional reform options that this imposes. This is exacerbated by the lack of access Sri Lankan teachers, students and researchers have to international legal scholarship, due to reasons of costs, language barriers, and other more deep-seated issues with the way especially tertiary education is currently structured in Sri Lanka. One of CPA's primary motivations with this publication, as indeed it has been with previous publications and seminar programmes, is to contribute in some way towards addressing this need by facilitating the widest possible access to the work of international and local scholars, through locally produced publications that are made available free or at a minimum price, without, at the same time, compromising on quality in any way. I have no doubt that the quality and rigour of the contributions to this volume will meet this criterion in ample terms.

The book does not strictly follow academic conventions with regard to edited collections, and perhaps it is more appropriate to describe it as an anthology. Aside from the broad unity of addressing constitutional questions that remain relevant today as they were at the formation of the republic, the contributions therefore are not variations on a single theme but reflect a wide variety of styles and approaches. However, I have little doubt that they are all important and useful contributions to a clearer understanding of the constitutional challenges in Sri Lanka, and many offer alternative ideas for meeting these challenges that have either not found expression in Sri Lankan debates so far, or are important developments and extensions of ideas published elsewhere before, or are to be published in the future.

I do not intend to introduce the chapters lengthily, and thereby risk superimposing my own interpretations of authors' views from the outset. I will only make a few brief observations in order to locate them within the scheme of the book, which is loosely structured in four parts, dealing with constitutional history, constitutional theory, constitutional practice, and finally, a set of interviews with political practitioners representing some of Sri Lanka's ethnic and political diversity. In doing so, I will also point out some of the lacunae in the treatment of some perspectives and issues which deny the book of any claim to comprehensiveness. There were a number of authors who were invited to contribute in these areas, but who were unable for various reasons to submit their chapters in time.

The book commences with Dr Nihal Jayawickrama's extended account of what transpired in 1970-72 from the perspective of a senior official participant in the process. While Jayawickrama's views on these matters are well-known, the present chapter adds a considerable amount of detail to what he has previously published, including in relation to some of the debates and discussions within the United Front government with regard to major questions of substance like the unitary state, official language, the

status of Buddhism, the bill of rights and the Constitutional Court, and also to matters of process in the context of the demands of ethnic pluralism and the Constituent Assembly model of constitution-making, the technical illegality of which (in terms of deliberately disregarding the amendment procedure in the pre-existing independence constitution so as to effect a complete break with the colonial past) may have been a cause for worry in the light of the Southern insurrection that broke out while the constitution was being drafted.

The issues with regard to the constitutional recognition of fundamental rights and the institutional framework of their enforcement are discussed in more specific detail in Dr Jayampathy Wickramaratne's chapter. Wickramaratne is of course the author of the standard text on fundamental rights in Sri Lanka, and he was also a friend and junior of Dr Colvin R. de Silva, the Minister of Constitutional Affairs in the United Front government and the most influential architect of the 1972 Constitution. This latter fact in no way impairs Wickramaratne's critical observations on the many weaknesses of the 1972 Constitution in relation to fundamental rights when considered in the light of the values and principles of constitutionalism.

Dr Radhika Coomaraswamy's chapter is based on previously published work (now out of print), but updated by the author in light of more recent history. It is largely a critical treatment of the 1972 Constitution from a normative perspective of pluralism and democracy in a developing postcolonial society, and explains the role of that instrument in pushing Tamil nationalism in the direction of violent secessionism.

In my own chapter, complementing that of Jayawickrama in particular, I revisit a major theoretical debate that took place in Ceylon in the late 1960s with regard to the scope and nature of the power of constitutional amendment under the Soulbury Constitution, in which I make an argument that accords more weight to the views of Sir

Ivor Jennings (whose advice was central to the scheme eventually reflected in the Soulbury Constitution) than they have hitherto been given in existing discussions on the matter. To many, this may seem only of academic interest now, but I believe the process dimensions of the path taken in the establishment of the republic not only had great political consequences in terms of the ethnic conflict that followed, but also remains critically important to the present, given that arguments for extra-constitutional methods of constitutional change continue to feature in contemporary debates.

The role and influence of Marxist political forces constitute one of the dominant themes of Sri Lankan politics in the early 1970s, and of course the driving force of the 1970-72 constitution-making process and its product was Dr Colvin R. de Silva of the Lanka Samasamaja Party (LSSP). The train of political events, including ideological adaptations that the Old Left underwent in order to enter into coalition politics with the Sri Lanka Freedom Party (SLFP), stretches even further back. In his chapter, Professor Kumar David discusses these aspects from the perspective of one who was an active participant in debates within the Left during this period. It was also ironically in 1971, when parliamentary leftists were in government and drafting a constitution for the realisation of a socialist state, that the country experienced its first Marxist insurrection led by the Janatha Vimukthi Peramuna (JVP). Lionel Bopage was a participant in this abortive revolution and was later a General Secretary of the JVP. In his epistolary interview, he discusses at length the causes and dynamics of the JVP as a political movement and its distinctive identity within the Sri Lankan Left.

Drawing on his recently concluded doctoral research, Benjamin Schonthal's chapter on the provenance of the Buddhism clause in the constitution offers what is to-date the clearest analytical account of the main post-independence debates with regard to the constitutional treatment of religion in general and Buddhism in

particular, and this places in context the interplay of influences that led to the specific textual form of the Buddhism clause which continues in force today. He reminds us in particular that this is not a provision establishing a state religion, and of the specific theoretical issues that arise in the interpretation of the clause due to the inherent compromises and even contradictions reflected in it.

While debates about the 1972 Constitution are generally dominated by its failure to secure the subscription of Sri Lankan Tamils to the new state, one of the important dimensions of ethnic pluralism that played a role in the 1970-72 constitution-making process is the role of the Muslims and their perspectives on the constitutional form of the future republic. Dr Farzana Haniffa's chapter helps us better understand this neglected dimension, and in explaining the relationship that Tamil-speaking Muslims had with both the majority Sinhalese and the Tamils during this time, she provides important insights for understanding the political dynamics of Muslim identity today.

Dr Michael Roberts deals with the issue of Sinhala identity and its historical continuities between the past and present. As the major political force of identity-nationalism that so centrally influenced the content of the first republican constitution, the importance of understanding Sinhala-Buddhist nationalism cannot be overstated. There is a rich social science literature on this, and Roberts has been a major scholar in this body of work from at least the early 1970s. His 2004 work, *Sinhala Consciousness*, is one of the most theoretically sophisticated accounts of Sinhala identity and, in his critique of the classical modernist assumptions of post-Orientalist scholarship on Sri Lankan ethnic nationalisms, his is a distinctive contribution to nationalism theory and nationalism studies more generally. In his chapter to this volume, he makes several important developments to the argument in *Sinhala Consciousness*, building on scholarship that has emerged since its publication.

Dr David Rampton's equally sophisticated chapter on Sinhala identity provides us with an alternative understanding of this central phenomenon since the nineteenth century. Critically drawing on the work of Schmitt, Agamben, Foucault and Laclau, it is distinct from Roberts' work methodologically, analytically and perhaps even ideologically. Dr Roshan de Silva Wijeyeratne likewise deals with the nature of the pre-British Sinhala-Buddhist state, and continues a strand of work he has been developing for some time, in arguing how the normative and operational logic of the pre-colonial state provides us with a rich seam of ideational resources with which to approach contemporary challenges in the management of pluralism. In particular, he demonstrates how contemporary Sinhala-Buddhist nationalism's appropriation of the unitary state, instantiated by the 1972 Constitution, is historically untenable. Providing context to these scholarly reflections in terms of the political position of Sinhala-Buddhist nationalism with regard to the constitutional form of the state is the interview with Udaya Gammanpila of the Jathika Hela Urumaya (JHU).

The unitary state of course has been the principal characteristic of both republican constitutions, but while there is a substantial and highly critical literature on it as a particular constitutional form, there has been very little effort to theorise the Sri Lankan conception of the unitary state. Given that dominant British ideas of the time clearly influenced the makers of our own constitutions, it seems appropriate to consider the radically pluralist directions that the British Constitution has taken in years since. One of the seminal accounts of the contemporary British conception of the unitary state is by Professor Neil Walker, first published in *Public Law* some years ago, and who has kindly made available that piece as his contribution to this volume. It is hoped that the ideas suggested in Walker's explanatory account of the contemporary British unitary state as a formal and flexible concept that facilitates substantive pluralism

would provide food thought for Sri Lankan defenders and detractors alike of the concept of the unitary state, and certainly provide a necessary corrective to some proponents of it, who continue to argue from an out-dated and outmoded notion of the unitary state reflected in old British constitutional doctrine.

In what is an unusual contribution to a collection of this nature, Sunela Jayewardene's original sketch produced especially for this volume captures the idea of the centralised unitary state in visual art form. It encapsulates the pre-colonial state's concepts of hierarchy and encompassment together with the crowning centrality of Buddhism that morphed into the modern form of the republican state. Likewise unusual in a volume of essays on constitutional law, is the presence of Qadri Ismail's poststructuralist meditation on culture. Language is central to the lawyer's trade and it is a more positivist discipline than most in the social sciences. For them particularly, Ismail's essay provides an opportunity to reflect on the uses of language, the assumptions underlying them, and the implications of power and culture in this exercise.

In the context of the unwritten nature of the British Constitution, the unitary state is a concept parasitic upon the doctrine of parliamentary sovereignty, which is another British idea that was obsessively subscribed to by the makers of the 1972 Constitution, in particular to an understanding of parliamentary sovereignty as being coterminous with the sovereign independence of the republican state. The chapter by Professor Cheryl Saunders and Anna Dziedzic explores the doctrine of parliamentary sovereignty from the comparative perspectives of the UK, Australia and South Africa, and relates the similarities and differences in those experiences to the Sri Lankan encounter with this idea.

Over and beyond the doctrine of parliamentary sovereignty, the issue of popular sovereignty was one of the central themes of the debates surrounding the



establishment of the republic. Two chapters deal with this important issue. Hallie Ludsin explores the idea of sovereignty in the people, which the republican constitutions purport to proclaim, in the light of the critique that what has in fact become reality in Sri Lanka is the sovereignty of the majority. Professor David C. Williams approaches this from the angle of political violence and the liberal theory of revolutionary constitution-making. In both respects, and indeed for the fact that it deals with the issue from the perspective of liberal constitutionalism, the chapter challenges established ideas about these concepts in Sri Lankan social science discourse.

Germane to any discussion about republican constitutionalism is the dominant concept of the nation-state in the present world order. Despite the many limitations and problems associated with this model in the context of post-colonial, developing, plural societies, it continues to exert a powerful hold on constitutional imagination. Lucian Arulpragasam's chapter provides an account of these challenges in the Sri Lankan case, contrasting in particular the theoretical assumptions of modernist nation-building that are at the heart of the Westphalian nation-state with the practical realities of ethnic pluralism and politico-constitutional culture in Sri Lanka. The challenges of ethnicity, pluralism and constitution-making in divided societies, within the overarching rubric of unity and diversity of the nation-state, from a more comparative perspective are dealt with in the chapters by two of the world's foremost experts in comparative constitution-making. Professor Yash Ghai's chapter treats the recent Kenyan constitution-making experience as a case study, which holds many useful lessons for Sri Lanka, but is nonetheless an unfamiliar case in Sri Lankan debates. Nicholas Haysom's chapter incorporates the distilled experience of a number of Asian and African cases.

An altogether more radical challenge to the Westphalian nation-state is presented by the body of work known as

plurinational constitutionalism, the theory and practice of which in Western liberal democracies like the UK, Spain and Canada represent one of the most exciting areas of comparative scholarship in constitutional theory today. In Professor Stephen Tierney's chapter, we have one of the world's leading theorists of the constitutional accommodation of national pluralism (i.e., the existence of more than one group claiming to be a nation within the territorial and historical space of an existing state) providing an introduction to this model to a Sri Lankan audience for the first time. Tierney does not attempt to relate his outline of the plurinational state model to the Sri Lankan context, which is in itself a separate (and formidable) challenge of comparative constitutionalism involving difficult questions of both methodology and substantive theory. This work remains to be done, although the relevance of Tierney's articulation of the plurinational state will be obvious to anyone with even a passing knowledge of the Sri Lankan situation of competing ethnonationalisms.

It was, however, originally intended that Tierney's contribution would be complemented by another chapter engaging with the plurinational model from a Tamil nationalist perspective. This was unfortunately one of the contributions that did not materialise. Instead, for this critical perspective we have two extensive interviews with D. Sithadthan and R. Sampanthan, which I would consider to be exceedingly valuable pieces of oral history of how Tamil claims originated and evolved in post-independence Sri Lanka, and the state of these claims post-war. The perspective of Tamils of recent Indian origin with regard to the state and power-sharing as well as their relationship with Sri Lankan Tamils and the majority community is discussed in the interview with P.P. Devaraj.

While there is a substantial literature on gender issues in the disciplines of sociology and politics in Sri Lanka, the two chapters focusing on these issues in this volume redress the relative absence of gender concerns in

specifically constitutional law debates. Professor Maithree Wickramasinghe and Chulani Kodikara's chapter is a critically comprehensive treatment of the gender representativeness of the Sri Lankan republic. Professor Susan H. Williams provides a likewise comprehensive discussion, drawing from a wide range of comparative experience, on how constitutions can be and ought to be made more representative from a women's perspective. Ambika Satkunanathan's related chapter interrogates Tamil nationalism, its reproduction and self-representation from the women's perspective. Based on extensive fieldwork, and placed within a theoretical framework of feminist approaches to nationalism, Satkunanathan's nuanced findings would make for informative reading for even those readers generally familiar with Sri Lankan and Tamil politics.

While the aggregation of these contributions doubtless makes for an interesting collection of reflections, there are a number of themes (in addition to the absence of a Tamil nationalist engagement with certain theoretical issues already noted) that were included in the original scheme, which would have considerably improved the book's coverage. Unfortunately, authors invited to contribute on these areas were ultimately unable to submit their chapters, although I should note that in a number of chapters that now constitute the book, some of these issues are addressed tangentially, and in some cases quite substantially. Key among these lacunae is a fresh psephological analysis of the 1970 general election, revisiting some of the empiricist work done at the time (for example by A.J. Wilson, Wiswa Warnapala and Michael Roberts). At the level of substantive constitutional law, the book would also have profited from a dedicated chapter on the constitutional and statutory framework relating to states of emergency, given that it was under the UF regime and the 1972 Constitution that government and governance in Sri Lanka became accustomed to the 'normalisation of the exception.' Perhaps the most serious omissions are two fundamental theoretical concerns that arise in the 1970-

72 constitutional moment: firstly, a theoretical treatment of the relationship between *pouvoir constituant* and *pouvoir constitué* (that which Neil Walker and Martin Loughlin have described as the ‘paradox of constitutionalism’), especially in the light of the *Suntharalingam* cases which were given short shrift by the Supreme Court; and secondly, an extended treatment of the theory of republicanism in the context of the form and substance of the state that was created in 1970-72. Hopefully, the publication of this book will encourage others to explore these issues elsewhere.

It now remains for me to acknowledge the many debts I have incurred in the production and realisation of this book. My first thanks are due to the contributors. Even a cursory glance at the biographical details in the list of contributors testifies to their eminence and standing in their respective fields. However, they are also extremely busy people, and the fact that they took the time to contribute to this book attests to their commitment to furthering the cause of universal learning without reward or remuneration: the essence of the academic profession. Many are also of course old friends, of both CPA and myself. I feel personally honoured by their acceptance of my invitation and the efforts they took on behalf of this volume. I am grateful to the support extended to me by Paikiasothy Saravanamuttu, Kishani Ganegoda, Subhashini Samaraarachchi, Nalaka Samarakoon and Jean Godlieb at CPA, and of course to Sagarica Delgoda and her colleagues at the Friedrich Naumann Stiftung für die Freiheit (FNF), Sri Lanka Office, without whose financial support none of this would have been possible. Kosala Tillekeratne of Globe Printers for meeting, as ever, the challenge of an impossible deadline. There are, however, four exceptional people whose magnificent support has humbled me at every step of the way to publication. They are Jagath Liyana Arachchi, Shehara Athukorala, Luwie Ganeshathan and Sanjana Hattotuwa. With colleagues and friends like these, anything is possible and nothing is impossible.

This book is a liberal democratic intervention into the Sri Lankan debate on constitutional reform at a time when liberal democratic values and the liberal democratic way of life are under peacetime siege as never before in the modern history of the country, and it is about a constitutional event that lies at the genesis and heart of our present travails. If at times it therefore seems like a Frida Kahlo painting – the nightmarish depiction of a reality, not a dream – I can only hope that it also provides some of the ideas for a release from the morass.

Asanga Welikala  
Colombo  
21<sup>st</sup> December 2012